Privy Council Appeal No. 38 of 1989

G.R. Banymandhub *Appellant*

v.

The Queen *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 28TH JANUARY 1991, DELIVERED THE 6TH MARCH 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This appeal arises out of the conviction of the appellant, his wife and two other men on 21st January 1988 by the Intermediate Court of Mauritius on a charge of swindling contrary to section 330 of the Criminal Code. The offence occurred in September 1985 and consisted of obtaining a sum of money amounting to 13,000 rupees from two persons, Ahmad Noorally and Shyam Kowlessur, by fraudulently and falsely representing to them that in return for the money so paid they would obtain counterfeit money in the shape of 50 rupee notes representing a much larger sum than the amount paid over by the victims. The appellant (accused No. 1) and the two other men were sentenced to 3 years' penal servitude and the appellant's wife (accused No. 2) was fined 3,000 rupees.

At the conclusion of the hearing their Lordships announced that they would humbly advise Her Majesty that the appeal ought to be dismissed for reasons to be given later. This they now do.

The appellant and his wife appealed to the Supreme Court of Mauritius on the following grounds:-

"1. Because the Learned Magistrates should not have found witnesses Noorally and Kowlessur to be

witnesses of truth and they were wrong to rely on the evidence of these witnesses to convict appellants (then accused Nos. 1 and 2).

2. Because the Learned Magistrates were wrong to conclude that the alteration to Rs 20,000. in Doc.A lends colour to the version of witness Noorally.

3. Because the Learned Magistrates should not have inferred that the appellant No. 1 (then accused No. 1) intended the pieces of paper found in his premises to be in the shape of Rs 50. notes.

4. Because the Learned Magistrates were wrong to find that the presence of appellant No. 2 (then accused No. 2) 'in the whole operation show that she was fully participating in the fraud'.

And for all other reasons to be given in due course."

The appeal was heard on 13th June 1988 and the only grounds relied on were the specific grounds mentioned in the notice of appeal. On 20th September 1988 the Supreme Court delivered a written judgment dismissing the appeals of both appellants. At the outset of the judgment they stated:-

"We must unfortunately agree with counsel for the appellants that the information was very unfelicitously drafted. The sum alleged to have been swindled is Rs 20,000. Yet the particulars of the information and the evidence show that only a sum of Rs 13,000 was involved. It is a matter for regret that the learned Magistrates of the Intermediate Court did not think it advisable to amend the information. Their failure to do so cannot, however, affect the appellants' conviction."

The judgment continued:-

"We have considered the first three grounds of appeal which challenge the Magistrates' findings of fact and their appreciation of the evidence in the light of the remarks of counsel for the appellant. We find it impossible to fault the reasoning of the learned Magistrates who, after hearing and seeing the two witnesses called by the Crown, accepted their explanations as to why they first tried to hide certain things to the Police and were satisfied that they were witnesses of truth on whose evidence they could safely act to find proved the guilt of the four accused. The first three grounds of appeal must therefore fail."

The fourth ground of appeal concerned only the appellant's wife who has not challenged the dismissal of her appeal.

The judgment concluded with the observation:-

"Our attention has been drawn to an error in the formal conviction which recites that the appellants and the two other accused were convicted of 'CONSPIRACY (breach of section 330 of the Criminal Code)'. We amend the conviction by substituting for the word CONSPIRACY the word SWINDLING."

From this judgment the appellant appealed to this Board, relying on entirely new and different grounds of appeal, which were as follows:-

"(A) The Appellant has suffered a gross miscarriage of justice inasmuch as his trial was vitiated by material irregularities in that -

(i) the information was bad for duplicity;

(ii) his conviction is bad for uncertainty and for duplicity;

(B) In view of the evidence on record, the Supreme Court of Mauritius was wrong to find that the discretion of the Learned Magistrates ought not to be interfered with in as much as -

(i) they failed to give themselves a corroboration warning before acting on the evidence of witnesses Noorally and Kowlessur and were wrong to have acted on the uncorroborated evidence of the said witnesses; and/or

(ii) they failed in their obligation, as judges of law, to advise themselves, as the sole arbiters of fact, to proceed with caution because there was evidence indicating that witness Noorally had a purpose of his own to serve in giving false evidence; and/or

(iii) they failed to direct their mind properly or at all to the need for proceeding with that witness Noorally's evidence was or could be tainted with improper motive and/or that he had a 'substantial interest' of his own for giving false evidence; and/or

(iv) they failed to assess witness Noorally's evidence with the requisite degree of caution in the light of the fact that this evidence was or could be tainted with improper motive because he had a substantial financial interest in the outcome of the proceedings."

