JAMES SILVA v. THE REPUBLIC OF SRI LANKA

COURT OF APPEAL
RANASINGHE, J. & RODRIGO, J.
C.A. (S.C.) 5/78; D.C. COLOMBO B/494 (BRIBERY)
JUNE 2 & 6, 1980

Criminal Law – Charge – Misdirection by judge – Presumption of innocence – Burden of proof.

The trial judge stated "I had considered the defence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution."

Held:

There is a serious misdirection in law. It is a grave error for a trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence.

Cases referred to:

(1) *Rajakaruna* v. *Attorney-General.* SC minutes of 27.2.1976; SC 31/76; D.C. Colombo 292/B
(2) *Jayasena* v. *The Queen* 72 NLR 313 (PC)
(3) *Rex v. Chandrasekera* 44 NLR 97.

APPEAL from the Order of the District Court of Galle

Jacolyn Seneviratne for the Accused-Appellant.

D. P. Kumarasinghe, State Counsel for the State.

Cur adv vult.

30th June, 1980.
RODRIGO, J.

Mudiyanselage Seelawathi Wijesekera (Seelawathi) was the plaintiff in divorce action No. 416/D in the District Court of Mount Lavinia. It had been filed on 30th April, 1975. Summons had been issued returnable for 27.6.1975. The defendant was not residing within the jurisdiction of Mount Lavinia District Court. His address had been stated as at Panadura. Summons had been sent by registered post. This was anticipating the Administration of Justice Law No. 25 of 1975 which came into operation only on 1st January 1976. Under the Civil Procedure Code then in operation at the time the action was instituted the summons had to be sent in the first instance through a process server. Be that how it may. On 27.6.75 there had been no return to summons. So the Court ordered await of the return of

summons and re-issue of summons for 22.8.75. In the meantime, on 30.6.75 the summons had been returned undelivered. When the case was called on 22.8.75 the Court, finding the summons returned undelivered, ordered its service through a process server returnable for 24.10.75.

Seelawathi's Attorney-at-Law (Attorney) had written to her in early August, to meet him. She had come and met him. This was a few days before 22.8.75. On this occasion she had been told that she had not furnished the correct address of her husband and the summons had been returned undelivered. She had maintained that the address was correct and that her husband was still at that address. She had added that the process server was playing the fool and left the place. A week later she had come again to see her Attorney and asked him how the summons could be served. Whereupon the Attorney had told her that a special process server would have to be engaged. The Attorney had been informed by her that her husband leaves home early morning and comes back home late in the evening. Thus informed, the Attorney had told Seelawathi that she might have to spend a whole day lying in wait for her husband with a special process server and a matron. The Attorney had made a rough calculation in his mind and thought that this journey up and down might cost Seelawathi about Rs. 50/- and told her to find Rs. 60/- and come and see him again.

According to her, she came on 27.8.75 and met the Attorney in his office. This, however, is denied by the Attorney and the Attorney's position is that she came on 26.8.75 to his bungalow in the afternoon. Any way Seelawathi had come again on 27.8.75 and met her Attorney in the Court premises. She also met on this occasion the accused who was a process server of the District Court of Mount Lavinia. Whatever had been discussed on this day between her on the one side and her Attorney and the accused, the Process server, on the other, the nett result was that in the afternoon of 27.8.75, officers of the Bribery Commissioner's Department arrested the accused and had him eventually prosecuted for soliciting and accepting Rs. 50/- from Seelawathi to serve summons in the divorce case on her husband. The indictment was laid under Section 19 of the Bribery Act as amended. The indictment, of course, was worded technically. He was tried and convicted and sentenced. This is his appeal.

Seelawathi's evidence in chief is that she met the process server for the first time on 26.8.75. That was in the office of her Attorney. The Attorney then had sent for the accused and he was introduced to Seelawathi in the office. Then the accused had been told by the

