BHOOSEE H v THE INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR

2021 SCJ 383

Record No. 8984

THE SUPREME COURT OF MAURITIUS

In the matter of:-

Hamed Bhoosee

Appellant

v

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

Respondents

JUDGMENT

The appellant was charged before the Intermediate Court with the offence of using his office for gratification whilst being a public official in breach of section 7(1) of the Prevention of Corruption Act. He pleaded not guilty and was represented by Counsel. The learned Magistrate found the appellant guilty as charged and sentenced him to 2 years' imprisonment.

The appellant is challenging both his conviction and sentence on the following grounds:

> *"1. The Lower Court erred and misdirected itself as regards the time of the offence, the more so as at the inquiry stage the appellant was specifically told that the offence was alleged to have taken place in May 2012 and this was the date that was averred in the information.*
>
> *2. The Lower court erred when it relied on the evidence of the complainant which was fraught with inconsistencies and contradictions rendering such evidence unsafe to convict the appellant.*

3. *The lower court failed to make a proper analysis of the evidence of the complainant and that of the appellant before coming to the conclusion that the complainant's version was the truth and that he had withstood the test of cross examination.*

4. *The lower court failed to analyze and give due weight to the version of the appellant in the light of all the evidence adduced which would have shown that the version of the complainant was untenable.*

5. *The lower court erred when it found that the appellant had been given the lie by the testimony of Mr Nowbuth on the issue of the aggressiveness of the complainant.*

6. *The lower court further misdirected itself when it found that the defence had come up with "yet another version" at the trial thereby misdirecting itself.*

7. *The lower court failed to direct its mind to the fact that in his letter of complaint to the Minister the complainant does not mention that there had been a solicitation from the appellant when the incident was supposed to have occurred already.*

8. *The lower court also failed to give due weight to the admission of the complainant that he was not going to complain but it is only when the ICAC came to him that he levelled the accusation.*

9. *The lower court failed to give due weight to the evidence of the complainant that he only informed the MPI that the project had been completed on 5th June 2012, that is after the date of the alleged solicitation according to the information and the charge that was put to the appellant at inquiry stage.*

10. *The lower court erred when it acted on the sole evidence of the complainant which stands alone, without corroborative evidence, in a case which was hotly disputed and which was based on a one-off incident.*

11. *The lower court failed to give due consideration to the fact that on 12th September 2012, the appellant made a further report which led to the amount payable to the complainant to be reduced.*

12. *The sentence is wrong in principle and is manifestly harsh and excessive in the circumstances."*

As can be gathered from all the above grounds of appeal, except for ground 12 which is against sentence, the appellant is challenging the appreciation of the evidence by the learned Magistrate and his findings of fact. Learned Counsel for the appellant submitted that the learned Magistrate was clearly wrong in his interpretation of facts and application of the

facts proved and was completely oblivious to certain issues and events and evidence placed before him.

We find it appropriate therefore to consider the facts and evidence before the learned Magistrate and deal with all the grounds of appeal together except for ground 12.

It is well settled that an appellate Court should be loath to interfere with the findings of fact of a trial Court which has the undeniable advantage of seeing and hearing the witnesses and is, therefore, in a better position to assess their credibility. An appellate Court will not intervene unless there is sufficient indication that the evidence has not been well appreciated on trial or that the findings of the trial Court are unwarranted, unreasonable or perverse. Moreover, a trial Court will not outright reject the evidence of a deponent merely because it contains inconsistencies. It has a duty to analyse the whole testimony of the deponent taking into consideration various factors, and then decide whether his credibility is affected and whether to accept or reject his evidence. It goes without saying that each case has to be decided on its own merits.

