

12, 1969

No. 25 of 1967

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)

B E T W E E N :

TAN CHOW SOO

Appellant

- and -

RATNA AMMAL
daughter of Veerasingam

Respondent

CASE FOR THE RESPONDENT

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 MAR 1970
25 RUSSELL SQUARE
LONDON, W.C.1.

1. This is an Appeal from a Judgment and Order of the Federal Court of Malaysia (Azmi, C.J., Malaya; Pike, C.J., Borneo, and Yong, J., Malaya) dated the 2nd day of March, 1967 whereby the said Federal Court allowed the Respondent's appeal against a Judgment and Order of the High Court in Malaya at Penang (Raja Azlan Shah, J.,) dated the 25th day of June 1966 dismissing the Respondent's claim against the Appellant as drawer of a cheque No. 459527 for \$50,000/- dated the 24th day of January 1961 drawn upon the Nederlandsche Handel - Maatschappy, Penang, payable to bearer. The said Federal Court set aside the said Judgment of the High Court in Malaya at Penang and ordered that the Appellant pay to the Respondent the sum of \$50,000/- and interest thereon at the rate of six per cent per annum from the 11th day of July 1963 together with the taxed costs of the appeal and of the proceedings in the court below.

pp.111-121

pp. 41-60

p. 3

2. The principal issues that arise in this Appeal are:

(a) Whether the Appellant discharged the onus of proving that the said cheque, of which he was admittedly the drawer, was given for an illegal consideration.

(b) Whether the Federal Court of Malaysia was wrong

in holding in the exercise of its appellate jurisdiction that upon the evidence the Appellant had not discharged such onus.

3. Section 30 of the Bills of Exchange Ordinance 1949 (No. 75 of 1949) provides as follows:-

(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

pp. 1&2
pp. 9&11

p.9, 1.31
to p.10,
1.2.

11.2-36
p.10.

4. The Respondent commenced THE PRESENT PROCEEDINGS by specially endorsed writ dated the 9th July 1963. In his Defence dated the 15th August 1963 the Appellant admitted that he was the drawer of the said cheque but pleaded that it was given by him to Ratnavale, the son of the Respondent, for an illegal consideration, namely in consideration of promises by the said Ratnavale to obtain official approval for the export of goods, under certain barter rights which the Appellant controlled, to Indonesia. The Appellant alleged in paragraph 2 of the Defence that it was "some time in August 1960" that these promises were made to him on behalf of Ratnavale by one Lee Yim Wah Ratnavale's agent. It was alleged that the Appellant was informed that "Ratnavale, who was then the Assistant Controller of Foreign Exchange Penang, could be of great help in the sale of the said barter rights, as the said Ratnavale could use his official influence as such Assistant Controller of Foreign Exchange Penang to push through and/or expedite the proposed official approval." In consideration of such services Lee Yim Wah and Ratnavale were to receive 75% of the proceeds of sale of the Appellant's said barter rights. "In furtherance of the said scheme, the said Ratnavale demanded security from the Defendant for the payment of the said 75% proceeds of sale in the sum of \$50,000/- and which the Defendant consequently gave in the form of the said cheque". The Respondent was the mother of Ratnavale and knew of the illegal consideration.

It was common ground that payment of the said cheque, which was dated the 24th January 1961, was countermanded. p.3, ll 7-11
p.11, ll 1-6

The burden of proof was accordingly upon the Appellant to prove that the cheque was affected by illegality and that the Respondent could therefore not sue upon it.

