CHANDRA SHEKAR (s/o SHIU SUNDAR of SUVA) and Another v STATE (AAU0056 of 2004)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, HENRY and MCPHERSON JJA

8, 15 July 2005

Criminal law — offences — standard of proof — corrupt practice — commission for award of council contracts to company — whether charges of corrupt practice defective — whether burden of proof shifted — whether judge has discretion to order retrial — Court of Appeal Act s 22(1), 22(3) — Criminal Procedure Code ss 119, 242, 319, 342 — Penal Code ss 376, 378.

This case was an appeal by the first Appellant (A1), the Director of the National Safety Council, and by the second Appellant (A2), the Marketing Manager of the Above Graphic Ltd (the company). The council used the company for their design works and printing. A1 was charged with three counts of corruptly accepting a commission and A2 was charged with three counts of corruptly giving a commission for the award of the council contracts to the company. Both of the Appellants pleaded not guilty but were convicted and sentenced to 6 months' imprisonment in each case.

The Appellants appealed to the High Court against the conviction on nine grounds but were allowed appeal on five grounds. The High Court also ordered that the case be retried by another magistrate. They now appeal the decision of the magistrate on three grounds: (1) that the charges were defective; (2) that the burden of proof shifted to the Appellants; and (3) that it was within the judge's discretion to order a retrial.

Held — (1) The Appellants had no doubt as to the nature of the allegations being charged. The nature of the allegations being charged was clear. While the particulars should be as informative as was reasonably practicable, it was not necessary to slavishly follow s 376 of the Penal Code. Moreover, the inclusion of the word "corruptly" in the particulars of the offence made the nature and effect of the allegation abundantly clear. It was counsel's responsibility to ensure the charge was correct, as per s 242 of the Criminal Procedure Code.

(2) The effect of a direction to a jury must be taken from the summing up as a whole. It was necessary to look at the whole judgment to ascertain the direction on the burden and standard of proof. Section 378 of the Penal Code shifts the burden of proof to the Accused once it was proved that money was paid. The Accused then bears the burden of proving that it was not paid corruptly. The defence of both the Appellants was that no money had been paid and so it would have been inconsistent if they had tried to prove that it was not a corrupt payment. The magistrate was correct once he found that the money had been proved to have been paid.

(3) Section 319 of the Criminal Procedure Code gives the High Court the power to return a case to the Magistrates Court with a direction that it be retried. The case involved a matter of public concern and was one in which the Appellants stand to lose a great deal if convicted. The judge has discretion to order a retrial following so many errors.

Appeal granted in part.

Case referred to

Director of Public Prosecutions v Solomone Tui [1975] 21 FLR 4, considered.

S. D. Sahu Khan and *M. Raza* for the Appellants

J. Naigailevu for the Respondent

[1] Ward P, Henry and McPherson JJA. The Appellants were tried together on charges of corrupt practice, contrary to s 376 of the Penal Code. The first Appellant (A1) was the Director of the National Road Safety Council and the

second Appellant (A2) was the Marketing Manager of Above Graphic Ltd. The council used the company for their design works and printing.

[2] The A1 was charged with three counts of corruptly accepting, and the A2 with three counts of corruptly giving a commission for the award of council contracts to the company, contrary to paras (a) and (b) of the section respectively. They both pleaded not guilty, were convicted and sentenced to a total term of 6 months' imprisonment in each case.

[3] They appealed to the High Court against conviction on nine grounds. In a judgment dated 3 September 2004, Winter J allowed the appeal in respect of both Appellants on five grounds and ordered that the case be retried by another magistrate.

[4] They now appeal that decision on three grounds:

1. That the learned appellate judge erred in law in not holding that the charges in counts 1 to 6 inclusive as framed did not disclose any offence known to law and/or the charges were defective in substance and form;
2. That the learned appellate judge erred in law in not holding that the learned trial magistrate did not adequately and/or properly direct himself and/or misdirected himself on the issue of standard and onus of proof; and
3. That the learned appellate judge erred in law in ordering a retrial against both the appellants.