In the present case, the contract for a project, namely the Extension to Accident and Emergency Department at SSRN Hospital ("the SSRN Project"), was awarded in 2009 to Kisten Enterprise Co. Ltd, whose Managing Director was Mr A. Kisten, witness No.2 ("the complainant"). The SSRN Project was undertaken at the request of the Ministry of Health. The appellant, who was posted at the Ministry of Public Infrastructure ("MPI"), was the project architect, which entailed designing the SSRN Project and supervising the work on site, including visiting the site and ensuring that the works were being executed according to the drawings and specifications in the contract. The appellant was working under the supervision of a Principal Architect, Mr Chooramun, at the time. On 22 September 2011, during a site meeting in the presence of all stakeholders, a dispute arose between the appellant and the complainant regarding the approval of certain samples and the use of materials. In a memorandum dated 28 September 2011 (Document G), the appellant asked to be relieved from the SSRN Project on the ground that he felt very disturbed and embarrassed by the misbehaviour and the harsh and authoritarian tone used by the complainant towards him in that site meeting. The appellant was accordingly replaced by Mr Singh.

Later, however, the appellant became again involved in the SSRN Project. On 28 May 2012, he was appointed Acting Principal Architect to replace Mr Chooramun who had gone on leave (Document B). As such, his duties included supervising the SSRN Project.

The case for the prosecution was that in May 2012, the appellant, in his capacity as Acting Principal Architect supervising the SSRN Project, met the complainant in the compound of the MPI and solicited a sum of Rs 100,000 from the latter in order to facilitate the handing over of the SSRN Project to the Ministry of Health.

Several witnesses were called by the prosecution but its case rested essentially, if not solely, on the testimony of Mr Kisten, the complainant. The learned Magistrate was convinced that the complainant was a witness of truth and found that he had withstood the test of cross-examination and had vehemently denied that it was a false allegation.

It is the appellant's contention that it was unsafe to convict him in view of the inconsistencies, contradictions and disturbing features in the evidence for the prosecution and misdirections on the part of the learned Magistrate.

We have duly considered the submissions of all learned Counsel in the light of the whole evidence on record.

It is averred in the information that the offence was committed "*in or about the month of May 2012*". As will soon become apparent, the date of commission of the offence was an important issue before the trial Court. One of the essential elements of the offence which the prosecution had to prove was that the appellant was a public official at the material time as particularised in the information, namely Acting Principal Architect. There is undisputed evidence that he assumed that post as from 28 May 2012 (Document B). It follows that he could have committed the present offence only on or after that date.

Now, it turns out that in a letter of complaint written to the then Minister of Public Infrastructure ("the Minister") dated 28 September 2012 (Document R), to which we shall come back later, the complainant alleged that, during the **3rd week** of May, in the compound of the MPI, he met the appellant who asked him for "*some favour*" to facilitate the taking over of the SSRN Project. This alleged incident formed the basis of the present offence. However,

as per the prosecution case itself (supra), the alleged offence could have taken place only on or after 28 May 2012, i.e. the last week of May, when the appellant was appointed Acting Principal Architect, not the 3rd week.

As pointed out by learned Counsel for the appellant, the prosecution must have realised that the offence could not have been committed in the 3rd week of May as alleged in the above complainant's letter of complaint, and this is why the case put to the appellant and the date averred in the information was that the offence took place "*in or about the month of May 2012*", which was quite vague.

On this issue, the complainant stated in examination-in-chief that he met the appellant "*ene beau jour*" and the prosecution did not attempt to elicit any date, let alone any precise date, from him. In cross-examination, he could not remember the day, date, month or year of the offence, save that it occurred *"quelques semaines avant ki the handing over of the building*".

The learned Magistrate did deal with the issue regarding the date of the offence but did so in a rather confused manner. Setting out the prosecution evidence, he wrote that the complainant explained having met the appellant *"one day"* in the MPI's compound. However, when dealing with disputed facts, the learned Magistrate noted that the complainant had explained that he had met the appellant in May 2012, which was incorrect as the complainant never gave such evidence. The learned Magistrate then equated *"quelques semaines"* (supra) to *"a couple of weeks*" and found that a couple of weeks before the handing over of the building, i.e. 13 July 2012, was *"clearly within the averments of the information*", which was not altogether correct as the date averred in the information was *"in or about the month of May 2012".*

