BUSAWAH M. & ANOR v THE INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC) & ANOR

2024 SCJ 400

THE SUPREME COURT OF MAURITIUS

Record No. 9068

In the matter of:-

Mooneshwarsingh Busawah

Appellant

v.

1. **The Independent Commission Against Corruption (ICAC) (now the Financial Crimes Commission pursuant to section 168(1) of the Financial Crimes Commission Act 2023)**

2. **The State**

Respondents

AND

Record No. 9071

In the matter of:-

Deoraj Bhirgoo

Appellant

v.

1. **The Independent Commission Against Corruption (ICAC) (now the Financial Crimes Commission pursuant to section 168(1) of the Financial Crimes Commission Act 2023)**

2. **The State**

Respondents

JUDGMENT

On a joint motion of all Counsel, the 2 above appeals were heard together as they arise from the same alleged offence and they involve common grounds of appeal. We shall accordingly deliver a single judgment, a copy of which will be filed in each record.

The 2 appellants were jointly charged before the Intermediate Court with making use of their office, whilst being public officials, for a gratification for themselves in breach of sections 7(1) and 83 of the Prevention of Corruption Act (now repealed). They pleaded not guilty and were represented by Counsel. The learned Magistrate found both appellants guilty as charged. He sentenced both of them to 9 months' imprisonment, which was suspended and converted to a community service order to perform unpaid work for 150 hours.

The case for the prosecution before the trial Court was as follows:

The particulars of the offence were that the appellants, while being customs officers on duty in uniform engaged in the verification of the luggage of Mr Hossen (witness No.5) and his wife Mrs Beedassy (witness No.6) at the arrival hall of SSR International Airport, obtained from the latter GBP 60 for themselves for effecting the verification of their luggage *"more quickly*".

Witnesses Nos.5 and 6 and their daughter arrived at SSR International airport from London. The appellants were on duty at the material time. Witness No.5 and his family were proceeding towards the green channel when they were requested by customs officers to follow them to the inspection room to have their luggage examined. After one suitcase had gone through a scanner, appellant Busawah (appellant No.1, then accused No.2) informed witness No.5 that he had found 2 cellular phones and a hair straightener. Upon being asked by appellant No.1 for the receipts for the articles, witness No.5 replied that he did not have any receipt. Appellant No.1 then informed witness No.5 that he would have to examine all his luggage, which consisted of 3 suitcases, 3 handbags and 2 carton boxes. Witness No.5 placed a carton box on the examination table, which appellant Bhirgoo (appellant No.2, then accused No.1) examined expeditiously.

Appellant No.2 told witness No.5 to give GBP 100 to appellant No.1 who would then allow witness No.5 and his family to go away quickly. Witness No.5 went to appellant No.1 to tell him that he did not have GBP 100 on him, upon which appellant No.1 replied that the remaining suitcases and handbags would have to be examined. Witness No.5 then went to see his wife who was looking after their daughter who had been sick during the whole flight. His wife told him that she had about GBP 50 only. Witness No.5 informed appellant No.1 accordingly and the latter replied "*li correct*". Witness No.5 went back to his wife to tell her to give the money to appellant No.1. She proceeded towards appellant No.1 to give him the money but appellant No.2 told her to put the money in the suitcase which was still on

the examination table. She left 3 notes of GBP 20 inside the suitcase. After appellant No.2 had gone to the table and taken the money, he told witness No.5 and his family that they could go.

The prosecution also produced a CCTV footage (Exhibit I) which recorded the acts and doings of the appellants and witnesses Nos.5 and 6 at the *locus in quo* at the material time.

The defence did not adduce any evidence before the trial Court.

After dropping some of the grounds of appeal, the grounds on which the appellants are challenging their conviction are in essence as follows:-

(i) the learned Magistrate was wrong to find that witnesses Nos.5 and 6 were credible witnesses in view of the inconsistencies in their evidence; and

(ii) the learned Magistrate was wrong to find corroborative evidence from the CCTV recordings.

(i) Credibility of witnesses Nos.5 and 6

The learned Magistrate was fully alive to the fact that the case for the prosecution rested mainly on the testimony of witnesses Nos.5 and 6. In this respect, he carefully and thoroughly set out and analysed their evidence to determine whether he could safely rely and act upon such evidence. He was aware that their evidence was not free from inconsistencies but, bearing in mind **Saman v The State** [2004 SCJ 3], he stated that *"(as) regards the inconsistencies, not every inconsistency would have an impact on the overall assessment of a witness*".

