Evidence of Decoy

SSC Mr. T. Mudalige.

(2)

(79)

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decoy evidence

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

Jagath Chandana Weerasinghe

Accused-Appellant

Vs.

C.A. No. 316/2007

H.C. Colombo No.B/1456/2004

The Commission to investigate allegations of Bribery or Corruption

No.36, Malalasekera Mawatha,

Colombo 07

Complainant- Respondent.

BEFORE : W. L. RANJITH SILVA, J. &
D. S. C. LECAMWASAM, J.

COUNSEL : Rienzie Arasacularatne P.C. for the Accused-Appellant.
Thusith Mudalige SSC for the Complainant-Respondent.

ARGUED ON : 27.07.2011, & 14.10.2011

DECIDED ON : 14th October, 2011.

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RANJITH SILVA, J.

The accused-appellant is present in Court on bail.

Heard both Counsel for and against this appeal. The accused was charged under the Bribery Act for having accepted a bribe which is an offence under Section 20(b)(VI) and Section 19(C) of the Bribery Act. After trial the accused was acquitted on counts No.1 and 5 and convicted for the rest of the charges. The judgment was pronounced on 05.01.2007 according to the Journal Entry. On that day the learned Judge had found the accused-appellant guilty of all the charges, i.e. charges 1 to 8 and had ordered to obtain the finger prints of the accused-appellant for the purpose of passing sentence. Now I refer to Section 279 of the Criminal Procedure Code which enumerates how the judgment should be pronounced in the High Court as distinct from a judgment in the Magistrate's Court. According to that section the Judge must either pass the verdict then and there and immediately thereafter pronounce the judgment. This is to provide for a situation where a Judge thinks that he could make a bench order or pronounce a judgment with which he had come ready. According to the 2nd limb of this section a Judge can pronounce a judgment within ten days of the conclusion of the trial and the second limb does not speak of a separate verdict. It speaks of a full judgment. In this case according to the journal entry of 05.01.2007 it appears that the learned Judge has pronounced the verdict and the judgment because a verdict has not been pronounced before that.

According to the journal entry the verdict and judgment has come simultaneously. But this judgment is not found in the record. Even if one takes this as only a verdict, what is recorded in the journal entry of 05.01.2007 is only the verdict. A judgment based on that verdict is not found in the record. But there is another judgment dated the same day which talks of a verdict that has been pronounced in Court and that particular judgment which is at page 102 of the brief speaks of another judgment, a pre-existing judgment wherein the learned Judge had made a mistake admittedly with regard to the respective counts on which the accused-appellant was convicted. In that second judgment she corrects herself and withdraws the convictions in respect of the 1st and the 5th charges. But even that judgment does not speak separately of the counts for which the accused-appellant was convicted. It, in a general manner, states that she is finding him guilty for the rest of the counts. But there too we find that she has convicted the accused on the rest of the counts only for the reason that there was evidence that Rs.25,000/= was handed over to the accused-appellant by the deceased complainant in the presence of 3rd witness Arosha Malkumari. Therefore it is inconceivable on this particular piece of evidence how the judge could convict him on the 2nd count of solicitation. Therefore once again the Judge has repeated the same mistake. Although there is no 3rd judgment rectifying that, there is another repetition of the same mistake. This judgment, appears to me, is not in keeping with the provisions of the Criminal Procedure Code and is repugnant and contrary to the law.

On the evidence, after hearing both parties I find that there is not sufficient evidence to prove even the charge of accepting a bribe. (3rd and 4th charges). Although 3rd and 4th charges refer to the same elements I find that there isn't sufficient evidence to prove that charge either, for the reason that when one peruse the main case record one could find that the money had been handed over in the presence of the sister of the wife of the deceased namely, witness No.2. According to the learned Judge the money had been handed over in the presence of Witness No.3 Arosha Malkumari who is the wife of the deceased complainant. Whereas the evidence categorically states that the money was handed over in the presence of witness No.2 that is Arosha Malkumari's sister-in-Law. This evidence is found at page 47 of the brief. When the wife of the deceased Arosha Malkumari was questioned;

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උ : ස්වාමි පුරුෂයා.

ප : කවුරු ඉදිරිපිටද දුන්නේ?

උ : මහත්මයාගේ නංගි ඉදිරිපිට.

ප : කවුද දුන්නේ?