As can be seen from the above, there is a real uncertainty as regards the date of the alleged offence. This was an important issue as it was incumbent on the prosecution to establish that the appellant was a public official, namely Acting Principal Architect, at the material time. As it turned out, the learned Magistrate did not deal with this issue in a satisfactory manner. Moreover, it was the appellant's version that he had in fact never met the complainant in the compound of the MPI. Had the prosecution not averred in the information such a vague date, the appellant might have been able to raise an alibi. In these

circumstances, the uncertainty and resulting doubt as to the date, albeit not fatal *per se* to the prosecution case, has to be viewed in the light of the whole case and can only be resolved in favour of the appellant.

There were other features in the present case which required careful consideration. The evidence revealed that there was already bad blood between the complainant and the appellant prior to the alleged offence. As stated above, on 22 September 2011, while the appellant was the project architect for the SSRN Project, during a site meeting in the presence of all stakeholders, a heated dispute arose between the appellant and the complainant regarding the approval of certain samples and the use of materials. Following that dispute, the appellant asked to be relieved from the SSRN Project and was replaced by Mr Singh.

The record shows that the complainant was most reluctant to admit that he was aware that the appellant had withdrawn from the SSRN Project following their dispute, and this only after he had repeatedly been asked whether he had not said so in his written statement. In assessing the credibility of the complainant, the learned Magistrate, however, did not address his mind to the bad blood existing between the appellant and the complainant and the latter's reluctance to admit such bad blood, which was an important omission. In fact, he contented himself with noting that the complainant had explained in cross-examination that the appellant had withdrawn from the SSRN Project and was replaced by Mr Singh.

In his analysis of the evidence, the learned Magistrate purported to note that the appellant had alleged in his written statement to the ICAC (respondent No.1) that the complainant was misbehaving towards him and *"was always aggressive and hence made a false complaint*" against him. The learned Magistrate found that the appellant, with regard to this allegation, had been given the lie by Mr Nowbuth of the MPI (witness No.5 for the prosecution). We are of the view that the learned Magistrate misdirected himself and misread the relevant extract of the appellant's written statement. The latter never stated therein that the complainant "*was always aggressive and hence made a false complaint"* against him. He was in fact referring to the specific site meeting on 22 September 2011 when a heated dispute arose between him and the complainant (supra). He stated that the complainant was aggressive and explained that he meant that the complainant had spoken to him in a loud and angry tone. He, however, specified that the complainant neither insulted nor assaulted

him. Mr Nowbuth, for his part, gave evidence to the effect that the complainant used to argue and to speak in a loud tone. In these circumstances, we find that far from giving the lie to the appellant, as wrongly found by the learned Magistrate, Mr Nowbuth rather supported the appellant's version.

From the above, it seems that the learned Magistrate was under the wrong impression that the defence version as contained in the appellant's written statement was that the complainant had made a false complaint against the appellant because he (the complainant) was misbehaving and was always aggressive towards the appellant. As already stated above, this was incorrect but this led the learned Magistrate to make another wrong finding, namely that the defence came up with another version in Court. The learned Magistrate held that the complainant vehemently denied that new defence version which was to the effect that the complainant had reported a case against the appellant because the latter had recommended a deduction from the amount due and payable to the complainant. However, as pointed out by learned Counsel for the appellant, the defence did not in fact come up with a new version in Court since the defence version had always been that the complainant had an axe to grind against the appellant.

As pointed out above, there was bad blood between the appellant and the complainant as a result of the heated dispute between them at the site meeting of 22 September 2011, which led the appellant to ask to be relieved from the SSRN Project. But this was not the end of the matter. Some 8 months later, as Acting Principal Architect, the appellant was called upon to supervise the SSRN Project. On 5 June 2012, the complainant informed the MPI that the SSRN Project had been completed and requested that the handing over procedure be initiated. However, on 12 June 2012, Mr Nowbuth effected a site visit in presence of Mr Oothendee, the complainant's representative, and drew up a snag list of 4 items of defective and outstanding works (Document J).