Before their Lordships the appellant's case was presented with admirable brevity by Mr. Guy Ollivry, Q.C., who had not been instructed in the Intermediate Court or the Supreme Court. He confined his submissions to Ground A.

The information was headed:-

> "Charge of Swindling
> Breach of Sec. 330 of the Criminal Code."

and the statement of the charge was as follows:-

> "That on or about the ninth day of September in the year one thousand nine hundred and eighty five at Pointe-aux-Sables in the district of Black River, one Gawtam Rishi Banymandhub, aged 41, Insurance Agent, and Renuka Banymandhub born Rambochun, aged 33 years, no calling, both residing at La Pointe, Pointe-aux-Sables, one Premchand Kissoondoyal also called Prem, aged 27, labourer, and one Naraindurh Kissoondoyal also called Narain, aged 28, labourer, both residing at Letord Street, Rose Belle, by employing fraudulent pretences to create the expectation of a chimerical event, obtain the remittance of a certain sum of money, to wit: Rs 20,000 did by such means as aforesaid criminally, wilfully and fraudulently swindled other person out of his property."

The particulars of the charge occupied 78 lines of typescript and took the form of a summary of the evidence to be relied on by the prosecution rather than the form of particulars customarily found in an indictment under the Indictments Act 1915. They purport to narrate the criminal transaction in considerable detail, but their Lordships find it necessary to refer only to the concluding paragraphs:-

> "Then the said Banymandhub informed them there was an amount of Rs 180,000 in notes and he is prepared to hand over the whole sum to them provided they signed a stamped paper in which the said Shyam would be indebted to pay Rs 20,000 and it was countersigned by the said Prem and Narain and the said Banymandhub left the place with the stamped paper.
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> On the same day at 21.00 hours, the said Banymandhub returned at his place escorted with two Policemen in uniform. They were frightened and left the place. On the following day, the said Jumeed and Narain went to see Banymandhub and they were told by the said Renuka Banymandhub that her husband is detained by the Police. He the said Ahmad Noorally also called Jumeed and the said Shyamlall Kowlessur also called Shyam had not received their money from the said Banymandhub.

Complainant further avers that by acting as aforesaid, the said Gawtam Rishi Banymandhub, the said Renuka Banymandhub born Rambochun, the said Narainduth Kissoondoyal also called Narain and the said Premchand Kissoondoyal also called Prem swindled the said Ahmad Noorally also called Jumeed and the said Shyamlall Kowlessur also called Shyam out of their property namely sum of Rs 8,000 and Rs 5,000 respectively as aforesaid."

The conviction was in the following form:-

"Be it remembered that on the 21st day of January in the year one thousand nine hundred and 88 in the Intermediate Court 1. Gawtam Rishi Banymandhub and 2. Renuka Banymandhub were convicted before the undersigned Magistrate for the said Court for that the said G.R. Banymandhub and R. Banymandhub committed the offence of Conspiracy (Breach of Section 330 of the Criminal Code).

And the Court adjudges the said G.R. Banymandhub for his said offence to be imprisoned for the space of three years penal servitude and the said Renuka Banymandhub to pay a fine of Rs 3,000 and the Court also adjudges each of the said G.R. Banymandhub and R. Banymandhub to pay the sum of Rs 400. for costs, and if the said sum for costs be not paid forthwith, then the Court adjudges each of the said G.R. Banymandhub and R. Banymandhub to be imprisoned for the space of 20 days, to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs shall be sooner paid."

Mr. Ollivry, addressing himself to ground A(i) cited the following authorities: *R. v. Greenfield* (1973) 57 C.A.R. 849; *Choolun v. R.* (1979) MR 291; *Edwards v. Jones* [1947] K.B. 659; *Flacq Long Mountain Bus Service Co. Ltd. v. The Queen* (1976) MR 208.

