

BADDEWITHANA
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL.

P. R. P. PERERA, J. AND W. N. D. PERERA, J.

C. A. 337/85 – HIGH COURT, COLOMBO No. B 563.

MAY 21, 1990.

Bribery- Acceptance of gratification to perform official act - Bribery Act s. 19 - Failure of accused to call available witnesses -Presumption under s. 114 (f) of the Evidence Ordinance -Evidence re purpose for which money was accepted.

(1) From the failure of an accused to offer evidence when a prima facie case has been made out by the prosecution and the accused is in a position to offer an innocent explanation, an adverse inference may be drawn under s. 114(f) of the Evidence Ordinance.

(2) When the accused's position was that the money received was as rent, the absence of any corroborative evidence of the prosecution case relating to the purpose for which the accused accepted the money, would make it unsafe to permit a conviction to stand.

Case referred to:

Rex v. Burdett (1820) 4 B & Ald. 95, 120

APPEAL from judgment of the High Court of Colombo.

R. I. Obeysekera with A. W., Yusuf, S. Gunasekera and N. Indatissa for Accused- Appellant.

N. Rodrigo, Senior State Counsel for the State.

Cur. adv. vult.

June 18, 1990.

P. R. P. PERERA, J.

The accused appellant who was a Public Health Inspector at Pundulu Oya, was indicted on the following charges :

- (1) that on or about 8.1.75, being a public servant, he did accept a gratification in a sum of Rs. 5/- from Mohammed Ibrahim Cader Ibrahim, as an inducement or reward to perform an official act, punishable under section 19 of the Bribery Act,
- (2) that on or about 11.1.75, he did accept a gratification in a sum of Rs. 20/- from the said Cader Ibrahim for the same purpose set

out in Count (1) – an offence punishable under section 19 of the Bribery Act.

- (3) that being a State Officer, he did accept a gratification in a sum of Rs. 20/- from the said Cader Ibrahim, an offence punishable under section 19 (c) of the Bribery Act,

At the conclusion of the trial the learned trial Judge convicted the accused-appellant on all the counts in the Indictment and imposed a term of twelve (12) months rigorous imprisonment suspended for a period of five (5) years on each count, and a fine of Rs. 250/- on each count. The present appeal is against the conviction and sentences imposed.

The prosecution case was briefly as follows : The complainant Cader Ibrahim was a licensee of a beef stall, at Katukithula, Pundulu Oya from 1972–1975. The appellant was the Public Health Inspector for that area and one of his duties was to inspect beef stalls and also to approve cattle for slaughter. On representations made by Cader Ibrahim to the Local Authority of the area in May, 1973, the Commissioner of Local Government, Nuwara Eliya, requested the Local Authority to direct the Overseer of that area to pass cattle for slaughter which was a duty ordinarily performed by the accused- appellant. A few months thereafter, on representations made by the accused to the Medical Officer of Health, Nuwara Eliya, these duties were restored to the accused. Cader Ibrahim had then made a complaint to the Bribery Commissioner against the accused in November, 1974. Thereafter the appellant had on 8.1.75, demanded from Cader Ibrahim a sum of Rs. 25/-. Ibrahim had given him Rs. 5/- and had requested him to come on the 11th of January for the balance Rs. 20/-.

At this stage, Cader Ibrahim had contacted the Bribery Commissioner's Department and had informed them that the accused had agreed to collect the balance sum of Rs. 20/- on 11.01.75. The officials of the Bribery Commissioner's Department then arranged for a detection on 11.1.75. The Bribery Officials had given the usual instructions to the persons participating in the raid. Particular mention must be made of the fact that the Bribery Officers had given specific instructions to Cader Ibrahim to converse with the appellant, with a view to eliciting the purpose for which the money was given. P. C. Hashim of the Bribery Commissioner's Department was asked to accompany Cader Ibrahim and to act as a butcher in the stall, and to listen to the conversation and watch the transaction.

After the usual instructions were given P. C. Hashim and Cader Ibrahim, had gone to the beef stall, around 9.00 a.m. on 11.1.75, and according to Ibrahim, the accused had called over at the stall at around 1.00 p.m. The accused had stated that he had come on that day because he was requested to come on the 11th for the balance. It is the evidence of Ibrahim that he had two cattle receipts on which he had purchased two heads of cattle. The accused had signed the cattle receipts even without examining the cattle. After the accused signed the receipts marked 'P1' and 'P1A', the accused had asked for the money and he had handed over the Rs. 20/- in marked notes which the Bribery Officials had given him to be given to the accused stating that that was the balance. The accused according to Ibrahim accepted this money and put it into his shirt pocket. At this stage, P. C. Hashim, who was watching the transaction and listening to the conversation had given a signal to Inspectors Serasinghe and Thavalingham, who had immediately arrived there and asked the accused to hand over the money which he had taken.