Worse was to come for the complainant. On 25 June 2012, the appellant effected a site visit in presence of the same Mr Oothendee and drew up a snag list of 74 items of defective and outstanding works (Documents K, L, M and M1). On 13 July 2012, in the course of a further site visit, the appellant found that most items had not been attended to and drew up an updated list of 66 items (Documents N and N1). As the client (the Ministry of Health) urgently needed the building, it was handed over to it but the complainant was

instructed to attend to all the remaining items on the snag list 2 days prior to the opening ceremony scheduled to be held after 27 July 2012. On 19 September 2012, the appellant wrote to the complainant to inform him that 23 items of works had not been executed as per the contract and that necessary deductions would be made from the next payment due to the complainant (Documents P and P1). This led the complainant to write on 28 September 2012 to the Minister to complain about abuse of authority, harassment, conflict of interest and corrupt practice on the part of the appellant (Document R). Nevertheless, Mrs Gungah-Burthun, Quantity Surveyor at the MPI, (witness No.6 for the prosecution), testified that she worked as per the appellant's list of omissions and deducted a total sum of about Rs 2.9 million as per Document Q from the final payment due to the complainant.

As can be gathered from the above, the defence version had always been that the complainant had an axe to grind against the appellant and the learned Magistrate misdirected himself when he held that the defence came up with another version in Court. Moreover, in assessing the complainant's credibility, the learned Magistrate did not give due consideration to the bad blood between the complainant and the appellant and to the above circumstances which led to that bad blood and which were directly related to the SSRN Project.

The letter written on 28 September 2012 by the complainant to the Minister, referred to above, triggered off the case against the appellant. It was a complaint about abuse of authority, harassment, conflict of interest and corrupt practice on the part of the appellant (Document R). As pointed out by learned Counsel for the appellant, the timing of that letter was an important factor to consider. It came after the appellant had written on 19 September 2012 to inform the complainant about deductions to be made from the next payment due to him as 23 items of works had not been executed as per the contract.

The learned Magistrate did not pay heed to the contents of the complainant's letter dated 28 September 2012 although it would have been relevant to do so. It was a very lengthy letter regarding the implementation of the SSRN Project with details about the dates, chronology of events, difficulties encountered and payments to be made but containing only one paragraph of a few lines relating to the present charge. It was in that letter that the complainant alleged for the first time that, during the 3rd week of May (i.e. 4 months prior to the letter), in the compound of the MPI, the appellant asked for "*some favour*" to facilitate the taking over of the SSRN Project without giving any detail about the

alleged "*favour*". As already explained above, there is a major difficulty regarding the alleged date of the offence, the more so that there is undisputed evidence that it was on 5 June 2012 that the complainant requested the MPI to take over the building, i.e. after the alleged date of solicitation by the appellant to facilitate the taking over. The complainant also explained in Court that he had no intention of reporting any case to the ICAC but was only interested in getting his money. It was only after the MPI had decided to refer his letter to the ICAC that he was interviewed and came up with the version that the appellant had solicited a gratification of Rs 100,000 from him.

In that same letter, the complainant stated that he had completed the works to the satisfaction of all concerned. This was not true as Mr Nowbuth, a prosecution witness, gave evidence that he had visited the site on 2 occasions, namely on 12 April and 12 June 2012, and had drawn up a snag list of defective and outstanding works (Documents H and J). The appellant also visited the site on 25 June and 13 July 2012 and drew up a snag list of 74 and 66 items respectively of defective and outstanding works (Documents K to N1). In his letter, the complainant stated that he had attended to the appellant's snag lists. He gave a different version in Court, namely that he did not agree with the appellant's snag lists and did not carry out any additional works but still obtained clearance for payment when another architect came on site. The learned Magistrate relied on the latter version without adverting to the contradictory version contained in the complainant's letter. As regards the payment effected to the complainant, there is no evidence that another architect visited the site after the appellant drew up the snag list of 66 items. We also have the above undisputed evidence of Mrs Gungah-Burthun, Quantity Surveyor at the MPI, that she did deduct a total sum of about Rs 2.9 million, as per the appellant's list of the complainant's omissions, from the final payment due to the complainant.

