BURHOO K. K. v. THE INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR

2012 SCJ 211

Record No. 8038

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Kiran Kumar Burhoo

Appellant

v.

1. The Independent Commission Against Corruption
2. The State

Respondents

JUDGMENT

The appellant was prosecuted before the Intermediate Court on a charge of public official using his position for gratification in breach of Section 7(1) and 83 of the Prevention of Corruption Act (POCA). He pleaded not guilty but was found guilty and sentenced to undergo six months imprisonment.

He has now appealed against his conviction initially on fourteen grounds out of which, only thirteen were pressed before us.

The undisputed evidence adduced before the trial court, revealed that on 19 September 2005 at around 8.30 a.m. at Nicolay Road, van No. 671 FB 99 driven by the complainant B. Doobery, was stopped by the appellant, a police officer who was on duty at the said spot. The complainant was not wearing his seat belt and further he was carrying a number of children in excess of the authorised number. The appellant informed the complainant that he had committed two contraventions and would be accordingly booked. The complainant begged the

appellant to be let off. The appellant noted down the particulars of the van on a piece of paper. However he did not book the complainant for the contraventions.

The version of the defence and that of the prosecution, differ as regards the events that ensued. According to the defence, the appellant gave in to the complainant's plea and allowed him to go scot-free on account of the fact that he was allegedly related to certain police officers posted at the same station.

Subsequently, according to the appellant's version contained in his statement of defence, whilst he was opposite the Intermediate Court eating a dhollpuri at about 11.30 a.m. he received a phone call from the station orderly, Hoormutally, asking him only about his whereabouts which he communicated to him. Whilst the appellant was eating, he saw the man whom he had stopped earlier that morning; the latter approached him, thanked him and offered him something to eat or drink, which the appellant refused. The complainant went away and shortly thereafter, the ICAC officers came towards the appellant and arrested him. He denied that he had ever asked the complainant for a sum of Rs 200 or that the latter remitted such a note to him when they met opposite the Intermediate Court.

The version of the prosecution on the other hand, is to the effect that when the appellant stopped him, the complainant offered him a Rs 100 note, the only note that he had,so that the appellant would refrain from contravening himwhich the appellant refused, asking instead for Rs 200 which sum the appellant informed him, had to be paid by noon. The appellant further informed the complainant that if the money had not been tendered by that time, the complainant would then insert entries in respect of the contraventions at the police station. The complainant agreed to meet him at Abercrombie Police Station to hand over the money.

The complainant withdrew a sum of Rs 200 from his account, photocopied the note and reported the matter to the Independent Commission Against Corruption (ICAC) office. The officers explained to the complainant how they would conduct a sting operationto catch the appellant. Three police officers, CPL Soobrayen, WPC Poorunsing and CPL Sirop travelled in the complainant's van to Abercrombie Police Station where the money was to be remitted. Reaching there, they did not meet the appellant who was on duty at the New Court House. PC Hoormutally, the station orderly called the appellant on his mobile phone and passed him onto the complainant.The appellant arranged to meet the complainant opposite the Intermediate Court. The police officers and the ICAC officers proceeded towards the Intermediate Court along with the complainant. WPC Poorunsing and CPL Sirop as well as Investigator Callea alighted and waited.

The complainant came along in his van, the appellant was then standing next to a dhollpuri seller opposite the Intermediate Court. The complainant signalled to him, went to park his van and came back to meet the appellant. The complainant shook hands with the appellant and in the process, passed on to him the Rs 200 note which had been previously folded. Upon the complainant's query,the appellant confirmed with the complainant that he had not reported the contraventions. The complainant then returned to his van and the appellant pocketed the money. CPL Soobrayen and WPC Poorunsing approached the appellant and informed him of their identity. The appellant withdrew his hand from his trousers pocket and put something in his mouth. He refused to remove it upon being ordered to do so. CPL Soobrayen pressed the appellant's cheeks to open his mouth and saw the Rs 200 note therein. The appellant swallowed the note; he was arrested by the officers.