[5] The first two grounds repeat two of the grounds rejected by Winter J.

Ground 1

[6] At the trial in the Magistrates Court, the Appellants were represented by counsel but no challenge was raised to the suggested defects in the charges. In face of that, the Respondent suggests that the terms of s 342 of the Criminal Procedure Code were a bar to the ground being raised in the High Court and they are also a bar in this court:

> 342. No finding, sentence or order passed by a magistrates' court of competent jurisdiction shall be reserved or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, unless if be found that such objection was raised before the magistrates' court whose decision is appealed from, nor unless it be found that, notwithstanding it was shown to the magistrates' court that by such variance the appellant had been deceived or misled, such magistrates' court refused to adjourn the hearing of the case to a future day:
>
> Provided that if the appellant was not at the hearing before the magistrates' court represented by a legal practitioner, the High Court may allow any such objection.

[7] Counsel for the Appellants cited the case of *Director of Pubic Prosecutions v Solomone Tui* [1975] 21 FLR 4 (*Tui's case*) in which Grant CJ considered the authorities and the similarly worded provision in s 100 of the English Magistrates Courts Act 1952 and accepted that:

> Despite its apparent scope, it has been held that the provisions of this section cannot validate a fundamental error going to the root of the matter; such as the failure to include in the charge a necessary ingredient of the offence in question, duplicity of a charge, want of jurisdiction, or a charge which discloses no offence known to law.

[8] We accept that is correct and counsel for the Appellants asked this court to find that these charges failed to include essential elements of the offences under s 376 to the extent that they did not disclose any offence known to law or were defective in substance and form.

[9] The particulars of offence in the charges under para (a) were similar apart from the sum involved and, after identifying the Accused and the date of offence, continued:

> … being an agent by virtue of his employment with the National Road Safety Council, a public body, corruptly obtained the sum of $500 as commission for awarding the National Road Safety Council printing contracts to the said (sic) Above Graphics Limited

[10] The equivalent portion of the particulars to the offences under para (b) stated:

> … corruptly gave the sum of $500 as commission to Chandar Shekar being a person employed in the National Road Safety Council for awarding printing contracts of the National Road Safety Council to Above Graphics Limited.

[11] It is necessary to set out the terms of s 376 so far as relevant to this case:

> If—
>
> (a) any agent corruptly accepts or obtains … from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing … or for having done … any act in relation to his principal's affairs or business …; or
>
> (b) any person corruptly gives … any gift or consideration to any agent as an inducement or reward for doing … or for having done … any act in relation to his principal's affairs or business …;
>
> he is guilty of a misdemeanour …

[12] The Appellants contend that the omission in the particulars of the offence under para (a) of any reference to the name of the person from whom he received the money, whether the payment was for himself or another person and whether it was made as an inducement or reward are fatal defects and, on the authority of *Tui's case*, mean that no offence has been disclosed.

[13] Similarly in the para (b) charges, the omission of the element that it was given to an agent and that it was as an inducement or reward has the same effect.

[14] We cannot accept that those omissions were such as to render the charges defective. The purpose of the charge is to ensure that the Accused person knows the offence with which he is being charged. While the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the section in the Act.

[15] Section 119 of the Criminal Procedure Code requires that:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

[16] We are satisfied that the Appellants had no doubt as the nature of the allegations being charged. Our only difference with the learned appellate judge's carefully worded decision on this ground was his comment, answering the Appellants' suggestion that the phrase "as commission for awarding" did not adequately replace the terms "inducement" or "reward":

> In a technical sense "receiving a commission" for awarding a contract may have a completely different substantive meaning to receiving a sum of money as an inducement or reward for awarding a contract.