5. The Appellant gave evidence that he was an importer and exporter and dealer in sundry goods, trading under the name of Chop Soo Seng. He imported produce from Sumatra, payment being effected by a system of barter, viz the export of goods from Singapore and Penang. Customs declarations were necessary at the points of entry for goods imported. Goods to an equivalent value could then be exported to Indonesia with the permission of the Controller of Foreign Exchange. The Appellant said that in 1958 he had barter rights to the value of \$1,400,000/- which were in the name of another shop of his, namely Chop Guan Cheong. p.13, ll 12-33

The Appellant said that through the initiative of Lee Yim Wah, whom he had known for 20 years, he met Ratnavale about the end of July or the beginning of August 1960 in a Government Quarters occupied by Ratnavale. At this meeting it was agreed that Ratnavale would obtain the necessary approval of the Appellant's barter rights. For this service Ratnavale and his group were to get 75% of the barter rights and as a security for his part of the bargain the Appellant gave a cheque EX. PIA for \$50,000/- to Ratnavale through Lee Yim Wah on the 19th January 1961. The cheque was a cash cheque and was not then dated and according to the Appellant, Ratnavale was to hold the cheque and not to make use of it without his prior permission. Subsequently, the date, the 24th January 1961, was inserted on the cheque, but later after 5 or 6 unsuccessful demands for its return, payment upon it was stopped by the Appellant on the 22nd March 1963. The Appellant said that he stopped payment because he and Ratnavale had differences of opinion. However, he admitted that the sale of the barter rights had been affected long before, namely between the 19th January 1961 and May or June 1961 by Lee Yim Wah in Singapore. The sale had been for \$117,946,60/- of which the Appellant had received \$57,523,30/-. In the meantime he had, he said, paid out various sums of money for Ratnavale totalling \$20,500/- and had also paid out various sums totalling \$20,878.19 to Lee Yim p.13, l 38
p.14, l 16
to p.16, l 8

Wah as agent of Ratnavale.

p.17
ll 11-29 6. In cross-examination it was suggested to the Appellant that the cheque exhibit P.l.A. was given to him by the Respondent in consideration for cheques for \$9,000/- \$25,000 and \$15,000/- (respectively exhibits D.5, D.6, and D.7), and cash of \$1,000/- given to him by the Respondent on the 13th January, 1961. D.5, D.6, and D.7 are cash cheques drawn by the Respondent and dated respectively the 13th January 1961, the 21st January, 1961 and the 23rd January 1961. The Appellant denied that either D.5. or D.7. was given to him by the Respondent. As to D.6. he admitted in re-examination that this was credited into his account, adding that this cheque was given to him to cash and that "Ratnavale must have given me exhibit D.6."

p.17
ll 8-21 The Appellant was also cross-examined about a cash cheque for \$3,000/- drawn by the Respondent and dated the 27th December 1960 (Exhibit D.4.) He denied that he had ever seen this cheque and said that he could not identify the signature endorsed on the back of it. However, Koay Teik Choon (D.W.3), who was the Appellant's clerk at the time and who admittedly had authority to sign on the Appellant's account, testified later that it was his signature on the back and that he had cashed it at the bank, his explanation being that Ratnavale had given him the cheque to cash and had received the proceeds.

p.7
ll 28-39 In the course of the Appellant's cross-examination paragraph 5 of his affidavit in opposition to summary judgment dated the 5th August 1963 was put to him. In this he had sworn that "some time in August 1960" he was desirous of disposing of his barter rights and had been approached by Lee Yim Wah, an agent of Ratnavale "who was then the Assistant Controller of Foreign Exchange Penang". The basis of the bargain subsequently struck, as deposed to in this affidavit, was that "Ratnavale could use his official influence as such Assistant Controller of Foreign Exchange Penang to push through and/or expedite the proposed official approval". The Appellant said that his evidence in the case was the same as what he had deposed to in paragraph 5 of his affidavit. However, an official notification in the Federal Government Gazette, G.N. 3045 dated the 4th August 1960, (Exhibit D.3) was also produced in the course of the Appellant's cross-examination, and this showed that Ratnavale had relinquished his appointment as Assistant Controller of Foreign

p.16
ll 17-19

p. 160

Exchange on the 19th July 1960.