In their skeleton arguments, counsel on each side grouped the grounds of appeal into clusters. We have done a similar exercise grouping those grounds which, in our view convey the same idea but we have however resorted to a grouping different from that of counsel.

We will first consider ground 14 which is the only ground raising a point in law and which reads as follows:

> *"The learned magistrate was wrong to find that s.4 and s.7 of POCA could be interchanged by the prosecution and by her."*

Before the trial court, the defencehad argued that the prosecution had wrongly charged the appellant under Section 7(1) of the POCA, when the circumstances of this case fall squarely under Section 4(1) of the Act.

The Magistrate rejected this submission and held that "*what is averred here can equally fall under Section 4(1) as under Section 7(1) of the POCA. However this does not make the information defective for uncertainty and is not fatal to the case for the prosecution".*

We find that the Magistrate's analysis on the issue, is correct. The fact that the appellant could, in the circumstances of the present case, have been equally charged under Section 4 of the Act, does not mean that the charge laid against him under Section 7,was defective.

We find it useful to reproduce the following comments made by the Supreme Court in the case of **ICAC v. Soobrun [2007 SCJ 318]**:

> *"POCA seeks to criminalize as many situations of bribery as may be possible and creates a host of offences. In many cases, the offences so created overlap not only with others in POCA itself but also with criminal offences under the*

> *Criminal Code. They are, however, not mutually exclusive. Which charge befits which offender in which situation is not for the courts to decide but for the prosecution in its discretion".*

In the present case, the prosecution in its discretion,chose to prosecute the appellant for an offence under Section 4 and on the evidence, they were entitled to do so inasmuch as the requisite elements for the offence charged were present and were eventually found proved beyond reasonable doubt by the Magistrate.

Ground 14 fails.

Grounds 1 & 12

Grounds 1 and 12 may be conveniently dealt together inasmuch as they both concern the Magistrate's overall appreciation of the evidence.

Ground 1 reads as follows:

> *"The learned magistrate erred in the appreciation of the evidence on record and wrongly found the appellant guilty."*

andGround 12 is as follows:

> *"On the whole the learned magistrate's findings are perverse and unwarranted."*

The evidence adduced before the Magistrate consisted of the testimony of the complainant, the officers of the ICAC and police officers, documentary evidence as well as the unsworn statements that the appellant gave to the police. The Magistrate analysed all the evidence and found the appellant guilty as charged. It is an undeniable principle that the trial

court remains sovereign in itsappreciation of the evidence adduced before it. The Magistrate had the opportunity of watching the witnesses depone before her and assessing their credibility as they were subjected to searching cross-examination by counsel. She noted inconsistencies in the evidence of the respective prosecution witnesses and she addressed her mind to them. She found that the flaws which the defencepinpointed in the version of the ICAC officers were "*inconsequential*". She analysedthe complainant's evidence and found it credible inasmuch as it had remained unshaken on the material facts. She found it safe to act upon his testimony.

She also relied upon documents which were adduced before her, notably documents C and D which were secured from the appellant at the time of his arrest. Document C is a memo sheet, on which the appellant had written down the particulars of the complainant's vehicle and the contraventions committed, a fact admitted by the appellant. Document D is an extract from the diary book of Abercrombie Police Station for the relevant day and which reveals that the appellant had formally booked another van driver for admitting excess passengers and failure to produce triangular warning sign, at 8.39 hours on that day.

The Magistrate found that the only reason why the appellant did not formally contravene the complainant and insert an entry to this effect in the diary book, was "for the reason for which he stood before Court". This reason,as revealed bythe prosecution evidence,would be that he had given the complainant up till noon to give him the money, failing which, he would have reported the matter.

We find from the Magistrate's analysis and assessment of the evidence, that it cannot be said that her findings are either erroneous or perverse such as to warrant the interference of the appellate court.Nor can it be said that the Magistrate has overlooked or misunderstood the evidence in some relevant aspect or has accepted evidence which was incapable of belief.

