15, 1969

No. 28 of 1968

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:

PUBLIC PROSECUTOR — Appellant

- and -

P. TUVARAJ — Respondent

CASE FOR APPELLANT

RECORD

1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia Holden at Kuala Lumpur dated the 19th day of February 1968, whereby the said Federal Court decided a question of law referred to it pursuant to the provisions of section 66 of the Courts of Judicature Act 1964 as being a question of law of public interest which had arisen in the course and had affected the determination of an appeal by the Appellant to the High Court in Malaya at Johore Bahru, in the State of Johore, from a Judgment and Order of the Sessions Court, Batu Pahat, dated the 21st day of November, 1966. By such Judgment and Order the said Sessions Court acquitted the Respondent of a charge punishable under section 4 (a) of the Prevention of Corruption Act 1961. The said High Court dismissed the Appellant's appeal, and the said Federal Court, in deciding the question of law referred to it, held that the decision of the

pp.49-60

pp.3-28

Sessions Court upon the appeal was right in law and ought to be re-affirmed by the Federal Court as it had been affirmed by the High Court.

2. The principal question raised by this Appeal is what is the nature and weight of the onus resting upon an accused where (a) the statute which creates the offence raises a certain presumption of fact against him "unless the contrary is proved", and also (b) there is, in a Code of Evidence expressed to apply to all judicial proceedings, a statutory definition of what constitutes proof.

p.43

3. The question of law referred to the Federal Court was as follows :-

p.33 l 36 - p.34 l.4

> "Whether in a prosecution under section 4 (a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable <u>or</u>
>
> whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (section 3 Evidence Ordinance)."

4. The following statutory provisions are relevant to this Appeal

<u>Prevention of Corruption Act 1961 (No.42 of 1961)</u>

s. 4 If -

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself

or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour, to any person in relation to his principal's affairs or business;

. . . . . he shall be guilty of an offence . . . . .

s.14

Where in any proceedings against a person for an offence under section 3 or section 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved.

Evidence Ordinance 1950
(No.11 of 1950)

An Ordinance to unify the law relating to evidence in the Federation.

s.2

This Ordinance shall apply to all judicial proceedings in or before any Court other than Courts Martial or Muslim Religious Courts, but not to affidavits presented to any Court or officer nor to proceedings before an arbitrator.

s.3

In this Ordinance, unless there is something repugnant in the subject or

context -

. . . . .

"fact" means and includes

(a) any thing, state of things or relation of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place is a fact.

(b) That a man heard or saw something is a fact.

(c) That a man said certain words is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation is a fact.

. . . . .

"fact in issue" means any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows;

Illustrations

A is accused of the murder of B.

At his trial the following facts may be in issue:

that A caused B's death;

that A intended to cause B's death;

that A had received grave and sudden provocation from B;

that A at the time of doing the act which caused B's death was by reason of unsoundness of mind incapable of knowing its nature.

. . . . . .

"Proved"; A fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"disproved"; A fact is said to be "disproved" when after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"not proved" A fact is said to be "not proved" when it is neither proved nor disproved.

s.4

"May presume" (1) Whenever it is provided by this Ordinance that the Court may presume a fact, it may either regard such fact as proved unless and until it is disproved, or may call for proof of it.

"shall presume" (2) Whenever it is directed by this Ordinance that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.

Section 101

Burden of proof

(1) Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102

On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103

Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 105

When a person is accused of any offence

Burden of proving that case of accused comes within exceptions

the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances, bringing the case under section 335, lies on A.

Section 106

Burden of proving fact especially within knowledge

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

. . . . . .

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Section 114

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Court may presume any existence of certain fact.

Illustrations

The Court may presume -

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

. . . . . .

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it -

as to illustration (a) - a shop-keeper has in his till a marked dollar, soon after it was stolen and cannot account for its possession specifically but is continually receiving dollars in the course of his business;

. . . . .

