Privy Council Appeal No. 48 of 1989

Y. Mamodeally *Appellant*

v.

The Queen *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY 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 Brandon of Oakbrook**]*

In 1983 and 1984 the appellant, a police inspector aged about 45, was acting as Public Prosecutor in the Second Division of the District Court of Port Louis in Mauritius. On 13th October 1986 he was charged before the Intermediate Court with three counts of forgery connected with his conduct in that office. The gist of each count was that he had misled the District Court by concealing from it previous convictions of the defendant concerned, with the result that such defendant received a more lenient sentence than he would otherwise have done.

On 29th October 1987 the Intermediate Court (Mr. Lam Shang Leen and Mrs. Chui Yew Cheong) convicted the appellant on all three counts and sentenced him to three years penal servitude in respect of them. It further ordered the appellant to pay 500 rupees as costs. The certificate of the convictions stated that they were under sections 107, 108, 109 and 121 of the Criminal Code.

The appellant appealed against all three convictions and sentence to the Supreme Court (Judge R. Lallah and Judge R. Proag). On 9th May 1989 that court quashed the convictions on counts 1 and 2 but affirmed the conviction on count 3, leaving the sentence unchanged. It further ordered the appellant to pay half the

prosecution's costs. The appellant now appeals to Her Majesty in Council against the judgment of the Supreme Court, both as to the affirmation of his conviction on count 3 and as to sentence. Their Lordships are accordingly not concerned with counts 1 and 2 but only with count 3.

The relevant provisions of the Criminal Code are these:-

"Section 106 - Forgery by public officer

Any functionary, or public officer, acting in the discharge of his duty, who commits a forgery -

(a) by a false signature;

(b) by the alteration of any act, date, writing or signature;

(c) by falsely stating the presence of a person; or

(d) by any writing made or interpolated in any register or other public act, after it has been completed or closed,

shall be punished by penal servitude.

Section 107 - Fraudulent alteration of public document

Any functionary, or public officer who, in drawing up a document or writing in the discharge of his duty, fraudulently alters its substance or particulars, whether by inserting any condition other than that directed or dictated by the parties, or by stating any false fact as true, or any fact as acknowledged which has not been so acknowledged, shall be punished by penal servitude.

Section 108 - Forgery by private individual of public or commercial writing

Any other person who commits a forgery in an authenticated and public writing, or in a commercial or bank writing

(a) by counterfeiting or altering any writing, date or signature, or by the use of a fictitious name;

(b) by fabricating any agreement, condition, obligation or discharge, or inserting it in any such act after it has been completed; or

(c) by adding to any clause, statement or fact which such act was intended to contain and certify or by altering such clause, fact or statement

shall be punished by penal servitude.

Section 109 - Making use of forged public writing

In every case specified in sections 106 to 108 any person who makes use of any forged document or writing knowing it to be forged shall be punished by imprisonment for a term not exceeding 10 years."

The charge against the appellant under count 3 was in these terms:-

"... that on the 6th day of October 1983 at the District Court of Port Louis (2nd Division) the said Yousouf Mamodeally did wilfully, unlawfully and fraudulently make use of a forged public writing, the said forgery having been committed by altering the facts which the said writing, to wit: a certificate of previous conviction from Port Louis District Court (2nd Division) was supposed to contain and certify, to wit: by omitting a number of previous convictions for drug offences of accused party Abdool Rashid Khoyratty."

As appears from the way in which this count was framed it was intended to charge the appellant with an offence under section 109 read together with section 108(c).

The facts proved by the prosecution in support of count 3 were these. On 6th October 1983 the appellant acted as prosecutor in the case of The Queen v. Abdool Rashid Khoyratty at the District Court of Port Louis (2nd Division) in which the accused was charged with two offences under the Dangerous Drugs Act. Among the documents contained in the appellant's file was a Police Form 19 relating to the accused, Khoyratty. That document showed that Khoyratty had had eight previous convictions. Of these six were for offences of dishonesty or violence: one in the Intermediate Court, one in the Port Louis District Court (1st Division) and four in the Port Louis District Court (2nd Division). In addition he had two previous convictions for drug-related offences: both in the Port Louis District Court (1st Division), one for possession of gandia and the other for possession of opium. It follows that, if Khoyratty was convicted of the two drug-related offences for which the appellant was prosecuting him, and it became necessary for the appellant to prove all Khoyratty's previous convictions, the appellant would need to produce to the court certificates of conviction from two different courts: the Intermediate Court and the Port Louis District Court assuming that, as their Lordships were informed, the records of the two Divisions of the latter court are combined. Khoyratty pleaded guilty to the two charges of drug-related offences brought against him, after which the appellant produced to the court a certificate in which only one previous conviction of Khoyratty was recorded, that being in respect of a single offence which was not drug-related. Having seen this certificate the

Magistrate concluded that the conviction to which it referred was Khoyratty's only previous conviction and imposed only a fine for the two drug offences to which he had pleaded guilty.