Grounds 1 and 12 accordingly fail.

Grounds 2 and 11 which concern the Magistrate's appreciation of the complainant's evidence, can be conveniently dealt with together. They read as follows:

Ground 2 –

> ***"****The learned magistrate was wrong to rely on the evidence of the complainant, Mr. Doobery especially as such evidence was riddled with contradictions and material inconsistencies."*

Ground 11 –

> "*The learned magistrate erroneously (sic) to counsel's cross-examination as twisting the complainant to obtain answers obtained in cross-examination from the complainant to be apologetic of that witness and then to attach credibility to his evidence."*

We find that there were indeed certain inconsistencies in the evidence of the complainant. The Magistrate was aware of these and specifically addressed same in her judgment. She then made the following observation:

> *"His line of responses, his evasiveness, far from impinging on his credibility revealed rather the low level of education or'intelligence' of this witness".*

The Magistrate's remark to the effect that *"defence counsel would twist him round his little finger, so to say",* must be read in the context of that particular paragraph and the judgment as a whole. We note that immediately after making the above remark, the Magistrate went on to expatiate thereon and wrote, "*He was amenable to any kind of responses sought to be*

extracted from him". The Magistrate's remark if anything, is a compliment to counsel's skill in cross-examination, and his obtaining the answers that he sought from the complainant.

The Magistrate, after a thorough analysis of the complainant's evidence and after having considered the inconsistencies therein, nevertheless found him to be a genuine witness whose version on the material facts, remained intact. We find no reason to disturb her findings. The evidence on record established all the elements of the offence namely that the complainant had in fact remitted to the appellant a sum of Rs 200 as solicited by him so that he would not book the complainant for the offences that he had committed.

At this juncture, we bear in mind the principle that has been repeated *ad nauseam* and reiterated by the Privy Council 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".*

In the present case, we do not find that the Magistrate has overlooked or misunderstood the complainant's evidence in some relevant respect nor that his evidence was manifestly incredible and we find no merit in this ground.

Ground 6 is as follows:

> *"The learned magistrate was wrong to suggest that the defence has to show motive that ICAC officers lied about the existence of the bank note and also to find that the defence had to rebut the complainant's evidence that he remitted the note."*

This ground is in effect alluding to a misdirectionby the Magistrate regarding the burden of proof. We do not agree that there was any such misdirection and we find that the Magistrate properly addressed the issue.

We take note that the Magistrate stated in her judgment that “no motive whatsoever has been suggested why the witnesses would have plainly lied about such a fact” (namely the existence of the bank note Rs 200). She also wrote that the complainant’s evidence regarding the remittance of the note, could not be rebutted.

We are of the view that these remarks, when read in the context of the specific paragraph and the judgment as a whole, cannot by any means be interpreted to mean that the defence had to establish a motive on the part of the prosecution witnesses or that it had the onus of rebutting the complainant’s evidence.At no time did the Magistrate state that the appellant had to give reasons as to why the ICAC officers would lie about the existence of the bank note or that he had to rebut the complainant’s evidence that he had remitted the note.

In fact, it was the defence who brought the issue of motive and suggested that the complainant might have had a motive to lie inasmuch as his fear of losing his licence, might have prompted him to level a false allegation against the appellant. In so far as rebutting the complainant’s evidence is concerned, the fact remains that once the prosecution had established a *prima facie* case against the appellant as was the case here, the defence had to rebut same.

This ground also fails.

Ground 8 is to the following effect:

> *"The learned magistrate's judgment is full of unwarranted conjectures and was apologetic of the weaknesses of the evidence of prosecution witnesses."*

We do not find any merit in this ground. We are of the view that far from making conjectures, the Magistrate chose not to ignore the flaws and weaknesses in the case for the prosecution and made an honest attempt to carry out an analysis of the evidence as it stood before her and made a critical appreciation thereof.