උ : මහත්මයා දුන්නේ 25,000/- ක්

Here she never states that she was there and that it was in her presence that the money was handed over, what she says is that the money was handed over in the presence of her sister-in-law by the husband. The prosecution had ample opportunity to question her whether she was

present and she saw this transaction. There had been no such questions and not such answers. Therefore, in a serious charge of this nature it is not for the Court to provide for what is wanting. Surmise or conjecture or to add words to affect the accused-appellant adversely as the presumption of innocence is in his favour and this type of doubt should inevitably be interpreted or resolved in favour of the accused. Nowhere in the brief the prosecution has ever tried to cover up this or provide for what is wanting, especially in the light of the evidence that the money was handed over in the presence of her sister-in-law should have cautioned the prosecution and put them on guard and the prosecution should have been alert to this matter and questioned the witnesses to prove the ingredients of the charge.

This is a case where the complainant is now deceased. A retrial will only help the prosecution to cover up what is wanting. Now that it has come to light, it would be inevitable that the prosecution will ask questions to cover up what is wanting. That would be to deprive a proper exercise of the right of appeal. When one exercises his right of appeal that should not be turned against him and the prosecution should not be allowed to take undue advantage. Otherwise that will hamper, deter, and discourage appellants from disclosing and presenting their case effectively in a Court of Law. The prosecution has failed completely to lead the evidence of the sister of the deceased, witness No.2 when the prosecution had ample and all the opportunity of leading the

evidence of that witness. Despite the fact that the evidence disclosed that the money was handed over in her presence. These are lapses and the Court should not come into the aid of those who have neglected and shown lethargy in prosecuting their case. In this case we find that the complainant was dead and there is not even corroboration. The corroboration should have come at least from the sister of the deceased witness No.2 who is said to have been there and whose presence the money had been handed over.

The reasons why a retrial is not ordered; firstly the offence was committed about ten years ago and the conviction was in 2007, now four years. Secondly this Court will not provide an opportunity to the prosecution to cover their gaps. In other words what is wanting and what they have not questioned. Thirdly a retrial will only provide the opportunity of leading the evidence of the 2nd witness whose evidence the prosecution has deliberately refrained from leading. Fourthly, in this regard, I would like to refer to **Shony 19th Edition page 4133** where the learned Author states Under the heading ***'When retrial should not be ordered'*** it is chaptered as 69 – **Shony's Code of Criminal Procedure - 19th Edition in 4 volumes and this particular volume is 'VI',** I quote;

> "An order of retrial of a criminal case is made in exceptional cases and not unless the Appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that trial was vitiated by serious illegalities or irregularities

or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control prevented from leading or tendering evidence material to the charge and in the interest of justice, the Appellate Court deems it appropriate having regard to the circumstances of the case, that the accused should be put on his trial again, an order of retrial wipes out from the record the earlier proceedings and exposes the person accused to another trial. In addition to this, a retrial should not be ordered when the Court finds that it would be superfluous for the reason that the evidence relied on by the prosecution will never be able to prove the charges beyond reasonable doubt and the like especially when the Court is of the opinion that the prosecution will be put at an advantage by allowing them to provide the gaps or what is wanting that resulted due to their own lapses."

On what Shony had to say on a comparison I find that it is not the mere irregularities that have been highlighted in this case. In this case the prosecution has deliberately refrained from leading evidence of the 2nd witness one of the most important witnesses. Further I would like to refer to book ***"Bribery"*** by Mr. R. K. W. Goonesekera . In his book at page 93 commented on this fact as follows;

"More than once the Supreme Court has been disturbed by the tendency of trial judges to treat the evidence of prosecution witnesses in bribery cases with the particular sanctity. In Mohamed Saleem's case the court observed that the evidence of prosecution witnesses does not carry any presumption of truth and should not be given undue weightage. In Siriwardane Vs. The Attorney General the Chief Justice cautioned trial judges against proceeding upon an irrebuttable presumption that police officers engaged in the Bribery Commission's Department always speaks the absolute truth as this would be to deny the accused the opportunity of a fair trial."

By the same token the same principles should apply and guide the judges in the assessment of the evidence of excise officers in narcotic cases. Judges must not rely on a non-existent presumption of truth fullness and regularity as regards the evidence of such trained police or excise officers.

I would also like to refer to the book entitled *"The Law of Evidence"* Volume 2 . I quote from E.R.S.R. Coomaraswamy in *The Law of Evidence* volume 2 book 1 at page 395 dealing with how the police evidence in bribery cases should be considered as states as follows;

"In the great many cases, the police agents are, as a rule unreliable witnesses. It is all ways in their interest to secure a conviction in the hope of getting a reward. Such evidence

ought, therefore, to be received with great caution and should be closely scrutinized. Particularly where their evidence is the only corroborating evidence of the evidence of the accomplice."

For these reasons we are constrained to set aside the judgment and the sentence of the learned High Court Judge and acquit and discharge the accused-appellant.

JUDGE OF THE COURT OF APPEAL

D. S. C. LECAMWASAM, J.

I agree.

JUDGE OF THE COURT OF APPEAL

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