The accused-appellant has not given evidence at the trial, but his defence, was that he had received this sum of money as rent due to his sister-in-law and denied that this was an illegal gratification. He has admitted having accepted Rs. 5/- on the 8th January, 1975, and Rs. 20/- on 11th of that month, He however, denied that it was a bribe. According to the evidence adduced by the defence, it transpired that Ibrahim resided in a house belonging to one Piyasena, who was a brother of the accused-appellant. This fact was conceded by Ibrahim Cader in his evidence. It was the defence case that some months prior to this detection Piyasena's wife had fallen ill, and they had shifted to Sangili Palama, which was about three to four miles from Katukithula. After they so shifted, it was the practice for the accused-appellant who also resided at Sangili Palama, to collect the rent from Ibrahim on behalf of Piyasena's wife. The defence position was that the rent that Cader Ibrahim paid was Rs. 25/- per month. The defence called a witness by the name of Habeebu Thamby. It was Habeebu Thamby's evidence that he was employed by Cader Ibrahim as a butcher for about two years. According to this witness, during the time he was working for Ibrahim the accused-appellant himself used to collect rents which were due to one Silva Nona. It is his evidence, that the accused used to come and collect rents from Ibrahim, and that on the 8th, the accused had come and got some money from Ibrahim although he did not know what amount of money was given to the accused. He had also stated, that on the 11th also Ibrahim had given some money to the accused, saying that it was money due to the accused.

In the course of his judgment having considered the evidence, adduced in this case, the learned trial Judge has made the following observation:

"The accused did not give evidence in this case. The accused did not call Piyasena or his wife, or Upali or Upali's brother as his witness. One of these people could have established the crux of the defence case. The defence chose not to call them although they were available. There is a presumption that such evidence being available and if not called, would be adverse if they were called to give evidence. The accused certainly is entitled not to give evidence."

Counsel for the appellant adverting to this passage in the judgment, submitted that it was not permissible in law to draw such a presumption under section 114 (f) of the Evidence Ordinance, against an accused person. It was his contention that the learned trial Judge had misdirected himself in drawing an adverse inference in terms of section 114 (f) against the accused-appellant in the present case. I regret I am unable to subscribe to this view contended for by Counsel. The inference that evidence which an accused might have called but has withheld was unfavourable to him is no doubt incompatible with the fundamental rule that an accused is free to elect whether he will or will not call evidence. However it may be necessary to consider in an appropriate case, whether it is an inference that should in any case be drawn. The proper effect to be given to the failure of an accused to offer evidence when a prima facie case has been made out by the prosecution and the accused is in a position to offer an innocent explanation, is set out in the dictum of Abbott, J. in *Rex v. Burdett* (1).

"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction can human reason do otherwise than adopt the conclusion to which proof tends." Having regard to the nature of the evidence adduced in this case. I am unable to say with any degree of conviction that the learned trial Judge was in error when he proceeded to draw an adverse inference against the accused-appellant that the evidence that the accused withheld could have been adverse to his case.

I am however in agreement with the submission of Counsel for the appellant, that it would be unsafe to permit the conviction of the accused-appellant in this case, to stand in the absence of any corroborative evidence to support the evidence of the virtual complainant Cader Ibrahim, in regard to the purpose for which the money was accepted as set out in the Indictment. On an examination of the totality of the evidence of this case, it is clear, that there is no independent corroboration of the evidence of the virtual complainant, either in respect of the allegation that the accused-appellant accepted a sum of Rs. 5 as an inducement or a reward to perform an official act, or that he accepted a sum of Rs. 20 on 11.1.75 for the same purpose. There is no corroboration of the evidence of the virtual complainant Cader Ibrahim in respect of the charge set out in count (3) as well.

It is indeed significant that at the trial, the most vital witness who is said to have watched the transaction and listened to the conversation between Cader and the accused on 11.1.75, namely P. C. Hashim has not been called to give evidence. This lapse on the part of the prosecution has to be considered in the light of the evidence of Habeebu-Thamby a witness called by the defence who has testified to the effect that the conversation between Cader Ibrahim and the accused-appellant related to some money that was due to the accused- which according to the defence was rent payable by the virtual complainant to the accused-appellant's sister-in-law.

I am therefore of the opinion that in the absence of any corroborative evidence relating to the purpose for which the accused-appellant accepted this money it would be unsafe to permit a conviction of the accused-appellant on charges under the Bribery Act to stand. I therefore set aside the conviction and the sentences imposed in this case and acquit the accused-appellant. The appeal is allowed.

W. N. D. PERERA, J.—I agree.

Appeal allowed. Conviction set aside and accused acquitted.