Privy Council Appeal No. 25 of 1967

Tan Chow Soo – – – – – – – – – *Appellant*

v.

Ratna Ammal daughter of Veerasingam – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JUNE 1969

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD UPJOHN
LORD DIPLOCK
[*Delivered by* LORD DIPLOCK]

This is an appeal from a judgment of the Federal Court of Malaysia of 2nd March 1967, allowing an appeal by the respondent, the plaintiff in the action, from a judgment of the High Court of the Federation of Malaya dismissing the plaintiff's action.

The plaintiff sued as bearer of a cheque for 50,000 dollars dated 24th January 1961, drawn by the defendant and presented for payment two and a half years later on 5th July 1963, when it was dishonoured. The defendant admitted that he was the drawer of the cheque but alleged that it had been given to one Ratnavale, the son of the plaintiff, for an illegal consideration, namely as a corrupt inducement to Ratnavale to use his influence with the Department of Foreign Exchange at Penang and the Department of Commerce and Industry at Kuala Lumpur, to obtain permits for the export of goods to Indonesia under certain " barter rights ".

The defendant admitted that he was drawer of the cheque. The onus accordingly lay upon him to establish that it was given to Ratnavale for an illegal consideration. If he succeeded in this, it would be for the plaintiff to prove that subsequent to the illegality value in good faith had been given for the cheque.

Until 19th July 1960, Ratnavale was employed in the Department of Foreign Exchange at Penang, ultimately as Assistant Controller. The defendant's story was that he was a merchant who engaged in trade with Indonesia.

Prior to 1960 he had imported from Indonesia rubber to the value of 1,400,000 dollars. At that time trade between Indonesia and Malaysia was conducted in part in cash and in part by barter. But the Malaysian Government discouraged it and did not normally permit money or barter goods in settlement for imports to be sent to Indonesia. In practice, however, it appears that remittances for imports were transmitted to Indonesia through the black market in Singapore and this the defendant had succeeded in doing for the rubber which he had imported. This was unknown to the Malaysian Government and as a result the defendant had what were known as " barter rights " to the value of 1,400,000 dollars

evidenced by the Customs Declarations upon the imported rubber. These " barter rights " would enable him or his assignee to export to Indonesia goods to this value provided that permission could be obtained from the Department of Foreign Exchange, from the Department of Commerce and Industry, and, it would appear, also from the Indonesian authorities. In 1960 and 1961 there was a great shortage of goods in Indonesia and bartef rights, in respect of which official permission could be obtained to export goods to the value covered by them could be sold in Singapore at a handsome profit.

The defendant's case was that early in 1960 he was approached by one Lee Yim Wah, on behalf of Ratnavale, with a proposal that Ratnavale should use his influence to obtain the necessary permits from the Department of Foreign Exchange, of which Ratnavale was then Assistant Controller and from the Malaysian Department of Commerce and Industry and the Indonesian Consulate, to enable the defendant to sell his barter rights. Ratnavale's terms for doing so were that the profit on the sale should be divided as to 25% to the defendant and as to 75% to Lee Yim Wah and Ratnavale. The defendant assented to this proposition made by Lee Yim Wah and handed over to Lee in February or March of 1960 the Customs Declarations evidencing his barter rights. In August 1960, after Ratnavale had in fact ceased to be Assistant Controller though the defendant did not know this, the defendant was taken by Lee Yim Wah for the first time to meet Ratnavale. At that interview Ratnavale demanded as a protection against the defendant's cheating him out of his share of the profits when the barter rights were sold that the defendant should give to Ratnavale a cheque for 50,000 dollars.

An undated cheque for this amount was eventually drawn by the defendant on 19th January 1961, and handed by the defendant to Lee Yim Wah who later handed it to Ratnavale. A permit from the Department of Commerce and Industry authorising the export of goods represented by the barter rights was granted in May 1961, and the barter rights sold by Lee Yim Wah in July 1961, for the sum of 117,946 dollars. Of this the defendant received 57,525 dollars, but claimed that he had previously paid to Ratnavale or on his behalf and to Lee Yim Wah a total of some 40,000 dollars. He therefore stopped payment of the cheque for 50,000 dollars as a result of which it was dishonoured upon presentation for payment by the plaintiff on 5th July 1963.

The defendant's case was supported by his own evidence and that of Lee Yim Wah and of his former clerk, one Koay Teik Choon. The last-named witness whose probity and credibility were not attacked deposed that he himself drew the cheque on 19th January 1961, a date of which there was documentary confirmation in the defendant's bank book. This was one of the few parts of the defendant's case which was supported by contemporary documents. But this is not surprising for the transaction described by the defendant was not of a kind which it is usual or prudent to record in writing.

If the defendant's story was untrue the obvious witness to refute it was Ratnavale, the plaintiff's son, whose character was so grievously attacked. The plaintiff did not call him nor did she offer any explanation for her failure to do so. Her story which depended on her own unsupported oral evidence was that the cheque was given to her upon 24th January 1961, by the defendant personally as consideration for a number of loans made to him on that date and preceding dates totalling 50,000 dollars. It was undated when he handed it to her and on her pointing this out he invited her to fill in the date herself, which she did. This date for the cheque instead of 19th January deposed to by Koay Teik Choon was vital to the credibility of her story and as already mentioned was inconsistent with the only relevant contemporary document produced in the action. She produced no scrap of writing which supported her account of what if she were to be believed was an innocent loan of a substantial sum of money.