The Appellant said in re-examination that he was "in affluent circumstances, particularly in January 1961", adding that his "weekly average credit balance with the Bank was \$180,000/-". It appeared, however, from the statement of his account with the bank (Exhibit P.11.) which was subsequently produced, that on the 20th January 1961 he was overdrawn by \$188,888.05, and he was recalled to the witness-box, when he said that he had made a mistake in giving this evidence to the Court and wished to withdraw it.

p.18
ll 26-29

p.166

p. 29
ll 19-24

7. Lee Yim Wah (D.W.2) testified on behalf of the Appellant, saying that he had known Ratnavale for many years and also the Appellant. The Appellant had handed him the cheque (P.1.A.) to hand over to Ratnavale with instructions that he was not to pay it in or use it without the Appellant's prior consent. The cheque was then undated. He gave evidence on broadly similar lines to that of the Appellant as to an agreement between Ratnavale and the Appellant for the obtaining of an approval of the Appellant's barter rights with a view to their sale. The cheque (P.1.A.) was given as security. It was agreed that, if the permit was approved, 25 per cent of the proceeds of sale of the barter rights would go to the holder and 75 per cent to Ratnavale's "Syndicate", the Appellant pressing for expedition and, according to the witness, saying that "he had no money".

p. 19
ll 8-34

p. 20
ll 40-46

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l 16
p.22 1.35
p.23 1.1

He admitted in cross-examination that the barter rights were sold in July 1961. They were so sold by him in Singapore. He added that the permit was "granted by the Controller of Trade Division, Ministry of Commerce at Kuala Lumpur in May 1960. The Defendant knew about this. I told him". The witness stated that the amount of \$20,500/- paid to Ratnavale had no connection with P.1.A. The witness was cross-examined as to a Statutory Declaration which he had made on the 16th August 1963 (P.10). He said that this Statutory Declaration had been made by him at the request of Ratnavale in order to facilitate his suing the Appellant. In it he referred specifically to paragraph 5 of the Appellant's affidavit in opposition to summary judgment. This affidavit had given a version similar to that given in the Appellant's (and this witness's) evidence. In the Statutory Declaration the witness had expressly denied what was contained in the

p. 147

p.22 affidavit. The evidence he now gave was that his
ll 25-28 Statutory Declaration (P.10.) was a false one. In
cross-examination he said that the falsity of the
Declaration was present in his mind but that he
p.24 "signed it for the sake of friendship". In re-
ll 31-35 examination he claimed that he did not understand
its contents, and he asked the court to accept the
account given by him in his evidence rather than
what he had stated in the Statutory Declaration.

p.25 8. A former clerk of the Appellant, Koay Teik Choon
(D.W.3.), testified that he prepared the cheque
exhibit P.1.A. on the 19th January 1961, noting the
date on the counterfoil, but he gave no evidence as
to the transaction to which the cheque related.

p.26 Another former clerk of the Appellant, Lee Kim
Seng, (D.W.4). gave evidence that the cheques ex-
p.27 hibits D.5. and D.7. were given him by Ratnavale to
l 4 cash, and both bore his signature on the back. He
p.27 said that he did not know who the drawers of the
l 16 cheques were.

p.28 In cross-examination this witness first said
ll 9-11 that between December 1960 and January 1961 the
Appellant's accounts with the Dutch Bank were not
p.29 overdrawn, but later admitted that these accounts
l 9&10 were overdrawn "but we were allowed overdrafts".

p.29 9. The Respondent gave evidence stating that she
l 11&12 gave the cheques exhibits D.5., D.6., and D.7., and
p.30 \$1,000/- cash as a loan and received in exchange for
l 28 to this from the Appellant the cheque exhibit P.1.A.
p.31 The Respondent repeatedly asked the Appellant for
l.16 repayment of the loan but he said he was doing sugar
business and was expecting money soon. Further he
p.35, was also a participant with the Respondent in the
l,43 to "Maha business", a joint business venture. For these
p.36 1.5 reasons the "cheque took 2½ years to settle".

p.30 The cheque exhibit D.4 was also a loan given by
ll 21-27 her to the Appellant on the 27th November 1960 and
duly repaid by him.

p.31 The Respondent referred in her evidence to
l 37 to properties in Tampin, Penang, Kuala Lumpur, and
p.32 Gemas which she and her late husband before her
l 27. possessed. She referred also to her interest in a
business, known as the Maha Syndicate in which she,
the Appellant and Ratnavale were interested and
p.32 which was started in November 1961. She was cross-
l 34 to examined at some length as to the unlikelihood of
p 33, 1.2

"a man with large credit facilities" (the reference being apparently to the Appellant) borrowing sums of money from her, and as to her having an overdraft.

