CURPEN M v INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR

2015 SCJ 66

Record No. 8546

THE SUPREME COURT OF MAURITIUS

In the matter of:-

Murday Curpen

Appellant

v

1. **Independent Commission against Corruption**
2. **The State**

Respondents

JUDGMENT

The appellant, a Police Corporal, was convicted by the Intermediate Court on a charge of bribery by public official, breach of section 4 (1) (a) (2) of the Prevention of Corruption Act 2002. He was sentenced to undergo three months imprisonment and to pay Rs 500 as costs.

The information charged the appellant with having solicited from another person, for himself, a gratification for doing an act in the execution of his duties. The particulars given alleged that while the appellant was the Enquiring Officer in a case of "*Issuing cheque without provision*" he solicited the sum of Rs 5,000/- from one Javed Toona Nanak so as to carry out the investigation in such a way that the said person would not be prosecuted for "*knowingly agree to receive a cheque without provision*".

He has appealed against his conviction on the following grounds:

> *"1. The Learned Magistrate was wrong to find, on the evidence on record, particularly in the light of the various inconsistencies and contradictions, the Accused (now Appellant) guilty as charged.*

2. *The Learned Magistrate was wrong in holding that the prosecution has proved all the elements of the offence.*

3. *The Learned Magistrate failed to give due and proper attention to the Defence of the Accused (now Appellant).*

4. *The sentence is wrong in principle and manifestly harsh and excessive."*

Additional Grounds of Appeal:

"1. The prosecution when refreshing the memory of Witness No. 4 and also in relation to putting to the witness his departing from his statement to ICAC officer infringed the law governing these respects and led the witness to depose.

2. It is not on record that on occasions motions to put inconsistent statements to witness were ever granted. Yet prosecution Counsel proceed to lead the witness.

3. The record shows that it was Counsel for prosecution who deposed instead of Witness No. 4 (Declarant)."

Respondent No. 2 had filed a preliminary objection to the effect that the appeal had been prosecuted outside the delay provided by section 93 (3) of the District and Intermediate Courts (Criminal Jurisdiction) Act. However, at the hearing of the appeal, learned Counsel for Respondent No. 2 informed the Court that he would not be insisting on the preliminary objection inasmuch as he was not resisting the appeal on its merits on the ground that the state of the evidence on record rendered it unsafe to allow the conviction to stand.

As was held in **Ramtohul v State** **[1996 MR 207]** after reviewing English and local cases, the appellate Court has a discretion to allow an appeal lodged out of time to proceed and the Court may, in exercising its discretion, consider where appropriate the circumstances that have given rise to the grounds of appeal and "*consider whether, having regard to their arguability, it should allow the appeal to be entertained out of time, whilst guarding itself, of course, from making any pronouncements, in advance, on any ground of appeals*." We consider that Grounds I and 2 and the issue raised in the additional grounds of appeal, in the light of the proceedings on record, rendered questionable the way some of the evidence was adduced. In the circumstances, it is most likely that this Court would have felt duty-bound to at least hear the appeal thus warranting it to exercise its discretion to overrule the preliminary

objection, in spite of the fact that the appeal was prosecuted outside the time limit. In that respect, the stand taken by the respondent No. 2 not to insist with the preliminary objection is commendable.

Learned Counsel for respondent No. 1 adopted the same stand as respondent No. 2 not to resist the appeal. He further conceded that the evidence was unsafe to ground a conviction as the prosecution was unable to discharge its burden of proving beyond reasonable doubt the purpose for which the sum of money was solicited, the main witness for the prosecution having been inconsistent in his testimony in that respect; so that there was no clear evidence that the act for which the gratification was solicited was to carry out the investigation in such a way that the said person would not be prosecuted for "*knowingly agree to receive a cheque without provision*".

The record reveals that the complainant started by expressing the wish, which he repeated later on, not to proceed with the case as he had come to know that the appellant had a family. He further stated at an early stage of his testimony that he had said a lot in his statements which he would not be able to remember. As a result, the prosecuting Counsel had to refresh his memory either because he was departing from his written statements or would not remember the relevant events. There is of course nothing sinister in the fact that in certain circumstances a witness's memory has to be refreshed in the course of his deposition in Court. However, there is indeed ground for concern where, as in the present case, extracts and at times lengthy extracts were read to the witness from his written statements in order for him to simply agree to them, a scenario which repeated itself throughout his testimony. The question arises whether there was reliable evidence upon which the Court could safely act to find the elements of the offence proved. In this case it would appear from the examination-in-chief that there was barely any relevant evidence forthcoming from the witness himself, since extracts from his written statements were being consistently put to him.

As was further pointed out by learned Counsel for respondent No. 1, the complainant was very inconsistent regarding the purpose for which the appellant had solicited a bribe. He at one time stated that there were certain sums of money which were needed as if "*soidisant kiti bizin"* for the complainant not to be arrested and at another time he mentioned that the money was a bribe to save him from a case of swindling. He also mentioned at one time that the arrest was in relation to the alleged fact that he had sold a car on which there was a lien and at another time that it was in relation to the case that he had reported at Vacoas; He confirmed

that in his statement he had said that he had understood the appellant to be asking a bribe from him "*pou dresse l'enquete*" in his favour.

We agree that the cumulative effects of the above features and the inconsistencies in the version of the complainant in the course of the trial did make it unsafe for the learned Magistrate to rely on the sole testimony of the complainant to find all the elements of the offence proved.

We accordingly allow the appeal and quash the conviction and sentence.

S Peeroo
Judge

D Chan Kan Cheong
Judge

27 February 2015

Judgment delivered by Honourable S Peeroo, Judge

For Appellant	**:**	**Mr Y Mohamed, Senior Counsel** **Mr O D Cowreea, Attorney-at-law**
For Respondent No. 1	**:**	**Mr K Goburdhun, of Counsel** **Mr S Sohawon, Attorney-at-law**
For Respondent No. 2	**:**	**Mr A Ramdahen, State Counsel** **State Attorney**