In his letter, the complainant also stated that no comments were made on the quality of work and snag list at the site visit of 13 July 2012. This was not the case as the notes of that meeting (Documents N and N1) indicate that most of the 74 items of the snag list of 29 June were found not to have been attended to and the complainant was instructed to attend to the remaining 66 items before the opening ceremony scheduled to be held after 27 July 2012. It is noteworthy that it was not the case for the prosecution that the snag lists drawn up by the appellant and backed by photographs (Documents E1 to E16) were

unjustified or exaggerated. The learned Magistrate, however, held that the snag lists showed that the appellant was bent on obstructing the handing over of the SSRN Project.

Moreover the complainant, in his letter and in Court, complained that the site visit by the appellant on 25 June 2012 leading to the appellant drawing up a snag list of 74 items took place in his absence. But the evidence shows that this site visit and other site visits on 12 April and 12 June 2012 by Mr Nowbuth were all carried out in the presence of Mr Oothendee, the representative of the complainant's company (Documents H and J).

We shall now turn to the alleged circumstances of the offence. The complainant's version was that there was a single meeting in the compound of the MPI between him and the appellant, where and when the latter would have solicited a sum of Rs 100,000 from him to facilitate the handing over of the SSRN Project. There was no other meeting or follow-up by the appellant on the alleged solicitation.

The appellant submitted that although corroboration was not required as a matter of law, the learned Magistrate should have addressed his mind to the absence of corroborative evidence and found it unsafe to convict the appellant.

The case for the prosecution rested on the evidence of the complainant. We agree that corroboration was not required as a matter of law and that the learned Magistrate could have relied and acted on the sole testimony of the complainant. However, before doing so, the learned Magistrate had to analyse the whole evidence on record very carefully, especially in the light of the alleged circumstances of the offence which were that the solicitation was made by the appellant in the course of a fortuitous one-off meeting with the complainant in the compound of the MPI without any witness. The analysis of the learned Magistrate has been found wanting in this respect. It was not sufficient for him to simply state that he was "*convinced that he* (the complainant) *was a witness of truth"* without addressing the above issues.

We have highlighted above the unsatisfactory nature of the evidence for the prosecution, to which the learned Magistrate did not give any, or due, consideration. This assumes all its importance when one takes into account the fact that the case for the prosecution rested on the complainant's evidence. The other prosecution witnesses did not

offer any evidence in support of the complainant's version with regard to the alleged circumstances of the offence, so that the learned Magistrate could rely only on his mere word. If anything, the other prosecution witnesses have confirmed the defence version as contained in the appellant's written statement. Moreover, we have highlighted above some misdirections of the learned Magistrate in his analysis of the whole evidence on record. Had the learned Magistrate paid due heed to the disturbing features and contradictions in the evidence on record and not misdirected himself on certain issues, we can only surmise as to whether he would have reached the same final conclusions. We, therefore, find that the learned Magistrate did not properly appreciate the evident on record.

For the above reasons, we find that it would not be safe to maintain the appellant's conviction by the learned Magistrate and that the appellant should be given the benefit of the doubt. We, accordingly, allow this appeal and quash the conviction and sentence of the appellant.

D. Chan Kan Cheong
Judge

R. Teelock
Judge

11 November 2021

Judgment delivered by Hon. D. Chan Kan Cheong, Judge

For Appellant	**:**	**Mr B. Sewraj, Senior Attorney** **Mr G. Glover, Senior Counsel together with** **Mr L. Balancy, of Counsel**
For Respondent No.1	**:**	**Mr S. Sohawon, Attorney-at-Law** **Mr H. Ponen, together with Mr H. Jeeha,** **both of Counsel**
For Respondent No.2	**:**	**State Attorney** **Mr D. Bhatoo, Senior State Counsel**