In re-examination she said that it was made known to her that the Appellant was not able to get an overdraft from the Bank in January 1961. p.36 ll 21-23

The Respondent called the manager of the Algemene Bank Netherland N.V., Penang, formerly known as Netherland Trading Society, who gave evidence as to the state of the accounts of Soo Seng Co. in December 1960 and January 1961, and produced the relevant documents. This evidence showed that the accounts of Soo Seng Co. at the material time were overdrawn, the authorised overdrafts were exceeded, and over and above the amounts overdrawn, other monies were owed to the Bank on bills. p.36 l 31 to p.37. l. 22

10. On the 25th June 1966, Raja Azlan Shah, J., delivered Judgment in favour of the Appellant, rejecting the evidence of the Respondent and holding that the Appellant had substantiated his claim that the cheque exhibit P.l.A. was given to Ratnavale and that at the time it was given it was tainted with illegality and was therefore void. p.41 - p.59

The learned trial Judge did not deal in his Judgment with the discrepancy in the Appellant's case between the date of the transaction alleged by him, which was "some time in August 1960", and the date when Ratnavale left the government service, which was the 19th July, 1960. As to the further discrepancy between the date of the alleged transaction between Ratnavale and the Appellant and the date when the cheque exhibit P.l.A. was alleged to have been handed by the Appellant to Ratnavale, which was some five months later viz in January 1961, he appears to have treated this, it is submitted wrongly, as of little moment.

The learned trial Judge accepted the evidence of Lee Yim Wah (D.W.2.) as corroborating the evidence of the Appellant, despite the fact that he admittedly had made a Statutory Declaration stating the exact contrary of what he deposed in the present suit. The learned Judge, stating that this Statutory Declaration "was made in contemplation that he (Lee Yim Wah) would not be made available as a witness in the present case", held that since he was a witness in the present case, its only relevance was as a previous statement which made it necessary to p.50. ll 21-29

treat his evidence with caution. Approaching the matter in this way the learned trial Judge accepted the evidence of this witness as truthful. It is respectfully submitted that in so doing the learned trial Judge was in grave error, and that where it is shown that a witness has previously given evidence on oath or made a Statutory Declaration completely contrary to the evidence he now gives, as was the case with this witness, no credit whatsoever can properly be attached to his testimony.

The learned Judge appears also to have attached considerable importance to the supposed fact that at the material time the Appellant enjoyed bigger overdraft facilities than those enjoyed by the Respondent and to the supposed lack of means of the Respondent. It is submitted that in so doing he overlooked the evidence as to the Appellant having exceeded his overdraft facilities at the material time and being otherwise in debt to the Bank.

11. It is submitted also that in his Judgment the learned trial Judge misdirected himself as to the standard of proof which was required in the case, having regard to the fact that what the Appellant was alleging and had to prove was fraud, illegality and criminal conspiracy. It is submitted that the learned Judge patently decided the case on a mere balance of probabilities, but that in such a case as this a heavier burden of proof is imposed.

p.121 12. The Respondent appealed to the Federal Court of Malaysia, which on the 2nd March 1967 allowed the appeal, set aside the Judgment of the High Court and ordered that the Appellant pay to the Respondent the sum of \$50,000/- and interest thereon together with the costs of the appeal and the trial.

