BUSAWAH M. & ANOR v THE INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC) & ANOR 2024 SCJ 400

Law: Sections 7(1) and 83 of the Prevention of Corruption Act (now repealed)

Facts: The Appellants are seeking to appeal against their respective judgments of the Intermediate Court. Appeals were heard together as they arose from the same alleged offence and they involved common grounds. The 2 appellants were jointly charged with making use of their office, whilst being public officials, for a gratification for themselves. They pleaded not guilty but the learned Magistrate found both appellants guilty. He sentenced both of them to 9 months' imprisonment, which were converted into CSO of 150 hours.

The particulars of the offence were that the appellants, while being customs officers on duty in uniform engaged in the verification of the luggage of witness No.5 and his wife (witness No.6) at the arrival hall of SSR International Airport, obtained from the latter GBP 60 for themselves for effecting the verification of their luggage "more quickly". The prosecution also produced a CCTV footage (Exhibit I) which recorded the acts and doings of the appellants and witnesses Nos.5 and 6 at the locus in quo at the material time.

Issue: The grounds of appeal were that (i) the learned Magistrate was wrong to find witnesses Nos.5 and 6 as credible witnesses in view of the inconsistencies in their evidence; and (ii) the learned Magistrate was wrong to find corroborative evidence from the CCTV recordings.

Held: <u>(i) Credibility of witnesses Nos.5 and 6</u>

The learned Magistrate was fully alive to the fact that the case for the prosecution rested mainly on the testimony of witnesses Nos.5 and 6. In this respect, he carefully and thoroughly set out and analysed their evidence to determine whether he could safely rely and act upon such evidence. He was aware that their evidence was not free from inconsistencies but, bearing in mind **Saman v The State [2004 SCJ 3],** he stated that *"(as) regards the inconsistencies, not every inconsistency would have an impact on the overall assessment of a witness".*

The learned Magistrate referred to **Dhunny v The Queen [1991 SCJ 145]** in which it was held that *"cross-examination of a witness in Court is not a memory test which the witness must pass before his evidence can be accepted and relied upon"* and to **Joomeer v The State [2013 SCJ 413]:-** *"[13] Who is a credible witness? A credible witness is one who demonstrates by his testimony that he has: (1) knowledge of the facts to which he is testifying; (2) he is a disinterested party on the facts to which he is testifying; (3) he shows integrity in his deposition; (4) there is veracity in his statements; and (5) he feels bound to speak the truth following the oath or solemn affirmation he has taken before starting to testify."* Applying the above test, the learned Magistrate found that both witnesses Nos.5 and 6 were credible witnesses. The Court of Appeal held that the analysis of the evidence of the learned Magistrate, more particularly of witnesses Nos.5 and 6, is unimpeachable. Reference was made to what was stated by Lord Reid in **Benmax v Austin Motor Co Ltd (1955) 1 All E.R. 326**, [...] *it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court* [...]" The Appeal Court found no merit in the appellants' contention that the learned Magistrate was wrong to believe witnesses Nos.5 and 6 and to act on their evidence.

<u>(ii) The issue of corroboration</u>

It was submitted by the appellants that the learned Magistrate was wrong to find corroborative evidence from the CCTV recordings (Exhibit I). This finding was wrong inasmuch as the CCTV recordings do not support the version of witnesses Nos.5 and 6 that the appellants committed the offence but, in fact,

prove that the appellants were all along acting within the scope of their duties and had not asked for, nor obtained, any gratification. The corroboration warning which the learned Magistrate gave himself was not adequate or sufficient.

It is well settled that evidence, to be capable of being "corroboration" in the strict or technical sense, must be relevant, be credible, be independent (i.e. emanate from a source 6 other than the witness requiring corroboration) and implicate the accused in a material particular. The learned Magistrate noted that witnesses Nos.5 and 6 were accomplices but had been granted immunity by the DPP. He stated that he was fully aware of the danger of acting upon their uncorroborated evidence and gave himself the adequate warning. The learned Magistrate, however, went even further. He was satisfied that he could safely act on the sole testimony of witnesses but he also found that corroborative evidence, if required, was available in the form of the CCTV footage.

The Appeal Court agreed with the learned Magistrate that the CCTV recordings support in a material and independent manner the version of witnesses and the inferences made by the learned Magistrate were reasonable and justified. The Appeal Court did not agree with the appellants that the learned Magistrate was wrong to find corroborative evidence from the CCTV recordings. On this issue, they were of the view that his analysis and his findings of fact and law cannot be faulted.

The Court held the appeal was devoid of merit. The duty of an appellate Court is to ask itself whether it is in a position to come to a clear conclusion that the trial Court was "*plainly wrong*". In **Henderson v Foxworth Investments Limited [2014] UKSC 41**, the English Supreme Court held as follows:

> *"67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*

` In the present case, the appellants have been unable to demonstrate that the learned Magistrate has made a material error of law or perverse, unreasonable or unwarranted findings of fact. Both appeals were dismissed with costs.