5. The respondent was charged as follows :-

That you on the 21st day of June 1966 at about 7.40 p.m. at Quarters No. PWD.C.J.784 Jalan Labis, Yong Peng, in the State of Johore, being an agent of the Government of the States of Malaysia, to wit, a Police Inspector attached to Yong Peng police station, did corruptly accept gratification for yourself to wit, $250/- cash, from one Ling Choon Seng as an inducement for forbearing to do an act in relation to your principal's affairs, to wit, to refrain from taking action against him for operating the illegal 36 digit lottery (Chee Fah), and that you thereby committed an offence punishable under section 4 (a) of the Prevention of Corruption Act No. 42 of 1961. pp. 1 - 2

6. The facts of the case were summarised in the Federal Court as follows :

> Brifly, a trap set by a Chee Fah lottery operator for a police inspector resulted in his being found in possession of $250 of marked money. The defence claimed that it was a plant, the money being delivered by the agent provocateur himself on the pretext that it was towards repayment of a debt which the accused had been requested by and on behalf of a brother-officer to hand over to the creditor for goods sold. p.49 l. 37 - p.50 l 8

7. On the 21st November 1966 the Sessions Court (Mr. Satchithanandhan President) found the Respondent not guilty. p.2 l 21

The learned Judge in his Grounds of Judgment held that the prosecution evidence established beyond reasonable doubt that the marked notes were in the possession of the Respondent, but held that the Respondent had rebutted the statutory presumption that arose under section 14 of the Prevention of Corruption Act 1961. pp.3 - 28

The way in which the learned Judge approached this latter aspect of the case is

indicated in the following passages :-

p.23 ll. 27 - 34

(a) "This is briefly the gist of the accused's defence, in rebuttal of the presumption under Section 14 of the Prevention of Corruption Act, 1961 - defence that was credible and one that could be reasonably true in the circumstances of the case, not the least circumstance being the silent workings and darker elements of P.W.1's character and disposition."

p.26 ll. 40 - 42

(b) "Having seen and heard the accused, the Court accepted this explanation as being probable and credible, in all the circumstances of this case."

p.28, ll. 8 - 13

(c) "With greatrospect, the Court was of the humble view, having weighed and estimated the force of each of the several circumstances in evidence, that the circumstances enumerated by the accused are consistent and compatible with the superior probability of his innocence."

It is respectfully submitted that these passages show that the learned Judge was applying a wrong test in considering whether the statutory presumption was rebutted. The correct test is not whether the accused has advanced an explanation which is credible or may reasonably be true or is consistent with innocence, but is the test enacted by the statute, namely whether "the contrary is proved". Section 3 of the Evidence Ordinance defines what "proved" means, and the definition shows that even probability is not enough, unless it is that high degree of probability approaching certainty which falls within the definition. It is submitted that the learned Judge wholly failed to consider whether the Respondent had discharged the <u>onus</u> laid upon him by the statute.

8. The Appellant appealed against the acquittal and discharge of the Respondent to the High Court in Malaya, which on the 24th day of May, 1967 dismissed the said appeal. pp.29 - 32 p.33 l.26

9. On the 9th day of June, 1967, the Appellant applied to the High Court of Malaya to reserve for the decision of the Federal Court of Malaysia the point of law hereinbefore in paragraph 3 mentioned. On the 16th day of July, 1967 the said High Court (Ali, J.,) refused the said application. pp.33 - 35 p.37

10. By Notice of Motion dated the 20th day of July, 1967 the Appellant appealed from the said refusal to the Federal Court of Malaysia, which on the 7th day of October, 1967 made an Order referring the said question for decision. pp.38 - 39 p.43

11. The Federal Court duly heard the Reference, and delivered Judgment on the 19th February 1968. pp.44 - 48 pp.49 - 58

In deciding the Reference the Court appears to have pronounced in favour of the first of the two alternatives set out in the question referred to it, although it did not in terms answer the question posed. It held that the decision of the trial Judge was

> "right in law and ought to be re-affirmed in this court as it had been affirmed by Ali J." p.58 ll. 37 - 38

The Judgment of the Court was delivered by Ong Hock Thye F.J.

12. The learned Federal Justice referred to a number of Malayan and Indian cases bearing on the subject under reference. These cases show some divergence of view, but the balance of authority, it is submitted, is strongly in favour of the second of the two alternatives posed in the question under reference.

