

WIJERATNE
v.
ATTORNEY GENERAL

COURT OF APPEAL
ISMAIL, J., (P/CA)
DE SILVA, J.,
C.A. NO. 204/93
H.C. NO. 744/92
MARCH 10, 1998
APRIL 1, 1998

Bribery Act – Amended by Act No. 9 of 1980 – accepting a gratification to prevent the performance of an official act – abetment of offence – Evaluation and assessment of evidence.

The accused Appellant, a P.H.I was charged on two counts of soliciting and on two counts of accepting a gratification from one D, in assisting in the prevention of the demolition of an unauthorised structure. The 2nd accused was indicted with having abetted the accused Appellant. After trial the 2nd accused was acquitted, the accused Appellant was found guilty on the counts of soliciting and accepting a gratification.

Held:

1. The trial Judge has not analysed the evidence of the complainant in regard to the solicitation taking into account the background to the transaction. The charges have clearly specified that the purpose of soliciting was to assist in the prevention of the demolition of the unauthorised structure. The accused Appellant had been instrumental in setting in motion the steps leading to the issue of the show cause letter. The trial Judge also found that the evidence of the decoy did not indicate that the money was forcibly given. There was a pressing need for the trial Judge to have evaluated the evidence in regard to the acceptance. He had a duty to consider whether a doubt arose in regard to the prosecution case considering the evidence of the accused and the sequence of events that led to the giving of the money.
2. There is no evidence that the accused had in any manner contributed to the delay in taking legal action against the complainant, on account of the unauthorised construction. There is no evidence that the accused appellant was taking steps to seek a gratification. The accused appellant had been prompt and has persevered in bringing to the notice of the authorities the need to take action in respect of the unauthorised structure.

APPEAL from the Judgment of the High Court of Colombo.

Cases referred to:

1. *King v. Gunaratne et al* – 14 Ceylon Law Recorder 174
2. *Martin Fernando v. Inspector of Police, Minuwangoda* 46 NLR 210

Ranjith Abeysuriya, P.C with Ms Priyadharshanie Dias for the Accused-appellant

Jayantha Jayasuriya S.S.C for the Attorney-General

Cur. adv. vult.

May 15, 1998.

ISMAIL, J. (P/CA)

The accused-appellant was a Public Health Inspector working in the office of the Medical Officer of Health, Padukka. He was at the relevant time attached to the Seetawaka Provincial Council in the Padukka-Waga sub-office and his duties included the examination and submitting of reports on any illegal construction of buildings within the area.

The 2nd accused named D. L. Mahipala was officer-in-charge of administration in a sub-office of the Provincial Council.

The 1st accused-appellant who was a public servant was charged on two counts of soliciting and on two counts of accepting a gratification of a sum of Rs. 1,500 from Jayantha Sirisena Devapriya on 5.7.90 at Padukka, in terms of section 19 and 19(c) of the Bribery Act, as amended by Act No. 9 of 1980, to prevent the performance of an official act, to wit, by assisting in the prevention of the demolition of an unauthorised structure in the Polwatte, Padukka area.

The 2nd accused was indicted on counts 5 and 6 with having abetted the 1st accused in the commission of the two offences of acceptance of the gratification referred to above.

The trial commenced on 24.8.92 and at its conclusion for the reasons set out in the judgment dated 22.01.92, the 2nd accused was acquitted of the charges in counts 5 and 6 of the indictment.

The 1st accused was found guilty and was convicted on the 1st and 2nd counts for the solicitation and on the 3rd and 4th counts

for the acceptance of the said gratification and was sentenced to a term of 5 years rigorous imprisonment on each count and the sentences were ordered to run concurrently. This appeal is against his conviction and sentence.