[17] The sentence, as it stands, is correct but it overlooks the fact that the phrase should, in the context of these charges, have been "corruptly receiving a commission … ". The inclusion of the word "corruptly" in the particulars of offence make the nature and effect of the allegation abundantly clear.

[18] It is and has long been counsel's responsibility to ensure the charge is correct. In this case, the prosecution could and should undoubtedly have worded the charges better. Equally, it is defence counsel's duty to ensure that his client understands the nature of the charge before he enters a plea. If the charge does not give sufficient or clear information, an application should be made to the court for correction. The court's duty, if amendment is permitted, is to allow the defence time to deal with the changes. Section 242 makes that clear.

[19] That section is based firmly on the duty of counsel to which we have referred. The proviso gives a strictly limited discretion to the appellate judge to consider alleged defects in the charge in cases where the Accused did not have the advantage of counsel's advice in the trial. It does not affect the position where the Appellant was legally represented in the Magistrates Court as was the case here.

[20] *Tui's case* was one in which the Appellant had not been represented. The decision was that the defects in that case were fundamental and could not be cured. It does not state any novel proposition of law but simply states the basic rule. In the present case, while the charge should have been better worded, there was no fundamental fault with the wording and the charge was not defective.

[21] If counsel at the trial had felt the charges were not clear, he should have raised the matter at that time. He did not and he is precluded by s 242 from raising it on appeal.

[22] The first ground fails.

Ground 2

It has been stated many times that the effect of a direction to a jury must be taken from the summing up as a whole. The same applies to the direction a magistrate gives himself in a summary trial. In this case, it is necessary to look at the whole judgment to ascertain the direction on the burden and standard of proof. There is certainly some substance in the Appellants' suggestion that the magistrate might have made it clearer.

[23] After dealing with the prosecution evidence, he said:

> To begin with I must warn myself that this is a criminal case in which the prosecution needs to prove all the elements of the offences with which the two accused have been charged with. If prosecution fails to prove one element both the accused are liable to be acquitted.

[24] The absence of any reference to the standard of proof was remedied later when he found:

> Therefore, in view of the above I am satisfied that the prosecution has proved beyond reasonable doubt that Chandar Shekar has received payment as agent from Bimal Shankar.
>
> Accordingly, the burden as laid down in section 378 of the Penal Code shifts to the two accused persons to prove to the court that taking and giving of the money in the case was not corrupt.

> I am satisfied beyond reasonable doubt that the 1st accused did receive the money from 2nd accused on the basis of PW1's evidence supported by the documentary evidence Exhibits 1 to 10 and that of prosecution witnesses 2,3,4,6 and 7 and accused 1 himself has not proved to me that he didn't take the money and accused 2 that he didn't give the money. In fact, accused 1 denied taking the money at all and accused 2 giving any money. (our underlining)

[25] It would have been very much better if the magistrate had dealt with the burden and standard of proof at the same time but the passages above satisfy us that he had both well in mind.

[26] However, the underlined words in the above passage cause us more concern. It is a reference to the negative averment in s 378:

> 378. Where in any proceedings against any person for an offence under this Chapter it is proved that any money … has been paid or given to … a person in the employment of … a … public body … by or from a person … holding or seeking to obtain a contract from the … public body … the money shall be deemed to have been paid … corruptly as such inducement or reward as is mentioned in this Chapter, unless the contrary is proved.

[27] The magistrate prefaced his reference to that section with the words:

> In my view the most significant feature of offences under Chapter XL of the Penal Code is the shift of the burden of proof under section 378.

[28] He returned to it later in the paragraph immediately preceding the underlined section above and correctly directed himself on the effect of s 378.

[29] It is clear that the terms of s 378 shift the burden of proof to the Accused once it is proved that money was paid. The Accused then bears the burden of proving that it was not paid corruptly. The defence of both Accused was that no money had been paid and so it would have been inconsistent if they had tried that to prove that it was not a corrupt payment. However, the magistrate was correct to deal with this aspect of the case once he found the money had been proved to have been paid. Unfortunately, in the underlined passage, he does not place the burden on the Appellants to prove the money was not paid corruptly but that it was not paid. In that he clearly erred.