Thus, in Saminathan v. P.P. (1955) M.L.J. 121, 124 (a Malayan customs case), Buhagiar J. said

> "The facts on which the defence rely must however be 'proved' and they are proved not by showing merely a possibility that such facts exist but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case.
>
> . . . . .
>
> In view of the Evidence Ordinance, 1950, I do not see how 'proved' in any statutory presumption can mean anything but 'proved' as defined in that Ordinance. Whatever view one may take of the policy of the legislation, there is also some policy in giving words a consistent meaning, and that is hardly done if 'proved' is given a different interpretation from that in the Evidence Ordinance, 1950."

The Supreme Court of India, in Dhanvantrai v. State of Maharastra A.I.R. (1964) S.C. 575, reached a similar decision on section 4 (1) of the Prevention of Corruption Act of India, 1947 (which is in pari materia with Section 14 of the Malaysian Act). In that case Mudholkar J. pointed out

> "that the burden resting on an accused person in such a case as the present would not be as light as it is where the Court may in appropriate circumstances presume certain facts under section 114 of the Indian Evidence Act (corresponding to Section 114 of the Evidence Ordinance of Malaysia) (e.g. that a man in possession of recently stolen goods is either the thief or a receiver) and cannot be held to be discharged merely by reason of the fact that the

explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one, i.e. 'proved' as defined by the Evidence Act."

This decision, which was in accord with earlier authority in the Indian Supreme Court and has been followed in the Indian High Courts was, it is submitted, correct and should have been followed by the Federal Court in the instant case.

13. The learned Federal Justice declined to follow Dhanvantrai's case and said that

> "the mere fact that section 3 of the Indian Evidence Ordinance (and ours) defines and explains how and when a fact is said to be 'proven' does not and should not, in our opinion affect the quantum of proof in India or Malaysia." p.55, ll. 27 - 31

It is respectfully submitted that this is not the correct view and that the Courts are not entitled to disregard the definition of proof contained in this section when determining whether "the contrary is proved" as required by section 4 of the Prevention of Corruption Act 1961.

The Learned Federal Justice posed the following question :-

> "The presumption under section 14, be it emphasised, is a rebuttable one and if the explanation offered is one which may very well be true, how can it be said that the case for the prosecution, at the close of the trial, has been proved beyond reasonable doubt?" p.58, ll. 15 - 20

and concluded that the finding by the learned President of the Sessions Court that the Respondent's explanation was "reasonable and probable" would have sufficed. p.58 ll. 31 - 33

14. The learned Federal Justice relied heavily in his Judgment upon the English case of R. v. Carr-Briant (1943) K.B. 607) where the meaning of the phrase "unless the contrary is proved" in a similar provision of the Prevention of Corruption Act 1916 was considered. It is submitted however that this case is not an authority for the proposition that it is sufficient in such a case for an accused to put forward an explanation which may well be true. It is quite clear from the report that it was not in issue that the accused had to prove, i.e. establish, the absence of a corrupt motive and that the point in issue was only as to whether the onus of proof upon him was that which was appropriate in a criminal or in a civil case. The decision was that he has to establish it only on a preponderance of probability and not beyond all reasonable doubt. The Appellant would not dispute the correctness of this decision so far as the law of England is concerned but would submit that in Malaya the rule as to onus in such a case must be taken subject to the qualification that in Malaya, but not in England, there is an express statutory provision as to what the quantum of proof is to be, namely, that contained in section 3 of the Evidence Ordinance.

15. The learned Federal Judge relied also on the English case of Woolmington v. D.P.P. (1935 A.C. 462) apparently as showing that the general presumption of innocence that exists in a criminal case would over-ride or modify even an express statutory provision which would otherwise put the onus as to a particular part of the offence upon an accused. It is submitted that even in English law Woolmington's case will admit of no such construction. It is clear from the speech of Viscount Sankey L.C., who delivered the principal opinion in that case, that the principle therein enunciated was in terms expressed to be "subject to . . the defence of insanity and subject also to any statutory exception"

(at 481). In any event, it is respectfully submitted that by virtue of sections 103 and 105 read with sections 2, 3 and 4 of the Evidence Ordinance 1950 the law of Malaya as to the nature and weight of the onus where the defence calls in aid a general or special exception or proviso, differs materially from the English law as laid down in Woolmington's case.