The complainant Jayantha Sirisena Devapriya was a technical officer attached to a sub-office of the Padukka Provincial Council at Hanwella. His evidence was that he had intended to construct a house for his brother in a plot of land belonging to him at Mahagamlandawatte in Padukka. He had put up a temporary structure to store the building materials at the site. As the construction of the building was being delayed, his brother moved in to live in the temporary building which was originally intended as a store at the site. He has admitted receiving several letters from the Provincial Council relating to the construction of the said unauthorised building. He had, however, not taken any steps in this regard despite admittedly receiving letters from the Provincial Council.

The complainant appears to have been annoyed that officials of the Provincial Council were more keen on seeking to have this temporary structure demolished rather than taking steps to allocate to him an assessment number for the lot on which the house was to be constructed. He had therefore decided to make a complaint to the Bribery Commissioner against the Public Health Inspector and the Technical Officer. His complaint was recorded on 31.5.90 and a trap was arranged for 6.5.90 by the officers attached to the Bribery Commissioner's office. The complainant had not made any specific allegation that the 1st accused-appellant had solicited a gratification or that he solicited a particular sum of money.

According to the evidence and the documents produced at the trial it appears that on 27.12.89, the 1st accused-appellant had made the detection of the said unauthorised structure having been constructed and has made notes of this detection in his field book at page 44 (1V6). He had then made an official report on 2.1.90 (1V7) to the Authorised Officer of the Council through his superior officer, the Medical Officer of Health, regarding the erection of this 10'x19' tiled house constructed with planks.

It appears that the officer-in-charge of the Padukka-Waga unit of the Provincial Council had by his letter dated 6.2.90 (1V5 & 1V9)

informed the complainant that a report had been received regarding this unauthorised construction and directed him to pay the Council a sum of Rs. 950 in respect of this illegal construction.

The 1st accused-appellant had once again by his letter dated 8.3.90 (1V8) drawn the attention of the authorised officer to his previous report dated 2.1.90 (1V7) and had stressed the need to take appropriate action promptly in respect of this illegal construction. The first accused-appellant has therefore taken up a consistent position at the trial that he was a conscientious and dutiful officer.

Thereafter the officer-in-charge of the Pudukka-Waga sub-office of the Provincial Council has by his letter dated 17.4.90(P4) written to the complainant directing him to show cause within 7 days in terms of section 12(1) of the Housing and Town Improvement Ordinance as to why steps should not be taken to demolish the structure and informing him that his failure to do so would entail legal steps being taken against him under section 13(3) of the said Ordinance.

The complainant took up the position in his evidence that he did not receive the letter dated 6.2.90 (1V5 - 1V9) by which he was directed to pay the council a sum of Rs. 950 on account of the unauthorised construction. However, learned Counsel for the accused-appellant has submitted that the complainant deliberately denied the receipt of this letter which directed him to pay Rs. 950 to the council and submitted that this necessarily affects his credibility. It was demonstrated that the complainant had admitted receiving letters previously from the Council and that his admission of the receipt of previous letters in his reply (P5) showing cause referred to none other than the letter dated 6.2.90 (1V5). It was the only letter sent to him previous to the letter dated 17.4.90(P4).

The complainant in reply to the letter of the Council(P4) dated 17.4.90, has purported to show cause by his letter dated 1.6.90 (P5). He had indicated in this letter that he would be submitting an application in respect of this building after an assessment number is given. He had also informed the authorised officer that he had gifted the said premises to his brother although no deed had yet been drawn up.

It is important to note that this letter showing cause has been written by the complainant the day after he had made his complaint regarding an allegation of bribery on 31.5.90 to the Bribery Commissioner against the Public Health Inspector and the Technical Officer. He had not made any specific allegation that a gratification was solicited by these officers. He has also not specified any amount as having being solicited as a gratification by either of them. Curiously, Inspector Wasantha who made arrangements for this detection to be conducted has drawn only a sum of Rs. 1,500 in three five hundred rupee notes to be used in the detection.