Their Lordships do not propose to analyse any of these cases, since they do not provide any assistance for the appellant. One only has to read the statement and particulars of the charge in order to appreciate that it is not bad for duplicity. The regrettable inconsistency between the allegations in the statement of the charge that the defendants obtained 20,000 rupees from their victims and in the particulars that they swindled them out of two sums amounting to 13,000 rupees has already been the subject of adverse comment by the Supreme Court, but this discrepancy is beside the point when the question is one of duplicity. The particulars of the offence allege that the victims signed a "stamped paper", which turns out to be a promissory note for 20,000 rupees, but this was not an accusation of an offence in addition to the offence of swindling the victims out of a sum of money. It was

simply a recital of part of the evidence which went to show how the defendants' fraud was organised. The essence of the charge is that there was one fraudulent misrepresentation as a result of which 13,000 rupees were paid over by the victims to the defendants.

Turning to ground A(ii), which alleged that the appellant's conviction was bad for uncertainty and also for duplicity, their Lordships take note of the appellant's submission, to the effect that in finding the appellant "guilty as charged", the learned Magistrates wrongly convicted him of more than one offence under a simple charge. That accusation clearly fails on reading the conviction, once it is clear, as their Lordships have held, that the charge is not bad for duplicity. As already noted, the Supreme Court had drawn attention in their judgment to the only defect in the formal conviction, namely the use of the word "conspiracy", which the Supreme Court amended to read "swindling".

Although counsel did not pursue ground B, their Lordships wish to refer to it, since the four heads which it embraces illustrate a point of general importance. The complaint made is that the Magistrates failed in four different ways properly to direct themselves as to the relevant law or the facts of the case, and therefore their Lordships wish to take the opportunity of saying that a court sitting to hear a criminal case without a jury has no obligation to include in either an oral or a written judgment any statement by which to confirm that it has given itself any direction or advice as to the law or the facts such as a trial judge would give to a jury in the same circumstances. The only exception to this rule is that, if a view has to be formed on a difficult or disputed point of law as a step preparatory to reaching a decision on the facts, the court ought in fairness to the accused to state the conclusion in point of law which it has reached.

For the sake of completeness, their Lordships refer to section 97 of the District and Intermediate Courts (Criminal Jurisdiction) Act 1888, which provides:-

"(1) No objection to a conviction shall be allowed or taken on the ground that there was some defect either in substance or in form in the information, warrant or summons, or on the ground that there was some variance between the information, warrant or summons and the evidence unless the objection was taken before the Magistrate or Intermediate Court.

(2) No conviction shall be quashed on the ground of any defect in substance or in form in the information, warrant, or summons, or for any variance unless the Magistrate or Intermediate Court has refused to amend the information and

> to adjourn the hearing, and unless the Court is satisfied that the appellant has thereby been misled or deceived and prejudiced in his defence."

Their Lordships have not failed to note that the grounds of appeal relied on before them, but not advanced in the Supreme Court, were exclusively concerned with procedural points, on which the courts in Mauritius could be expected to exercise an authoritative judgment.

Their Lordships conclude this judgment by pointing out that, at the time the appellant appealed, by virtue of section 70A of the Courts Act an appeal lay to Her Majesty in Council as of right in all criminal cases. It was clearly and emphatically stated in the judgment of the Board delivered by Lord Hailsham of St. Marylebone, L.C. in *Badry v. Director of Public Prosecutions* [1983] 2 A.C. 297, and repeated in the judgments delivered by Lord Keith of Kinkel in *Buxoo v. The Queen* [1988] 1 W.L.R. 820 and *Gaffoor v. The Queen* (2nd October 1990 unreported), that the Board would, when dealing with an appeal as of right, apply the principles traditionally in use as regards applications for special leave to appeal in criminal cases generally. Accordingly, an appeal will only be allowed if the Board are satisfied that they can properly advise Her Majesty that a really serious miscarriage of justice has occurred, by reason of misconduct of the trial or upon some other cogent ground. So far from that being the position in the present case, their Lordships are satisfied that this is an appeal which should never have been brought.

The appellant must pay the costs of the appeal.