With regard to the testimony of witness No.5, the learned Magistrate found that there was a very minor and insignificant inconsistency relating to the reply witness No.5 gave to his wife upon being queried as to why he needed GBP 100. We find no reason to disturb the finding of the learned Magistrate. In fact, the inconsistency was more apparent than real. It turned out that witness No.5 stated in Court that he had told his wife that the customs officers were asking for money so that they could let them go while he stated in his written statement to respondent No.1 that he had told his wife that the money was meant for customs officers.

With regard to the testimony of witness No.6, the learned Magistrate found that there were some inconsistencies between her version in Court and her version in her statements to respondent No.1 and the Mauritius Revenue Authority ("the MRA"). These inconsistencies related to whether her husband had told her why the money was needed and whether she had heard any conversation between her husband and appellant No.1. In the latter case, her version in Court was similar to the version in her written statement to respondent No.1 but different from that in her written statement to the MRA.

The learned Magistrate bore in mind the following dictum in **Dhunny v The Queen** [1991 SCJ 145] in which it was held that "*cross-examination of a witness in Court is not a memory test which the witness must pass before his evidence can be accepted and relied upon*".

The learned Magistrate also referred to the test to determine who is a credible witness as laid down in **Joomeer v The State** [2013 SCJ 413]:-

> "*[13] Who is a credible witness? A credible witness is one who demonstrates by his testimony that he has: (1) knowledge of the facts to which he is testifying; (2) he is a disinterested party on the facts to which he is testifying; (3) he shows integrity in his deposition; (4) there is veracity in his statements; and (5) he feels bound to speak the truth following the oath or solemn affirmation he has taken before starting to testify.*"

Applying the above test, the learned Magistrate found that both witnesses Nos.5 and 6 were credible witnesses. He pointed out that both witnesses did not try to fabricate facts by, for example, conceding that they did not see appellant No.2 actually taking the money from the suitcase but that this could be inferred from the surrounding circumstances and acts of appellant No.2. He bore in mind that both witnesses were giving evidence some 6 years after the event. He was fully aware that there were some inconsistencies in their evidence but he held that they were minor ones and did not affect their overall credibility and truthfulness. He accordingly found that he could fully rely and safely act on their evidence.

After going through the evidence, we are unable to find any fault with the approach and reasoning of the learned Magistrate. The appellants are challenging the learned Magistrate's appreciation of the evidence. We are, however, of the view that his analysis of the evidence, more particularly of witnesses Nos.5 and 6, is unimpeachable. He had the undeniable advantage of hearing and seeing the witnesses. He was entitled to reach the conclusions he did regarding their credibility. The appellants have been unable to

demonstrate that those conclusions were perverse, unreasonable or unwarranted having regard to the evidence on record. In these circumstances, an appellate Court will be loath to intervene. As was stated by Lord Reid in **Benmax v Austin Motor Co Ltd (1955) 1 All E.R. 326**, *"(a)part from cases where an appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations.*"

In the light of the above, we find no merit in the appellants' contention that the learned Magistrate was wrong to believe witnesses Nos.5 and 6 and to act on their evidence.

(ii) <u>The issue of corroboration</u>

It was submitted on behalf of the appellants that the learned Magistrate was wrong to find corroborative evidence from the CCTV recordings which were produced as part of the prosecution case (Exhibit I). This finding was wrong inasmuch as the CCTV recordings do not support the version of witnesses Nos.5 and 6 that the appellants committed the offence but, in fact, prove that the appellants were all along acting within the scope of their duties and had not asked for, nor obtained, any gratification. In these circumstances, the corroboration warning which the learned Magistrate gave himself was not adequate or sufficient.

It is well settled that evidence, to be capable of being "*corroboration*" in the strict or technical sense, must be relevant, be credible, be independent (i.e. emanate from a source

other than the witness requiring corroboration) and implicate the accused in a material particular.

The learned Magistrate noted that witnesses Nos.5 and 6 were accomplices but had been granted immunity by the Director of Public Prosecutions. He stated that he was fully aware of the danger of acting upon their uncorroborated evidence and gave himself the adequate warning. He was nevertheless satisfied that he could safely rely upon the evidence of witnesses Nos.5 and 6, whose only motive was to tell the truth and who would not have wasted time in enquiries at respondent No.1 and the MRA given that they were on holiday in Mauritius.

