BALOOMOODY L. v THE STATE OF MAURITIUS & ANOR

2020 SCJ 172

Record No. 9004

THE SUPREME COURT OF MAURITIUS

In the matter of:

Loganaden Baloomoody

Appellant

v

1. **The State of Mauritius**
2. **The Independent Commission Against Corruption**

Respondents

JUDGMENT

The appellant was prosecuted for the offence of bribery by a public official in breach of section 4(1)(c) and (2) of the Prevention of Corruption Act. He pleaded not guilty to the charge and was found guilty by the learned Magistrate of the Intermediate Court. He was sentenced to undergo 6 months' imprisonment. He is now appealing against the judgment and sentence on the following grounds:

> ***"Ground 1***
>
> *Because the Learned Magistrate erred in her appreciation of the evidence of the main witness for the Prosecution whose character had been made a live issue and had a motive to harm the appellant.*
>
> ***Ground 2***
>
> *Because the Learned Magistrate erred when she rejected the version of the Appellant which remained consistent throughout the inquiry and the trial.*
>
> ***Ground 3***
>
> *Because the sentence is wrong in principle and manifestly harsh and excessive in the circumstances."*

The prosecution adduced evidence at the trial that, on or about 11 September 2007, appellant, a police officer posted at the then Drug Assets Forfeiture Office, was entrusted with file bearing No.1202 in the name of Fezal Sammiah (witness No.8) for investigation regarding disclosure of assets. Appellant requested a sum of Rs. 3000 to Rs. 3500 from the said Fezal Sammiah in order to speed up matters for the completion of the enquiry. A sting operation was set up by the Independent Commission against Corruption (ICAC) in connection with this case where the said Fezal Sammiah remitted the sum of Rs.1500 to the appellant. Appellant did not depose before the trial court but gave his version as per his out of Court statements. He admitted having been found in possession of the Rs.1500 but denied that it was for the purpose claimed by Fezal Sammiah.

In relation to ground 1, the learned Magistrate considered the various inconsistencies in the testimony of Fezal Sammiah which she listed out in her judgment, namely:

- *"He stated in his statement that he was informed that by the Board that the enquiry would last three months which he denied in Court*
- *The accused stated that he could give a clear description of accused and yet he stated that he could not say if he had a "moustache" or not.*
- *He did not use the term "du the" in his statement when he mentioned same in Court*
- *Witness no8 stated that accused called him and asked him to meet him when in his statement he said that they had fixed an appointment on 11 September at 1230 hrs.*
- *He was asked if accused gave him his mobile number which he could not remember and it was put to him that he stated so in his statement. Witness no8 stated that he became aware of his number when accused called him when he was at ICAC. It was then put to him that he stated in Court that 'mo fine trouve so numero la paraitre mo finn dire bann officer l'ICAC guette so numero sa' to which he agreed."*

We are satisfied that the learned Magistrate did not find the above inconsistencies to be so serious and material as to undermine the credibility of witness Fezal Sammiah. The following extract from the case of **Saman G v The State** [2004

SCJ 3]**,** and which was referred to by the Supreme Court in the case of **Marday Curpen v The State** [2010 SCJ 105] as regards inconsistencies, is applicable to this case:

> "*inconsistencies must therefore be measured by the yardstick of seriousness and materiality which must be linked with the overall issue of truthfulness. Not every inconsistency is serious and material and inconsistencies need not affect per se the appreciation by the trial Court that a particular witness's testimony is true."*

Since it is for the trial court to appreciate the testimony of witness Fezal Sammiah, and considering that the learned Magistrate had the benefit of assessing his demeanour and found him to be a credible and reliable witness, despite the above inconsistencies to which she was alive, we see no reason to disturb her findings of fact. As was held in the case of **S Patel & Others v A Beenessreesing & Anor [2012 UKPC 18]**:

> "*An appellate Court should not interfere with a finding based on witness evidence unless the trial judge has overlooked or misunderstood the material in some relevant respect or has accepted evidence which was manifestly incredible."*

Besides, we also note that the learned Magistrate found that witness Fezal Sammiah successfully withstood the "*stringent*" cross examination to which he had been subjected by defence counsel.

