Rajen Hanumunthadu v The state and the independent commission against corruption.

2010 SCJ 288

Judgment delivered on 01 September 2010

This was an appeal from the Intermediate Court where the Appellant was convicted and sentenced to undergo six months imprisonment.

The Appellant was prosecuted before the Intermediate Court under section 4(1)(a) of the Prevention of Corruption Act(POCA), for having, whilst being a Town Engineer of the Municipal Council of Quatres Bornes, solicited from another person, for himself, a sum of fifty thousand rupees to certify and process a claim for payment to that person from the Municipal Council of Quatres Bornes in respect of works carried out for the said Municipality by that person.

The Appellant challenged the conviction as well as the sentence passed on various grounds.

According to evidence adduced before the Intermediate Court, the Appellant would be the person to sign claims submitted to the Municipal Council and he asked the complainant the sum of fifty thousand rupees to facilitate his works.

The Supreme Court considered that it is sufficient for the prosecution to show that the purpose for which the money was solicited was in fact an act in the execution of the Appellant's duties and that it was immaterial whether such purpose was achieved or not.

The Supreme Court also considered the issue of refreshing of memory. The Court was of the view that cross-examination is not a memory test and that refreshing of memory was not carried out on material facts. As such, it was proper for the Magistrate to allow the witness to refresh his mind while deposing in Court.

For the above reasons and after having gone through all the facts of the case, the Supreme Court concluded that it should interfere neither with the conviction nor with the sentence passed. The appeal was thus dismissed.

SUNEECHARA O. v. THE STATE 2007 SCJ 131

The Appellant, then an Assistant Commissioner of Police in charge of the Central C.I.D, who was sometimes referred to by his family name Suneechara, and at times by the name Sunneechurra in the proceedings, was charged, pursuant to section 4(1)(a) of the POCA, with having wilfully and unlawfully accepted from the General Manager of the Oberoi Hotel, for himself, a gratification, viz. free accommodation with free food and beverage at the above mentioned hotel from 2 to 4 August 2002, for doing an act in the execution of his duties viz. in relation to the investigation of criminal cases having allegedly been committed within the said hotel.

He pleaded not guilty to the charge and was duly represented by Counsel before the trial Court.

The facts of the case were as follows: -

- The Appellant was an Assistant Commissioner of Police and posted at the Central C.I.D. He was informed by the Commissioner of Police [CP] that complaints had been received from the management of the Oberoi Hotel to the effect that it was subject to blackmail and larcenies;
- The Appellant detailed on officer to enquire into the blackmail aspect of the complaint and eventually this problem was sorted out. The Appellant and his staff were thanked by the management of the Hotel (Mr Nirula), who however requested Appellant to tackle the problem of larcenies since it was a sensitive issue which involved the reputation of the hotel to which the Appellant replied that he will look into the matter.
- During the same period, Mr Husraz, the brother-in-law of the Appellant, happened to spend his holiday in Mauritius together with his family. Mr Husraz, a person of means, wanted to book a hotel for a week-end and to invite

Appellant and his family. The Appellant suggested the Oberoi and personally made the booking in his name on behalf of his brother-in-law for two nights.

- Four rooms were booked and the Appellant and his family were offered VIP treatments.

Officers of the management of the Oberoi Hotel were the main prosecution witnesses. They were Mr Nirula and Mr Wilhelm. It has been established through these witnesses that the Appellant was in fact informed that the accommodation would be free for all police officers who are on official duty at the hotel.

On 11 April 2006, he was found guilty and sentenced to undergo 3 months' imprisonment.

He appealed against conviction and sentence. The Appeal was resisted and skeleton arguments of the Respondent also contained a preliminary objection as to the fact that the ICAC should have been joined as a party (Respondent) inasmuch as it was the ICAC which prosecuted the Appellant, and that this defect was fatal to the appeal.

The Court held that, on the facts on record, ICAC, as a separate entity, remained an interested party and that it would have been advisable that it be made a respondent in the present appeal, with full latitude to take its own stand at that stage of the criminal proceedings. The Appellant was however right to join the State as a respondent considering the fact that the appeal is against a conviction. However, given the fact that learned State Counsel's appearance before the trial Court could have misled the Appellant into believing that the DPP had exercised his power to take over the prosecution pursuant to section 72(3)(b) of the Constitution, the Appellate Court was of the opinion that, in compliance with the overriding principle that justice must not only be done but be seen to be done, the appeal ought to be heard on its merits. The Court allowed appeal to proceed on its merits as a matter of expediency.

The appeal relate to 4 aspects of the trial:-

- Fairness of the Enquiry;
- Failure of the Learned Magistrate of the Intermediate Court to give herself a warning as to the fact that some of the prosecution witnesses can be qualified as accomplices;
- The appreciation of facts by the trial court; and
- The Burden of Proof which has been placed on the Appellant (then Accused) and the constitutionality of section 4(2) of the POCA.

a. Fairness of the Enquiry

Counsel for the Appellant submitted that the Appellant has had to face an unfair trial given the fact that the ICAC failed to record a statement from the Appellant's brother-in-law. The evidence on record shows that the Appellant's brother-in-law lives abroad. He was not in Mauritius when the enquiry was ongoing. When he returned to Mauritius, the DPP had already referred the matter to the Intermediate Court and an Information had already been lodged against the Appellant. The Appellate Court held that submission of counsel for the Appellant has no merit when it considered that the Appellant, who was represented at the trial by Senior Counsel, could not have suffered any prejudice since he could have himself called the brother-in-law as a defence witness at the trial. The non recording of a statement from a defence witness at a time when the information had already been lodged did not close the option of the defence to call him on its own initiative and there was no deprivation of the substance of a fair trial and the protection of the law before the trial Court. As such, there was no unfairness in the enquiry.