16. Another ground upon which the Federal Court based their decision was that under section 105 there is an equally mandatory presumption "but again so far as we are aware, the burden on the defence is discharged, for instance in the case of any of the five special exceptions raised to the offence of murder (see section 300 of the Penal Code), by evidence sufficient to the degree only of showing that the explanation may reasonably and probably be true." p.57, ll. 8 - 15

It is respectfully submitted that in cases falling within section 105 the burden of proving that the case of the accused comes within the exception is, just as in the instant case, to be construed as meaning that the accused must "prove" this in the sense in which "prove" is defined in section 3 of the Evidence Ordinance 1950. In Ceylon, where the material provisions of the Evidence Ordinance are in substance the same as in Malaya, it has been authoritatively so held in the case of The King v. James Chandrasekera (44 N.L.R. 97), which was a majority decision (by 6 to 1) of a Full Bench of the Court of Criminal Appeal. The contention of the Appellant in that case that the burden of proof resting on an accused in such a case was not a legal or persuasive burden but only an evidential burden, i.e. in the sense of the duty or necessity of introducing evidence, was there rejected. The Court held, it is submitted correctly, that the burden of proof upon the accused was a legal burden of proving the facts which established the exception and

that, there being a statutory definition of proof, the proof that had to be tendered was the proof as defined by the legislature, whose definition was not to be superseded by principles developed in English case law. Chandrasekera's case has been good law in Ceylon for nearly 30 years and has been consistently followed there ever since it was decided.

17. The Order of the Federal Court was as follows :-

p.60 ll. 3 - 10

> "THIS COURT DOTH FIND that in a prosecution under section 4 (a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act, the burden of rebutting such presumption can be said to be discharged by a defence as being reasonable and probable."

pp. 61 - 63

18. By Order dated the 28th August 1968 the Appellant was given Special Leave to Appeal on condition that he lodge an undertaking in the Privy Council Registry that whatever be the result of the Appeal no further proceedings would be pursued against the Respondent in respect of the said charge. The Appellant has duly lodged such undertaking.

19. The Appellant respectfully submits that having regard to the express terms of section 4 of the Prevention of Corruption Act 1961 and of section 3 of the Evidence Ordinance it was not sufficient for the Respondent to offer an explanation that might very well be true or that had a degree of probability, but that it was necessary for him to establish the truth of his account of the matter with the degree of certainty required by the Evidence Ordinance 1950. It is respectfully submitted that the law is as stated in the second of the two alternatives posed in the question referred to the Federal Court.

20. The Appellant respectfully submits that this Appeal should be allowed and the question

of law referred to the Federal Court answered in favour of the second alternative therein posed for the following amongst other

R E A S O N S

(1) BECAUSE the effect of section 14 of the Prevention of Corruption Act 1961 is that the legal burden of proving the absence of corruption rests on an accused.

(2) BECAUSE the nature and weight of the burden so resting upon an accused are as defined in the Evidence Ordinance 1950.

(3) BECAUSE the Evidence Ordinance 1950 is a complete code of the law relating to evidence in Malaya.

(4) BECAUSE if and where the Evidence Ordinance 1950 differs from English case law, it is the former which must prevail.

(5) BECAUSE it cannot be said that an accused has proved the absence of corruption as required by section 14 of the Prevention of Corruption Act 1961 unless he has proved that it did not exist or that its non-existence was so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition of its non-existence.

(6) BECAUSE it is for an accused to prove the existence of the facts upon which his defence under section 14 of the Prevention of Corruption Act is founded

(7) BECAUSE section 3 of the Evidence Ordinance defines what constitutes proof of the facts in which an accused in such a case relies

(8) BECAUSE Saminathan's case and Dhanvantrai's case were rightly decided and should be followed.

(9) BECAUSE Chandrasekera's case was decided for the reasons stated in the majority Judgments therein and the like reasoning applies to the present case.

DINGLE FOOT

MONTAGUE SOLOMON

No. 28 of 1968

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CASE FOR APPELLANT

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