Attorney about the problem of serving summons in Seelawathi's case. The accused thereafter had met her outside the room of the Attorney and is alleged to have told Seelawathi, "Mr. Samarakkody that had been retained for the case, mentioned that Rs. 50/- will be given. Has it been brought?" She said "No" and that on the following morning, that is on the 27th, it would be brought. What the accused is alleged to have told Seelawathi outside the room is testified to by Seelawathi in direct speech. It form and phraseology triggers signals of caution in my mind in regard to its truthfulness – here is a man who has just emerged from the Attorney's room after a discussion among them with regard to the problem of serving of summons. Seelawathi was there inside the room all the time with the accused and with the Attorney. Could the accused then have referred to the Attorney in speaking to Seelawathi as "Mr. Samarakkody that has been retained for the case." Is it not more natural that he should have been referred to as "Mahattaya"? Then the words "He mentioned that Rs. 50/- would be given" – would not a natural conversation be in the form "Have you brought the Rs. 50/- that Mahattaya had mentioned?" It is pertinent to recall in this context that Seelawathi had said in her evidence later on that on 27.8.75 what she was going to tell the accused was rehearsed by the Bribery officers to her before she came with the Bribery officers into the Court premises on that day. It is, therefore, very probable that what she was going to say in evidence was also rehearsed to her and that accounts for the artificiality of the actual words alleged to have been uttered by the accused outside the room. Its incongruity is still more striking in the Sinhala version of the alleged conversation. In fact, if the accused had uttered these words as alleged, he would not have been conversing with Seelawathi but making a speech. When tested against her cross-examination, its incredibility is inescapable for, in cross-examination she says, that she met the accused when her Attorney took her to the accused. This was on the 26th. She had forgotten that she had said that in evidence-in-chief that she met the accused in the Attorney's room. Then she continued that she had accompanied the accused to the record room. He looked up the record of the case and found that the defendant was residing in Panadura. Then he had told her that he was not the process server for Panadura. Having said that he had gone with Seelawathi to see the Attorney's clerk. After that the accused had gone away. What Seelawathi and the accused had told the Attorney's clerk is not in evidence. Seelawathie, however, stayed behind and met the Attorney. What Seelawathi had told the Attorney is also not in evidence. But the Attorney had asked her to come on the following day. It must be remembered that the Attorney is denying all this, but still, according to Seelawathi's evidence, there is no mention of her Attorney having told her at this point of time anything about Rs. 50/-.

In fact her position in cross-examination was that her Attorney, after he had told her that it might cost her about Rs. 50/- to get the summons served when she met him in answer to a letter from him about a week before the 26th, had thereafter not told her anything about Rs. 50/-. So that as far as the cross-examination goes, there is nothing in the conduct of the accused on the 26th to suggest even a faint suspicion of any angling on the part of the accused for a bribe. On the contrary, his conduct indicates that he had washed his hands altogether of any interest in the service of the summons in the divorce case. This finding is strengthened when one considers the Attorney's evidence which was not challenged. His version in cross-examination was that he met Seelawathi on the 26th at his residence in the afternoon and he had not met the accused on the 26th at all. He, however, said that he had introduced Seelawathi to the accused in the lawyer's chambers prior to the 26th and told him about the problem relating to the service of summons in the divorce case but never had he mentioned to him anything about Rs. 50/-. The accused himself in giving evidence admitted his being introduced to Seelawathi by the Attorney and that the Attorney mentioned to him about the summons to be served in Seelawathi's case. But he could not say whether it was on the 26th. He, however, did not speak to meeting Seelawathi in the Attorney's office, far less of any mention of Rs. 50/-. It is thus seen that the very birth of this story of solicitation is tainted with a contradiction and an inconsistency. Therefore, what happened on 26.8.75, if anything happened at all, does not bring the accused within the shadow of the charge against him.

I will now examine the events of 27.8.75. Seelawathi had contacted the Bribery Commissioner's officers on the 27th morning. What provoked her to do that is not clear from the evidence of the events of the 26th. Any way, Seelawathi had come to Court with a woman officer of the Bribery Commissioner's Department. That was around 10 a.m. on the 27th. Seelawathi's evidence-in-chief is that as soon as they entered the Court premises, the accused called her and said that the gentleman, meaning the Attorney, was waiting for her and asked her why she was late. Then she was taken, accompanied by Biso Menike, the woman Police Officer, to the Attorney who was in the Court-house. But in cross-examination her position was that she did not meet the accused before she met the Attorney. This accords with the Attorney's evidence that he was with the accused in the Court-house when Seelawathi came to him with Biso Menike. The accused, however, supports Seelawathi's version in evidence-in-chief when he said that he told Seelawathi that the Attorney was waiting for her. But the point is that Seelawathi says one thing in her evidence-in-chief and yet another thing in her cross-examination which is contradictory. The accused had met the Attorney in the morning