p.111-117 13. The principal Judgment in the Federal Court, with which Yong J., Malaya, concurred, was delivered by Azmi C.J., Malaya. The learned Chief Justice referred to the way in which the learned trial Judge had dealt with the discrepancy arising out of the fact that Ratnavale had left the government service on the 19th July, 1960, i.e. before the Appellant ever met him, and stated that he was unable to understand what the learned trial Judge meant in the passage of his Judgment which dealt with this matter.

p.116
11.4&5

p.116 1.11 to p.117, 1.10 The learned Chief Justice referred also to the complete contradiction between the evidence of Lee

Yim Wah (D.W.2.) and his Statutory Declaration, and held that the learned trial Judge had misdirected himself upon this matter. The learned Chief Justice held, it is submitted correctly, that the evidence of this witness must be totally disregarded.

He also held that the learned trial Judge had fallen into error in taking as evidence against the Respondent that the Appellant had bigger overdraft facilities than those of the Respondent and in failing to take into account that the Appellant "had practically exhausted his overdraft facilities on 29th January 1961".

Upon a consideration of the evidence, the learned Chief Justice concluded that the Appellant had failed to prove his case. It is respectfully submitted that this was a right conclusion and a conclusion which a trial Judge who had properly directed himself and had approached the evidence in the correct way must necessarily have arrived at.

The learned Chief Justice found that the trial Judge had not misdirected himself as to the nature of the burden of proof which rested upon the Appellant on the question of whether the cheque Exhibit P.1.A. was tainted with illegality.

Pike, C. J. Borneo, agreed with the Judgment of Azmi, C.J., Malaya, except that he expressed the view that the learned trial Judge had misdirected himself as to the nature of the burden of proof resting on the Appellant. The unsatisfactory nature of the evidence upon which the learned trial Judge had found in favour of the Appellant reinforced the view that he must have misdirected himself upon the nature of the burden of proof, but even on the test which he had applied, namely on a bare balance of probabilities, the evidence was clearly insufficient to enable any court properly directed to be satisfied of the existence of the criminal conspiracy alleged by the Appellant. It is submitted that Pike, C.J., Borneo, correctly so held.

14. The Appellant was given Conditional Leave to appeal to His Majesty the Yang di-Pertuan Agong on the 19th April 1967, and Final Leave on the 7th August 1967.

15. The Respondent respectfully submits that this Appeal should be dismissed and the said Judgment and Order of the Federal Court of Malaysia dated the

p.60

2nd day of March 1967, allowing the Respondent's appeal against the said Judgment of the High Court in Malaya at Penang dated the 25th day of June 1966 with the costs of that appeal and of the trial, should be affirmed, and the Appellant should be ordered to pay the costs of this Appeal, for the following amongst other

R E A S O N S

1. BECAUSE the Appellant failed to prove his case.
2. BECAUSE the learned trial Judge misdirected himself as to the nature of the burden of proof which rested on the Appellant and applied a wrong test in considering the evidence.
3. BECAUSE the learned trial Judge misunderstood and misconstrued the evidence in the case, particularly with regard to dates and the respective financial positions of the parties.
4. BECAUSE a trial court, acting upon proper principles must necessarily have disregarded the evidence of Lee Yim Wah (D.W.2) as wholly unreliable.
5. BECAUSE the nature of the Appellant's defence necessarily involved that he was guilty of corruption and had taken part in a criminal conspiracy and was such that his evidence could not properly be accepted by a trial court without corroboration.
6. BECAUSE there was no corroboration of the Appellant's evidence.
7. BECAUSE a trial court which properly directed itself on the matter of burden of proof and applied a correct test could not find in favour of the Appellant on the evidence in the case.
8. BECAUSE it appeared clearly from the evidence and the reasons given by the trial court for its findings thereon that the trial court did not take proper advantage of having heard and seen the witnesses, and the Federal Court was entitled to set aside such findings and rightly did so.
9. BECAUSE the Judgment of the High Court in Malaya at Penang was wrong, and the Judgments of the Federal Court of Malaysia were right for the reasons therein stated.

E. F. N. GRATIAEN. Q.C.

MONTAGUE SOLOMON

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