We find that the learned Magistrate was correct to conclude that witness Fezal Sammiah had no "*particular motive"* to report the matter against appellant. The version put up by appellant in his out of court statement that witness Fezal Sammiah reported the matter against him as the latter was not agreeable that he enquired into the wealth of his family was not found to be worthy of belief. The learned Magistrate was instead convinced by the version of witness Fezal Sammiah whom she found to be credible. We agree with the finding of the learned Magistrate as to the absence of "*any particular motive*" from witness Fezal Sammiah or the non-existence of any "*bad blood"* for "*such a serious false allegation*" to be levelled against appellant, the more so since reporting the matter against appellant would not help witness Fezal Sammiah in any manner whatsoever in relation to the enquiry regarding his assets at the then Drugs Assets Forfeiture Office.

We are also satisfied that the evidence of the Secretary of the then Drugs Assets Forfeiture Office who confirmed that the file of witness Fezal Sammiah was referred to appellant for investigation and that of sergeant Kissoondoyal who formed part of a sting operation set up by ICAC both added credence to the version of witness Fezal Sammiah. Ground 1 has therefore no merit and fails.

As regards ground 2, we are satisfied that the learned Magistrate made a proper assessment of the out of court statement of appellant which she found hard to believe and not credible. There is no denial by appellant that he was found in possession of Rs.1500 at the time of his arrest. We cannot but agree with the following finding of the learned Magistrate:

> "*As such, it is most surprising that the accused who was posted at the DAFO should require a person with a previous conviction relating to a drug case to do work at his place or even lend him money. I find the explanation given by the accused to be farfetched and difficult to believe.*"

On the basis of the satisfactory reasons given by the learned Magistrate for disbelieving the version of appellant as regards his possession of Rs 1500, we find no merit in ground 2.

Finally, as regards ground 3, in relation to the sentence being manifestly harsh and excessive, we are satisfied that the learned Magistrate took into account all the relevant considerations before passing a custodial sentence such as the circumstances of the case and the fact that appellant was a police officer when he committed the offence of bribery, and rightly concluded that a non-custodial sentence would not serve its purpose as a strong signal needs to be sent to like-minded public officers for the sentence to be a deterrent. We note that the law provides for a sentence of penal servitude for a term not exceeding 10 years when the accused is convicted of an offence under section 4(1)(c) of the Prevention of Corruption Act.

We are of the view that, if anything, the learned Magistrate erred on the side of leniency when she gave a discount on account of the delay of 9 years which had lapsed since the commission of the offence in 2007, which she described as a mitigating factor, without making a finding as to whether there had been a breach of the appellant's right to be tried with a reasonable time as guaranteed under section 10(1) of the Constitution.

It is very clear from the following extract from the judgment of **Boolell v The State [2006 UKPC 46]** that such breach has to be established for a remedy to be afforded to the appellant such as a reduction in the penalty imposed on a convicted defendant:

> *" …If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established…….If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant."* (emphasis being ours)

In the light of the above including all the circumstances of the case, it cannot be said that the sentence of 6 months' imprisonment was wrong in principle nor manifestly harsh and excessive. Further, we also note that the learned Magistrate rightly considered whether she should exercise her discretion to impose a community service order and found that a community service order would not meet the ends of justice based on the circumstances of the case and the gravity of the offence. Ground 3 has therefore no merit and fails.

Having found that all the grounds of appeal have failed, we dismiss the appeal with costs.

A D Narain
Judge

M J Lau Yuk Poon
Judge

27 July 2020

Judgment delivered by Hon. M. J. Lau Yuk Poon, Judge

For Appellant	**:**	**Mr. G. Glover, Senior Counsel** **Mr. S. Sookia, Attorney**
For Respondent No. 1	**:**	**Mr. N. Bisnatsingh, Senior State Counsel** **Mrs. D. Dabeesing Ramlugan, Principal State Attorney**
For Respondent No. 2	**:**	**Mr. H. Ponen, of Counsel** **Mr. K. Beeharry, of Counsel** **Mr. S. Sohawon, Attorney**