The facts relating to the solicitation has been set out by the High Court as follows: "Having received instructions from the Bribery officers on 5.6.90 he (the complainant) had gone to the office of the 1st accused and on failing to find him in the office or at his home, he had recognised him by his uniform as the PHI and upon confirmation of his identity from a passer by, he had approached the accused and had identified himself. It was the position of this witness that at the time of this meeting he had not even known the identity of the 1st accused.

As soon as the witness had presented himself to the 1st accused and established his identity, the 1st accused had upbraided him for not coming to meet him inspite of the several messages sent to him. This conversation had taken place in the presence of the Bribery officer, who had posed as the brother of the complainant, namely the witness above named. The 1st accused had also stated that the complainant, should "....do what he had to do by today or tomorrow". The witness had requested for time until the afternoon as he had to get the money from the bank, but the accused had said "do what you have to do soon, I will be leaving within half an hour". The witness had gone on to query the amount and had asked "...is not the amount Rs. 1,500?", to which the 1st accused had indicated that it is so by nodding his head."

Learned Counsel for the accused-appellant has pointed out that two versions had been given by the prosecution in regard to the solicitation. The first version of the complainant is as referred to above. The evidence of the decoy, on the other hand, is that the complainant was asked whether it was Rs. 1,500 and that the complainant shook his head in assent. Learned Senior State Counsel submitted in regard

to these two versions that one of them may have made a mistake as to the exact details of the conversation but there was no contradiction in regard to the amount involved or the manner in which the amount was confirmed by a nod.

It appears that this conversation in regard to the solicitation had taken place while the complainant and the decoy were seated on the motorcycle and while they were about to leave the place.

The trial judge has set out the next sequence of the events as follows: "The witness had gone back to the Padukka junction where the other bribery officers has remained and at that point the money had been given in marked notes in a sum of Rs. 1,500. They have returned to where the 1st accused was in about half an hour, and had gone into the office with the 1st accused. The witness told the 1st accused that he had brought the money and it was thereafter that the 1st accused had invited him into the office in to the presence of the 2nd accused, saying that he had to have the assistance of the other officers to attend to the task.

The trial judge has set out the position of the 2nd accused in this transaction as follows: "Concerning the 2nd accused the main evidence against him concerns the incident inside the office at the time the gratification was accepted by the 1st accused. At this time, when the money was given to the 1st accused, which had been handed over by the complainant with the words "Here is the money requested by the 1st accused", to which the 2nd accused had replied, "Those matters can be attended to later, first get these matters legalised". These words cannot be in anyway interpreted to be an abetment of the offence of acceptance by the 1st accused. It is clear that the 2nd accused was never concerned with the quantum of the amount nor the purpose of the gratification. It is doubtful whether he even knew how much or for what purpose the money had been given...."

The trial judge had then proceeded to acquit the 2nd accused of the two charges of abetment against him.

In dealing with the case against the 1st accused-appellant the trial judge has had no hesitation in acting upon the evidence of the complainant Devapriya. The following observations have been made; "However, from this witness's conduct, bearing and deportment both

during evidence in chief and during his cross examination, I observed that he was frank, and honest, in giving evidence. The contradiction can be attributed to a faulty memory. In any event, this contradiction, does not bear upon the material and important aspects of this case".

However, it is apparent that the trial judge has not analysed the evidence of the complainant in regard to the solicitation taking into account the background to this transaction. The charges in the indictment have clearly specified that the purpose of soliciting the gratification was to assist in the prevention of the demolition of the unauthorised structure. The evidence is clear that it was the accused who made the detection of this unauthorised structure in December '89 and that having sent an official report in January '90 (1V7), he followed it up with a further report in March '90 (1V8). As at the date of solicitation several letters had been sent to the complainant according to one of which he was called upon to pay the council a sum of Rs. 950. The last letter was P4 dated 17.4.90 and it was a letter asking him to show cause in terms of section 12 (1) of the Housing and Town Improvement Ordinance as to why the unauthorised structure should be demolished. The complainant has purported to show cause by his letter (P5) dated 1.6.90. He has made the complaint of bribery to the Bribery Commissioner the previous day on 31.5.90. Clearly then, the accused-appellant could not have in these circumstances assisted in any manner in preventing the demolition of the illegal structure. The prosecution had therefore failed to prove this ingredient in the charges. The 1st accused-appellant had by then been instrumental in setting in motion the steps leading to the issue of the 'show cause' letter. At this stage the only matter that could have been pursued was as to whether the demolition of the unauthorised building could have been prevented by the payment of Rs. 950 stipulated in the letter (1V5) dated 6.2.90. There is some indication that this exactly was in consideration as can be gathered from the words said to have been spoken by the 2nd accused to the effect "....first get these matters legalised".