[30] Winter J dealt with this aspect of the appeal in this way:

> That aspect of the trial gained particular significance it was said because the appellants' prime defence was a total denial of either receiving or giving the money. Counsel were concerned that the correct burden of proof had not been placed on the prosecution particularly by reference to this phrase:
>
> … Accused 1 himself has not proved to me that he didn't take the money and accused 2 that he didn't give the money.
>
> That passage while creating this impression, was with respect, lifted by appellants' counsel out of a lengthy judgment and decision. Isolated consideration of such extracts is often misleading. These individual passages need to be read in the full context of an entire judgment.

[31] He then sets out the passages quoted above and continues:

> Words and phrases in a judgment on evidence are the only indication of a judicial officer's thought process. It is important that the words and phrases we use are accurate. However, individual words and collections of phrases need to be read in context.

[32] He rejected this ground.

> With respect, he appears to have missed the point being raised by counsel for the appellants and fallen into the same error as the magistrate by failing to see that the burden which was placed on the accused by the magistrate was to prove the wrong point.

[33] The learned judge should have allowed the appeal on this ground also and we do so.

Ground 3

Section 319 of the Criminal Procedure Code gives the High Court the power to return a case to the Magistrates Court with a direction that it be retried. Section 22(3) of the Court of Appeal Act gives this court a similar power.

[34] Winter J concluded his judgment:

> Appellants' counsel argued that for 3 reasons I should not order a retrial in this matter. They said:
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> — it would allow the prosecution to get a 'second bite of the cherry and improve their case'.
>
> — It will be against the interest of justice including the interest of the accused to have the matter continually hanging over them.
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> — There is a risk that evidence of the accomplice would be polished in the intervening period.
>
> I find none of these reasons motivate me to avoid ordering a retrial.

[35] In order to reach that decision, he had considered the evidence in the lower court and the submissions on that by counsel. Counsel for the Appellant in this court sought to raise the same issues and to bring the various evidential aspects of his submissions before the court.

[36] We did not allow him to do so. Section 22(1) of the Court of Appeal Act provides:

> 23.(1) Any party to an appeal from a magistrate's court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only …

[37] The question of law in a challenge to an order for retrial is whether the appellate judge had a right to make such an order and whether he did so on proper grounds. If this court accedes to the Appellants' request to review the evidence called before the magistrates' court, we would have to consider the weight and effect of that evidence. That is effectively an appeal on a point of fact and law and the section does not allow such an appeal.

[38] There is nothing on the record and counsel could not point to anything other than the evidence adduced at the Magistrates Court upon which it could be demonstrated that the judge had exercised his discretion to order a retrial wrongly.

[39] An appellate court is always hesitant to interfere with a judge's exercise of his discretion unless there is a clear basis for saying that he did so on wrong grounds. The Appellants have not demonstrated any such ground. On the contrary, it is clear that there is evidence to support these charges. The magistrate misdirected himself on a number of issues and it is a proper order that it be tried afresh before another magistrate.

[40] Counsel has suggested that, as we have now allowed a further ground of appeal, that in itself is a reason for rescinding the order for a retrial. We disagree. This case involves a matter of public concern and is one in which the Appellants stand to lose a great deal if convicted. Following so many errors, it is important that they should have their case properly tried and the order for a retrial is the appropriate way to achieve that.

[41] This ground of appeal fails.

Order

(1) Appeal allowed on ground 2 but dismissed on grounds 1 and 3.
(2) Case to be returned to the Magistrates Court to be tried by a different magistrate.
(3) We understand that the Appellants are on bail and we order that it be extended on the same terms to the next appropriate sitting of the Magistrates Court.

Appeal granted in part.