It is apparent from this summary of the evidence, which is analysed in detail in the careful judgment of the trial Judge, Raja Azlan Shah J., that this was a classic example of a case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned judge, at the trial, were to be believed. An Appellate Court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

The learned trial judge who had all these advantages during a hearing which lasted for five days, in his judgment, summed up his impression of the plaintiff's credibility: "I have no doubt in my mind that her evidence is not worth a moment's glance." He referred more than once to the caution with which he approached the evidence of the defendant and of Lee Yim Wah, who were both self-confessed parties to an illegal and corrupt transaction, and analysed with care the various detailed criticisms which had been made of their evidence. Nevertheless taking all this into account he came to this conclusion: "If it is necessary to decide between the evidence of the Defendant and that of the Plaintiff, I have no hesitation in accepting that of the Defendant. He gave his evidence in a straightforward manner and I consider him to be a truthful witness." Of Lee Yim Wah he said: "No doubt, as I have indicated above, Lee's evidence must be treated with caution, but after observing his demeanour I accept his evidence." "Having reviewed the evidence as a whole" said the learned judge "I am satisfied that on the balance of probabilities as is required to be proved in a case of this nature, the Defendant has substantiated his claim that the cheque was given to Ratnavale and that at the time it was given it was tainted with illegality and is therefore void. It is manifest that in the circumstances this Court cannot entertain the Plaintiff's claim."

On appeal to the Federal Court of Malaysia, the Chief Justice of Malaysia, with whom Mr. Justice Yong agreed, allowed the appeal and reversed the findings of fact of the trial judge upon three grounds. The first was that he had failed to consider adequately the fact that Ratnavale had left the Government service on 19th July 1960, and that the first meeting between him and the defendant did not take place until after that date. This criticism pays no account to the evidence of Lee Yim Wah which the learned judge accepted that the defendant's Customs Declarations were handed over to Lee by March of 1960 when Ratnavale was still Assistant Controller of Foreign Exchange. The permit needed to complete the transaction which was not obtained until May 1961 was not one from the Department of Foreign Exchange but from the Department of Commerce and Industry.

In their Lordships' view there is no compelling reason to suppose that Ratnavale who on the evidence while Assistant Controller had made a business of corrupt transactions of this kind had on his dismissal abandoned his contacts with officials of other Departments.

The second ground relied upon for allowing the appeal was based upon the fact that at an early stage in the proceedings Lee Yim Wah had made a statutory declaration in which he denied that he had any connection with the transaction which the defendant alleged took place. In his evidence at the trial, Lee gave an explanation of the circumstances in which he had made the declaration. The trial judge was well aware of the importance of Lee's statutory declaration. He referred to it expressly in his judgment and added: "in the light of his explanation I have therefore to consider his whole evidence with caution". Nevertheless he came to the conclusion to which their Lordships have already adverted that Lee's oral evidence which confirmed that of the defendant could be accepted. The learned Chief Justice of Malaya said of this "In my opinion if a witness made two contradictory statements on the same matter he must be held to perjure

himself unless perhaps he could satisfy the Court that there was compulsion or duress in the making of one. . . . So that in my view, the evidence of Lee Yim Wah in reference to the alleged conspiracy must be totally disregarded with the result that the Court was left to consider on the uncorroborated evidence of the respondent alone." In their Lordships' view this puts the matter far too high. No doubt the fact that a witness has made a previous contrary statement particularly in the solemn form of a statutory declaration is a matter to be given great weight in considering whether his oral evidence is to be believed. But the learned judge who was fully conscious of this was in their Lordships' view entitled if satisfied that Lee's later statement was true to accept and act upon it.

Finally, the learned Chief Justice of Malaysia considered that the learned trial judge was induced to disbelieve the plaintiff's evidence about her alleged loan to the defendant which she said she made on overdraft on the mistaken ground that the defendant had greater overdraft facilities than the plaintiff. The learned Chief Justice pointed out that at that time the defendant had already exceeded his existing overdraft facilities. But this, with respect, overlooks the fact that the defendant's Bank Manager, who was called as a witness, for the plaintiff, stated that if special arrangements were made the defendant's overdraft facilities could be doubled.

The Chief Justice of Borneo considered as an additional reason for allowing the appeal that the trial judge had misdirected himself as to the standard of proof required in a case where criminal conspiracy was pleaded. Their Lordships agree with the majority of the Federal Court that the learned judge correctly directed himself upon this matter.

As already mentioned, this case turned entirely upon the rival credibility of the defendant and Lee Yim Wah on the one hand and the plaintiff on the other. There was, as is to be expected in so devious a transaction, very little documentary evidence to support the story of one side or another and such little as there was inconsistent with the story of the plaintiff. Ratnavale the plaintiff's own son, who was the obvious witness to refute the defendant's evidence if it were untrue, was never called.

In this kind of case it is very rarely that an Appellate Court is justified in reversing the decision of the trial judge who has had the opportunity of seeing and hearing the witnesses and who has directed himself correctly, as in their Lordships' view the learned judge in this case did, as to the caution with which to approach the evidence of witnesses who are confessedly parties to an unlawful and corrupt transaction. In their Lordships' view there was nothing in this case which justified an Appellate Court in substituting its own view of the facts for that of the trial judge.

Their Lordships will accordingly report to the Head of Malaysia their opinion that the appeal ought to be allowed the Judgment of the Federal Court set aside and the Judgment of the High Court restored and that the respondent ought to pay the costs of the appeal to the Federal Court and of this appeal.

39842—1 Dd. 178094 75 7/69

In the Privy Council

TAN CHOW SOO

v.

RATNA AMMAL

DELIVERED BY
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1969