before he met Seelawathi and suggested to the Attorney that summons might be served on the defendant at the Colombo address. This is the Attorney's evidence. The Attorney had further testified that he had told the accused then that he wanted to take instructions first on that matter. Seelawathi too speaks of the accused mentioning the service of summons on the defendant in Colombo. She said the accused took out a piece of paper from his pocket and referred to it and mentioned a Colombo address at which summons could be served on her husband. She had, however, not examined or looked at the piece of paper. But according to Seelawathi this conversation had taken place in her presence between the Attorney and the accused. Another matter that evokes surprise is that when the accused met the Attorney with Seelawathi he had asked the Attorney what the case was. This is Seelawathi's evidence. If that is so, the events that Seelawathi had said had happened on the 26th is incomprehensible. The Attorney tells Seelawathi that her file had been removed by her brother which she denies. The Attorney asked her for the number of the case. This is all according to Seelawathi's evidence. This conduct of the Attorney does not make sense, if, as Seelawathi says, all of them met together on the previous day, in the Attorney's room and had discussed this matter, but it does make sense if as the Attorney says he did not meet Seelawathi on the 26th with the accused. When Seelawathi was asked if it is true that her husband is in Colpetty she had hesitatingly said "Yes." The Attorney apparently learns all this for the first time on the 27th which then supports the Attorney's evidence that he did not meet Seelawathi on the 26th with the accused. The Attorney in this situation, that is, not having the case file, not knowing the number of the case, asked the accused to bring the record to him to enable him to peruse the entries and, as he says, to take necessary action after going home as the assistance of his clerk was needed. With this request to the accused, he parted company, with Seelawathi and Biso Menike going one way to find a bench to sit on and, the accused going back to his office. Seelawathi had been asked by the Attorney to wait. That is why they looked for a bench to sit on. When the accused was on his way back to the office after parting company, Seelawathi had requested the accused to serve the summons. He had then himself asked them to wait. He had come back, however, after about 5 minutes but only to tell Seelawathi that her waiting was useless. In the course of the morning, Seelawathi admits having told the accused that she must get back to work in the afternoon. What she expected or requested him to do before noon is not in evidence. Whatever he was doing in the morning in connection with Seelawathi's case was at the request of the Attorney. The Attorney had only asked him to bring the file. Why Seelawathi was asked by the Attorney to wait is not clear. Perhaps it was to enable her to know

what steps the Attorney proposed to take after perusing the file. I have already said that nothing had transpired in the evidence of the events of the 26th to justify any finding to incriminate the accused, for the conduct of the accused on that day does not incriminate him. But then according to Seelawathi the events took a dramatic turn at this point of time. Seelawathi says that the accused came and said that "There is no point in your waiting". Then Seelawathi promptly, as promptly could be, had said "I have brought the Rs. 50/- that was required yesterday for the service of summons." Whereupon the accused had said "Then give it and go". In my view, the phraseology of this statement of Seelawathi apart from the version given by Biso Menike and the accused is remarkable for its suddenness and lack of natural conversational style. It must be remembered that the officers of the Bribery Commissioner's Department had rehearsed to Seelawathi what she was expected to say on the morning of the 27th. That is Seelawathi's evidence. She had met the Bribery officers only on the morning of the 27th. Whether she had said what she now says in evidence she said on the 27th at that point of time to the accused in that form is problematic for, if, in fact, she had used those words the accused might have thought that something was wrong with her as people do not make speeches when conversing. If the Rs. 50/- had been solicited on the previous day she had merely to say, in my view, that she had brought the Rs. 50/-. Its purpose is already known but let me assume that in fact this lengthy statement was made at that time for the benefit of the Bribery officers. The Bribery officer Biso Menike does not mention the accused coming to them and telling them that there was no point in waiting. According to her, Seelawathi on seeing the accused coming out of the office started addressing the accused and said "Sir, summons must be sent. Can you do it Sir? For that, I have brought the Rs. 50/- today that you asked for yesterday." to which the accused replied "Ah, you have brought the money?" Seelawathi said "Yes". The accused had then said "Then give it". Examining this evidence without reference to that of the accused what strikes me is that Biso Menike had suppressed from Court that the accused had told Seelawathi that there was no point in waiting. It is already in evidence that Seelawathi had said that she had to get back by noon. It is a fair inference that the accused suggested that Seelawathi might go away without wasting her time any longer, from the words he is alleged to have uttered. Unless what Seelawathi said at this time could be connected with the events of the 26th, it is difficult to believe that the accused understood what Seelawathi was saying in the manner testified to by her. When Seelawathi asked "Can you do it?" what sense, does it make in the light of Seelawathi's own evidence that the accused had already said that he cannot serve summons at Panadura. It is true that the accused had mentioned the possibility of the service of