The function of an appellate court in dealing with a judgment mainly on the facts from a court which saw and heard the witnesses has been specified as follows by Macdonnell C.J. in the *King v. Gunaratne*⁽¹⁾ "I have to apply these tests, as they seem to be, which a Court of Appeal must apply to an appeal coming to it on questions of fact: 1 (was the verdict of the Judge unreasonably against the weight of

the evidence, 2) was there misdirection either on the law or the evidence, 3) has the Court of trial drawn the wrong inferences from matters in evidence."

Similarly Wijewardene, J. stated in *Martin Fernando v. Inspector of Police, Minuwangoda*⁽²⁾, that;

"An appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically" although "the decision of a Magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight", where "a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt".

Besides the weaknesses that have been referred to in the case of the prosecution in regard to the charges of solicitation, the trial judge has failed to consider the evidence of the accused-appellant himself, that the complainant having informed him that he would "legitimise the entire thing" had forcibly placed some money into his pocket. The money even according to the complainant was accepted after an extended conversation in the office of the 2nd accused for a period of about 15 minutes and no sooner the money was handed over the complainant had rushed out of the office. The trial judge has found that the evidence of the decoy did not indicate that the money was forcibly given. There was a pressing need for the trial judge to have evaluated the evidence of the prosecution in regard to the acceptance. The trial judge had a duty to consider whether a doubt arose in regard to the prosecution case, considering the evidence of the accused and the sequence of events that led to the giving of the money.

Learned Counsel for the accused-appellant has pointed out that the trial judge has made totally erroneous assumptions and unwarranted inferences against the accused which had gravely prejudiced him. It was never the position of the accused-appellant that the accused took steps to receive any money from the complainant on behalf of the Council. The trial judge has incorrectly stated that the defence had appeared to suggest that the sum of Rs. 1,500 was part of a legitimate payment. Again, the trial judge has wrongly assumed that the accused had written several letters to the complainant. On the contrary the letters to the complainant were sent officially by the Provincial Council.

Learned Counsel for the accused-appellant quite legitimately pointed out that the most damaging and completely unwarranted inference drawn by the trial judge was stated in the penultimate part of the judgment as follows:

"It is clear that the delay in the 1st accused taking meaningful action concerning the alleged illegal structure gives further credence to the prosecution version that the 1st accused was delaying taking steps in this manner so that he could seek a gratification from the complainant".

There was no evidence led at the trial that the accused had in any manner contributed to the delay in taking legal action against the complainant on account of the unauthorised construction of a building. There was no evidence that the 1st accused was taking steps to seek a gratification from the complainant. On the contrary the 1st accused has been prompt and has persevered in bringing to the notice of the authorities the need to take action in respect of this unauthorised building.

For these reasons I am of the view that the verdict of the trial judge is unreasonably against the weight of the evidence and that a close examination of the evidence raises a strong doubt as to the guilt of the 1st accused-appellant.

The conviction of the 1st accused-appellant on 1st, 2nd, 3rd and 4th charges is therefore quashed and the sentences imposed are set aside. The 1st accused-appellant is acquitted of all charges.

DE SILVA, J. – I agree.

Appeal allowed.