The appellant elected to give no evidence at his trial. In that situation it was readily to be inferred that the appellant, knowing of Khoyratty's eight previous convictions from the Police Form 19 on his file, had deliberately misled the court into believing that Khoyratty had had only one previous conviction as recorded in the certificate which the appellant had produced, and neither the District Court nor the Supreme Court had any hesitation in drawing that inference.

There is one more fact to which it is necessary to refer. The certificate of conviction which the appellant had produced was duly placed on the court file of Khoyratty's case. Later, however, the court file was interfered with and the certificate removed. The evidence did not establish when, how or by whom this removal was effected. No copy of the certificate was available.

The main ground of appeal relied on by counsel for the appellant before their Lordships was that, on the facts proved, the appellant had not committed any offence under section 109 of the Criminal Code. This ground of appeal, fundamental as it obviously is, does not appear to have been relied on to any great extent before the Supreme Court, which, while dealing with and rejecting a number of other grounds of appeal, did not refer to it expressly in its judgment. The ground was, however, included in the appellant's notice of appeal to the Supreme Court, and the Solicitor-General of Mauritius, who appeared for the Crown on this appeal, did not object to its being relied on before their Lordships.

The Supreme Court took the view that the certificate which the appellant produced to the District Court was a forgery in that it recorded only one previous conviction of Khoyratty and omitted all his other convictions, including in particular the two in respect of drug-related offences; that the certificate was therefore a forged public document; and that the appellant had made use of it knowing it to be forged. On this basis the Supreme Court held that the appellant had been properly convicted on count 3 under section 109 of the Criminal Code.

With great respect to the judges of the Supreme Court, their Lordships are unable to agree with this conclusion. In order to establish against an accused an offence under section 109 of the Criminal Code the prosecution must prove three things. First, that the accused used a public document; secondly, that that

document was forged in one or other of the ways described in sections 106, 107 and 108 of the Criminal Code; and, thirdly, that the accused, when using it, knew it to be so forged.

For the reason given earlier neither the certificate of conviction produced to the District Court by the appellant nor a copy of it could be put in evidence. Secondary oral evidence of its contents was therefore admissible and according to that evidence it was an ordinary certificate recording one previous conviction of Khoyratty in respect of an offence which was not drug-related. There was no evidence to show either (1) from which court the certificate emanated, or (2) that it had ever been altered in any of the ways described in sections 106, 107 or 108, or (3) that it falsely stated the presence of a person as mentioned in section 106(c), or (4) that it stated any false fact as true, or any fact as acknowledged which had not been so acknowledged, as mentioned in section 107. So far as the evidence went it was entirely possible that the certificate came from the Intermediate Court and related to Khoyratty's single conviction by that court of an offence which was not drug-related. In these circumstances their Lordships are of the opinion that the facts proved before the District Court were not sufficient to establish that the certificate was forged, and accordingly not sufficient to establish that the appellant, by making use of it with knowledge of all Khoyratty's other previous convictions, committed any offence under section 109.

There can, of course, be no doubt that the appellant deliberately misled the District Court by producing the certificate to it and indicating, expressly or by clear implication, that it contained a complete record of Khoyratty's previous convictions. Such conduct on the appellant's part was highly reprehensible but it did not by itself bring the case within section 109.

In approaching this appeal their Lordships have necessarily had regard to the established practice of the Board in criminal cases in relation to both applications for special leave to appeal and to substantive appeals, such as the present one, brought as of right under section 70A of the Courts Act of Mauritius as originally enacted and as still in operation when the appeal was instituted. It is to be noted, however, that section 70A as originally enacted has since been repealed and replaced by a different provision by section 3 of the Judicial Provisions Act 1990 which came into operation on 1st August 1990. The practice referred to is that the Board does not sit as a Court of Criminal Appeal, and that it will therefore only grant special leave to appeal, or entertain and adjudicate upon a substantive appeal brought as of right, in exceptional circumstances. The necessary exceptional circumstances have been said to exist in cases where some clear departure from the

requirements of justice has taken place, or in which, by reason of a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done, *Ibrahim v. The King* [1914] A.C. 599 per Lord Sumner at pages 614-615. The necessary exceptional circumstances have also been said to exist where there is something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to direct the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future, *Badry v. Director of Public Prosecutions* [1983] 2 A.C. 297 per Lord Hailsham of St. Marylebone at pages 302-303. In their Lordships' opinion, where an accused is charged with a serious offence, such as making use of a forged document during the discharge of his functions as a Public Prosecutor, his conviction on proved facts which are insufficient, as a matter of law, to establish the charge, does have the consequence that substantial and grave injustice has been done. Their Lordships are further of the opinion that a conviction which, as in the present case, involves an erroneous interpretation or application of a series of connected sections of a Criminal Code relating to the serious offences of a functionary or public officer forging documents or using forged documents, is something which tends to direct the due and orderly administration of the law into a new course, and which may be drawn into an evil precedent in future. Their Lordships are therefore satisfied that, in entertaining and adjudicating on the present appeal, they are not departing from the established practice to which they have referred.

For the reasons given earlier their Lordships will humbly advise Her Majesty that the appeal should be allowed, the appellant's conviction on count 3 quashed and the orders as to costs made against the appellant by the District Court and the Supreme Court discharged. There will be no order as to the costs of this appeal.