summons at Colpetty but the Attorney had not approved of it, as he wanted to see the case file before he decided on that. Biso Menike had an interest in the prosecution, being a Bribery officer, that is, in bringing home the charge. Therefore, this alleged conversation has to be tested in the light of the version of the accused. The accused had testified that the Attorney had asked him, after he spoke to Seelawathi and the accused, to send him the file. The accused thereafter had gone back to the office to attend to his work. Whether he looked for the file is not in evidence. He has not spoken to Seelawathi when he went back to the office. After about 5 minutes Seelawathi came to the door of the office and beckoned him to come out, and when he came out she had said that she had to go back to work for the afternoon session. She had added after a while that she had brought the money that "the gentleman" asked her to bring. This he understood to mean that Seelawathi was referring to what the Attorney might have asked her to bring. Thereupon, he had said "Then give it and go". Then she has said that the Attorney was in the Courtroom and that she could not go in there and added "You give it to him". She presently took the note from Biso Menike and gave it to him. He kept it in his hands and went inside the office and started attending to his work when S.I. Jayasinghe came in and started investigating.

Since the events of the 26th and the events of the 27th till the last five minutes when the note changed hands, do not lend themselves, in my view, to an inference of incriminating conduct on the part of the accused, the prosecution had to establish beyond reasonable doubt that the note that was suddenly sprung on the accused after a long wait on the morning of the 27th, was both bait and trap. It must be noted that neither Seelawathi nor Biso Menike had said that the accused demanded or solicited this money at any time in the course of that morning though he had ample opportunity of doing so and particularly, a suitable opportunity arose when he met them as they were walking into the Court-house. If it had been arranged on the 26th, as Seelawathi says it was, it is incomprehensible that the accused never asked for it. On the contrary, the accused had asked them to go away without wasting time. The Attorney had discounted the story of Seelawathi that she met the accused in the Attorney's office on the 26th with the Attorney. If, in fact, the Attorney met the accused and Seelawathi on the 26th in his office, it would not, cast any slur or throw any suspicion of any kind on the Attorney. He had, therefore, no comprehensible reason to deny this story. Tested in this light, Seelawathi appears to be a woman capable of manufacturing stories. She appears to have had ungrounded hostility towards process servers, for it must be recalled, that when in early August she was told by her Attorney that summons had been returned

undelivered, her reaction was to say that the fiscal officers were playing the fool, quite ignorant of the fact that summons had been sent by post. With Seelawathi's credibility thus impaired and Biso Menike's evidence tainted with suppression of evidence in that she did not mention that the accused had asked them to go away without waiting, there remains the accused's explanation of how the note came to be in his hands. The accused presumably made a prompt statement to S.I., Jayasinghe. His evidence has not been contradicted. To disbelieve the accused, we have to hold that he manufactured this evidence in next to no time given to him by S.I. Jayasinghe for him to make a statement. The explanation of his conduct promptly given, is quite consistent with the circumstances that preceded the handing over of the note and the circumstances immediately attending the handing over of the note. His explanation is credible when regard is had to Seelawathi's own evidence that she had told the accused earlier that she had to be at her workplace in the afternoon. It is also not contradicted that the Attorney was in the Courtroom at the time. It is also not controverted that they were waiting there because the Attorney had asked them to wait. Following the principles enunciated in judgments – *see* Sirimane, J. in *Rajakaruna v. Attorney-General* (unreported)[1], the prosecution evidence must be tested in the light of that of the defence. The accused's evidence of events leading to the receipt of the Rs. 50/- note has not been exposed to be inconsistent with proved circumstances.

The reasoning of the trial Judge does not persuade us to take a different view. The evidence of Seelawathi has not been examined critically. He calls her "the poor woman" meaning a woman in financial difficulties whom her Attorney was seeking to exploit to benefit the process server, the accused. To quote the learned trial Judge,

> "Indeed, on the evidence of Seelawathi and Mr. Samarakkody it would appear that Mr. Samarakkody had wanted Seelawathi to bring Rs. 50/- as a bribe to be given to the accused if summons was to be served on Seelawathi's husband. I regret I have to come to this conclusion but the evidence in this case is overwhelming. Mr. Samarakkody had leant himself in this manner to help the accused at the expense of a poor woman who was his client."