b. Failure of the Learned Magistrate of the Intermediate Court to give herself a warning as to the fact that some of the prosecution witnesses can be qualified as accomplices

One of the grounds of appeal finds fault with the learned Magistrate's alleged failure to give herself the warning that two of the prosecution witnesses were accomplices and had been given immunity from prosecution by the DPP. It is conceded that there is no specific pronouncement in the judgement of the trial magistrate to that effect but the record shows that the Learned Magistrate could not have overlooked that fact. The reason for this is the fact that the record clearly shows that two of the prosecution witnesses were given immunity as they were accomplices. The Appellate Court held that the Magistrate, who is a trained lawyer, is not to be presumed to have failed to warn herself of the need to view with caution the evidence of accomplices simply because she has not stated that she was giving herself the warning. It is only if the record indicates that the Magistrate actually overlooked the fact that the witness was an accomplice that the Appellate Court should interfere. As such, the Learned Magistrate cannot be said to be at fault.

c. The appreciation of facts by the trial court

The Appellant firstly questioned the finding of gratification by the trial court. The Appellate Court held that the word gratification which is defined in section 2 of the POCA must be applied in its proper context. If ever a public officer is enquiring in the hotel, it would be expected that he should have at least, for the sake of transparency, informed a superior officer of the impending enquiry and of the facilities provided to him. In common parlance, such necessitated stay would have been for business rather than pleasure. Furthermore, given the fact that the Appellant was staying at the hotel together with his family and that of his brother-in-law after having been informed that officers who are on duty at the hotel will enjoy free accommodation, the trial court was right to conclude that the Accused had the necessary mens rea. The Appellate Court held: -

"While the stay of the appellant would not have been blameworthy had that stay been primarily concerned with the purposes of furthering the police investigation on site, the fact that he took his family, including his extended family to enjoy the hotel facilities free of charge clearly amounts to accepting gratification in the circumstances. The gratification he accepted for his wife, his son and his brother-in-law and family, for which no charge was levelled in the information, can only give colour to his own stay which must be considered as tainted and amounting to the accepting of a gratification for himself and for which he stood charged."

As to the agreement, counsel for the Appellant submitted that the fact that the enquiry as to the blackmail was already over, the proposition that there must be at first an agreement and then the act stands unclear in the case against the Appellant. The Appellate Court held that the provisions of the POCA provide that a public official may obtain gratification after having done or performed an act. The court held that there was accordingly no discrepancy or uncertainty between the offence charged and the evidence adduced before the trial court.

It was also submitted that the trial court erred in not concluding that the Appellant intended to pay for his stay inasmuch as, in one of the four registration forms the box for cash payment was ticked. The evidence on record shows that the Registration Forms were not properly filled in but on one form the box for Mode of Payment was ticked, without any record as to his credit card details. The Appellate Court held that proposition that the Appellant intended to pay cash for his stay is not serious when one consider that for the Appellant's stay and that of his family, even his credit card details were not recorded in the relevant box found in the Registration Forms. This should have been flagrant to everyone handling the registration form, including the Appellant, the more so when a stay at the Oberoi in Mauritius is not within the means of many mortals. This is confirmed by the Registration Card which indicates that the rate for a double room at that particular hotel is not less than 700 Euros per day during off peak season. To crown it all, the preponderance of evidence indicates that the Appellant occupied Room 504, the Registration Form of which did not bear any indication regarding the mode of payment.

Submissions for the Appellant were also to the fact that there is no evidence that the Appellant inquired during his stay at the hotel. There was evidence on record which shows that the Appellant was informed that the accommodation will be offered to police officers who are on duty and involved in an enquiry. In the Appellant's statement produced in court, he stated that in relation to a case of larceny at the hotel, he did his duty and made several observations. The Appellate court held that the finding of fact of the trial magistrate cannot be faulted.

d. The Burden of Proof which has been placed on the Appellant (then Accused) and the constitutionality of section 4(2) of the POCA

Section 4(2) of the POCA is to the effect that, where it is proved that a public official has accepted a gratification, it shall be presumed, until the contrary is proved, that the gratification was accepted for doing an act in the execution of the duties of that public official.

Section 10 of our constitution provides for the right of an accused to be presumed innocent until the contrary is proved.

The Appellant questioned the constitutionality of section 4(2) of the POCA inasmuch as when the presumption operates, the onus is shifted onto the Accused to prove the contrary.

The court referred to numerous cases whereby the law puts that burden on the accused to prove or disprove an element of an offence or to rebut a presumption.

The Court held that the presumption of innocence has long been a governing principle of criminal law and has been memorably affirmed in numerous cases. However, the court went on to state that there is no doubt that the underlying rationale of the presumption of innocence is a simple one; that it is repugnant to ordinary norms of fairness for the prosecution to accuse a defendant of a crime and for the latter to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. Section 4(2) of the POCA only creates a rebuttable presumption which does not infringe the principle of fair trial and more specially that of presumption of innocence enshrined in section 10(2) of the Constitution.

On the 21st of May, 2007, the Appeal was dismissed with costs.

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The Appellant sought leave of the Court to add an additional ground of appeal which was already set out in his Skeleton Argument on the day of hearing of the Appeal. The State objected to the prayer of the Appellant as same was to be made outside statutory delay. The Learned Judges held that the procedure to seek for leave of the Court to entertain the additional ground of appeal outside delay has not been followed. They also held that they find no sufficient reason to condone the failure to follow established procedure and they accordingly declined to entertain the verbal motion for leave.
The Appeal is due to be heard on the merits on the 21st of June, 2010.