Ground 8 accordingly fails.

Under Ground 9 it is averred that:

> *"The learned magistrate failed to appreciate that the prosecution had failed to prove that the appellant had swallowed a bank note especially as the medical report was negative."*

We are of the view that the criticisms levelled under this ground, are not warranted. Under the charging section, it was not an element of the offence which the prosecution had to establish, that the bank note had been swallowed by the appellant. In fact the Magistrate found that the evidence of Dr. MootienPillay who deponed on this issue did not add anything to the case for the prosecution nor didit cast doubt upon it. She was of the view that even if it was proved conclusively that no bank note had in fact been swallowed, the case would still stand, the issue to be decided being whether the appellant had actually taken the note which the complainant had given to him and she found that evidence to this effect, existed on record. We agree with the Magistrate's analysis on the issue and ground 9 accordingly fails.

Grounds 3, 4, 5, 7, 10 can be addressed together as they all in effect deal with alleged flaws in the testimony of the prosecution witnesses notably ICAC officers, WPC Poorunsing and CPL Soobrayen. They are reproduced hereunder:

Ground 3 –

> *"The learned magistrate erred, after having found that ICAC officers "might have exaggerated not only the existence and denomination of the crushed/folded bank note but also the exact details of the circumstances in which they managed to have a view of it" to believe them."*

Ground 4 –

> *"The learned magistrate was wrong to rely on the evidence of WPC Poorunsing although she found that the witness was forced to "lend herself to a few inconsistencies" as her evidence was full of contradictions."*

Ground 5 –

> *"The learned magistrate was wrong to ignore the statement under solemn affirmation of witness Poorunsing who stated that she could not be sure that the complainant had only one Rs 200 bank note in his possession especially as the latter was not searched either before or after the alleged remittance."*

Ground 7 –

> *"The learned magistrate erred in concluding the CPL Soobrayen's version was coherent and clear."*

Ground 10 –

> *"The learned magistrate should not have found that the flaws in the ICAC officers' version were inconsequential."*

The Magistrate was aware of certain inconsistencies in the prosecution version. She addressed them in her judgment and concluded that "the flaws pinpointed in the version of the ICAC officers were inconsequential" and further that "whatever zeal might have been deployed by the ICAC officers, does not impinge on the complainant's version". The Magistrate concluded that the complainant was the person who knew most about the remittance of the money and it was his testimony, which she found credible, that was of crucial importance.

Concerning WPC Poorunsing.the Magistrate found that "the alleged apparent defects in her testimony notably as to whether she had seen the note, do not affect the prosecution version". The Magistrate further observed that in re-examination, WPC Poorunsingdid confirm having seen the note in the appellant's mouth when CPL Soobrayen pressed his cheeks.

In so far as CPL Soobrayen is concerned, the Magistrate found that his version was coherent and clear and his evidence could not be impeached. She accepted his evidence that the complainant had shown the officer the Rs 200 note whilst they were travelling to the Intermediate Court in the van and that the officersaw the bank note in the appellant's mouth when he pressed the latter's cheeks.

We are of the view that the Magistrate's conclusions regarding these witnesses, cannot be impeached. She had the benefit of seeing the witnesses depone before her in court and assess their credibility and we do not find her findings to be perverse such as to warrant our intervention.

We find no merit in grounds 3, 4, 5, 7, 10.

All the grounds of appeal having failed, we dismiss the appeal. With costs.

E. Balancy
Judge

R. Mungly-Gulbul
Judge

13 June 2012

Judgment delivered by Hon. R. Mungly-Gulbul, Judge

For Appellant	:	**Mr. Y. Mohamed, SC** **Mrs. Attorney A. Ragavoodoo**
For Respondent No.1	:	**Mr. K. Goburdhun, of Counsel** **Mr. Attorney S. Sohawon**
For Respondent No. 2:	:	**Mr. Ramdahin, State Counsel** **State Attorney**