This comes at the heel of the passage immediately next preceding which reads,

> "I must state that although Mr. Samarakkody had asked Seelawathi to bring this money, the accused had solicited it

from her on the 26th, being well aware of the fact that Mr. Samarakkody had asked her to bring this Rs. 50/- for the service of summons on her husband."

The inference drawn by the trial Judge in the first paragraph quoted is not a necessary or fair inference from the fact that Mr. Samarakkody had asked Seelawathi to bring Rs. 50/- for the service of summons. Besides, how did the learned trial Judge reach his finding "that the accused had solicited Rs. 50/- from Seelawathi on the 26th, being well aware of the fact that Mr. Samarakkody had asked her to bring Rs. 50/- for the service of summons?" Seelawathi had testified that her Attorney had mentioned to her that Rs. 50/- would be required, not on the 26th, but about a week earlier when she went to see him to find out how summons could be served. Thereafter he did not mention to her at any time anything about the Rs. 50/-. Her evidence is that the Attorney had said that the enterprise will cost her about Rs. 50/-. He accepted Biso Menike's repetition of what Seelawathi is alleged to have said to the accused, namely, that "she has come prepared with the Rs. 50/- asked by the gentleman". He accepted Biso Menike's evidence that by "gentleman" Seelawathi meant the accused. He concludes that Seelawathi said that she had come prepared with the Rs. 50/- required by the "gentleman" because the accused had asked her earlier whether she had brought the money. It was an inflexible impression in the learned trial Judge's mind that the accused had asked Seelawathi whether she had brought the money. This must be a reference to what Seelawathi says happened outside the Attorney's room on the 26th. But I have already discussed above the difficulties standing in the way of this piece of evidence being accepted. The learned trial Judge however does not show any inclination to assess such a crucial piece of evidence but accepts it on its surface value and makes it a springboard for reaching inferences. That Biso Menike did not mention that the accused had told Seelawathi that her waiting was pointless had made no impression on the trial Judge, or the fact that Biso Menike was a Police Officer having an interest in the prosecution.

We find that in discussing the evidence of the accused the learned trial Judge misdirects himself on matters of fact testified to by witnesses. For, in one passage, the learned trial Judge states "I must state that the evidence of Seelawathi is that the accused had accosted her on the 26th August at the Mount Lavinia District Court and inquired from her whether she had brought the money which she had been told to bring for the service of summons on her husband. I prefer to accept the evidence of Seelawathi to that of the accused on this aspect of the matter." Seelawathi had never said so according to the record. Again the learned trial Judge states:

> "Furthermore, Mr. Samarakkody in his evidence said that he had introduced the accused to Seelawathi on the 26th".

This is not borne out by the record. In fact Mr. Samarakkody's evidence is that Seelawathi saw him at his bungalow on the evening of the 26th. The learned trial Judge continues,

> "Seelawathi had stated in her evidence that she had told the accused that she had brought the Rs. 50/- demanded by the accused for the service of summons."

This is not correct. Seelawathi had not said so. That was Biso Menike's version of what Seelawathi is alleged to have said.

Then there is this serious misdirection in law, namely, to quote the trial Judge,

> "I had considered the defence of the accused and I hold that it is untenable and false **in the light of the evidence led by the prosecution.**"

It is a grave error of law for a trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the defence in the light of the evidence led by the prosecution. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved. This is rooted in the concept of legal inviolability of every individual in our society, now enshrined in our Constitution. There is not even a surface presumption of truth in the charge with which an accused is indicted. Therefore to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence.

A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalising and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty – see the Privy Council Judgment in *Jayasena v. The Queen* [2].

By reason of the learned trial Judge misdirecting himself on the law as stated above, he has not considered whether the evidence of the accused creates a reasonable doubt in the prosecution case. He has directed himself to examining the defence by itself. It must be remembered that there was no fact in issue such as a special defence or a general exception which rested the burden of proof on

the accused. See *Rex v. Chandrasekera*[3] which was mentioned with approval in *Jayasena v. The Queen (supra).* The burden therefore, was all along on the prosecution to bring home the charge of solicitation and acceptance of a bribe to the accused beyond reasonable doubt and it is our view that, when the evidence adduced by the prosecution and the defence is analysed and examined, the prosecution has not discharged that burden.

For these reasons we set aside the conviction and sentences and acquit the accused.

RANASINGHE, J. – I agree.

Appeal allowed.