The learned Magistrate, however, went even further. He was satisfied that he could safely act on the sole testimony of witnesses Nos.5 and 6 but he also found that corroborative evidence, if required, was available in the form of the CCTV footage (Exhibit I) which shows recordings from 12.39 hrs to 12.45 hrs on the material day at the *locus in quo.*

It is not disputed that the recordings show the following chronology of events:-

(a) appellant No.2 approaches witness No.5 while appellant No.1 is examining the suitcase and the carton box is on the other side of the examination table. Both appellant No.2 and witness No.5 leave their respective spots;

(b) witness No.6 looks in her handbag near the carton box. Appellant No.2 approaches her, following which she moves towards the open suitcase with her purse in her hand while the suitcase is still being examined by appellant No.1;

(c) appellant No.2 again approaches witness No.6 near the suitcase and points inside the suitcase;

(d) the carton box is barely examined by appellant No.2 without being opened with only its seal being broken and is then placed on a trolley;

(e) appellant No.2 comes near the suitcase which has its lid over it but is still open and unzipped while witness No.6 is still standing near the suitcase. Appellant No.2 peeps inside the suitcase and moves away;

(f) appellant No.2 introduces his left hand inside the suitcase and then puts the same hand inside the left pocket of his trousers. He then immediately removes his hand from inside his pocket;

(g) the suitcase is closed by both appellant No.2 and witness No.6. Witness No.5 places the suitcase on the trolley; and

(h) there is no further examination of any of the remaining luggage of witnesses Nos. 5 and 6 and they leave the spot.

Basing himself on the above facts and circumstances as disclosed by the CCTV footage, the learned Magistrate inferred that witness No.6 had put 3 notes of GBP 20 inside the suitcase and that appellant No.2 had removed the money and placed it inside the left pocket of his trousers. After reiterating that he could safely rely on the sole uncorroborated evidence of witnesses Nos.5 and 6, the learned Magistrate held that there was nevertheless independent corroborative evidence in the form of the CCTV recordings.

We have compared the version of witnesses Nos.5 and 6 in Court with the events shown by the CCTV recordings. We agree with the learned Magistrate that the CCTV recordings support in a material and independent manner the version of witnesses Nos.5 and 6. The inferences made by the learned Magistrate from the CCTV recordings were reasonable and justified. We find no merit in the appellants' submission that the CCTV recordings prove their innocence. In fact, it is the contrary.

In the light of the above, we do not agree with the appellants that the learned Magistrate was wrong to find corroborative evidence from the CCTV recordings. On this issue, we are of the view that his analysis and his findings of fact and law cannot be faulted. In any case, as emphasised by the learned Magistrate, he was already satisfied that he could safely rely on the sole uncorroborated evidence of witnesses Nos.5 and 6 and the CCTV recordings constituted additional evidence in the form of corroborative evidence further strengthening, if there was need, the case for the prosecution.

In addition to the above grounds of appeal, we shall deal with the submission made on behalf of the appellants that the learned Magistrate was wrong to conclude that their respective conduct meant that they could let witnesses Nos.5 and 6 leave the red channel more quickly in the absence of evidential basis to support same.

This submission is misconceived. There was ample evidence from witnesses Nos.5 and 6 and the CCTV recordings, if accepted, to support the above conclusion of the learned Magistrate. Since the latter had determined that he could safely rely upon that evidence, he was perfectly entitled to reach that conclusion. In this respect, he pointed out that the appellants allowed witnesses Nos.5 and 6 to leave after obtaining the money without full verification of their luggage. The appellants are seeking to challenge a finding of fact of the learned Magistrate but we find no reason warranting our intervention.

Final conclusions

For the above reasons, we find no merit in the present appeals. The duty of an appellate Court is to ask itself whether it is in a position to come to a clear conclusion that the trial Court was "*plainly wrong*". In **Henderson v Foxworth Investments Limited [2014] UKSC 41**, the English Supreme Court held as follows:

> "*67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.*"

In the present case, the appellants have been unable to demonstrate that the learned Magistrate has made a material error of law or perverse, unreasonable or unwarranted findings of fact. On the evidence before the learned Magistrate, he was entitled to reach the conclusions he did and he was not plainly wrong. We accordingly dismiss both appeals with costs.

D. Chan Kan Cheong
Judge

M. I. Maghooa
Judge

5 September 2024

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

For Appellant in both cases	**:**	**Mr P. Thandarayan, Attorney-at-Law** **Mr R. Valayden, of Counsel** **Mr S. Mungroo, of Counsel**
For Respondent No.1 in both cases	**:**	**Mr S. Sohawon, Attorney-at-Law** **Ms P. Bissoonauthsing, of Counsel** **Mrs A. Rangasamy-Parsooramen, of Counsel**
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