Barbe v Republic

(2010) SLR 455

Nichol GABRIEL for the appellant
Hemanth KUMAR for the respondent

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Fernando JJ

This is an appeal against conviction for importation into Seychelles of a controlled drug, namely, 402.4 grams of heroin (diamorphine) on 7April 2008. According to the particulars of the offence, Kevin Barbe on 7April 2008 imported into Seychelles a controlled drug, namely, 402.4 grams of heroin (diamorphine). A sentence of 11 years' imprisonment, which the appellant is currently serving, was imposed by the trial Judge.

In the original indictment filed before the Supreme Court the appellant was, in addition to a charge of importation, charged together with Jean-Paul Bacco for conspiracy to import into Seychelles a controlled drug, 402.4 grams of heroin (diamorphine). Jean-Paul Bacco was also charged as co-accused under a separate count for aiding and abetting the appellant to import the said drug into Seychelles. We learn at pages 4 and 7 of the appeal brief that the charges against Jean-Paul Bacco had been withdrawn leaving only one charge against a sole accused, the appellant, that of importation. We have not found any formal application for leave to withdraw the charges against Jean-Paul Bacco. More about this later.

This appeal essentially concerns circumstantial evidence, ie the circumstances and conditions required for such evidence to uphold a verdict of guilt. The courts have always been very strict to ensure that no injustice is done to the accused; however, in cases where it is the accused, himself/herself who "wastes" his/her chances, he/she has no one but himself/herself to blame.

We have a number of judgments of our Supreme Court which clarify the issues in hand. For instance, in his judgment in *Onezimev Republic* (1978) SLR 140,Sauzier J rehearses salient aspects of the law, with which we fully concur.

In that case:

> The appellant was convicted in the Magistrates' Court on three counts charging dangerous driving and relating to three distinct offences, alleged to have been committed at three different times on the same night. The evidence in respect of counts I and 2 was merely circumstantial.
>
> HELD

(1) Before a conviction can be based on circumstantial evidence, the trial

> Court must direct itself that the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Before drawing the inference of guilt from the circumstantial evidence, the trial Court should also ensure that there are no other circumstances "weakening or destroying" the inference of guilt.

(2) The statement given by the appellant to the Police and produced at his trial was a self-serving statement in which he alleged that the car was not being driven by him at the first two incidents. Such statement was not evidence that the accused was not the driver, but was a circumstance capable of "weakening or destroying" the inference of his guilt.

(3) The Magistrate had failed to direct himself properly on these issues, and the convictions on the first two counts were quashed, the conviction on the third count being upheld.

The case against the appellant was heard by the Supreme Court (Burhan J) and several witnesses testified on behalf of the prosecution, namely, Dr Abdul Jakaria, Government Analyst, Inspector Wesley Frangois, Principal Trades Tax Officer, Mr Patrick Didon, Trades Tax Officer, Damien Frangoise and Police Constable, Malvina. The trial Judge ruled that the accused had a case to answer but the latter chose to remain silent, exercising his constitutional right in article 18(3) of the Constitution. The Judge warned himself, as required, that no adverse inference should be drawn from the exercise of his right to silence. He found the accused guilty as charged and explained his decision as follows:

> Having considered the entirety of the circumstantial evidence by the prosecution this court is satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused.
>
> This court is also satisfied ... ... that there are no other co-existing circumstances which weaken or destroy the inference of guilt.
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> However, the court in coming to its final conclusion must determine how far the prosecution case has been weakened by cross examination. It appears in this case as mentioned above that several vital pieces of circumstantial evidence led by the prosecution have gone uncontested and it appears that the defence set up implied by cross examination is a mere suggestion by the defence counsel that the parcel was never sent to Bacco by Kevin Barbe (vide page 12 of the proceedings of 13 March 2009, 1.45 PM). Considering the circumstantial evidence led by the prosecution in the context of self preservation, specially when he chose to remain silent, the evidence led by the prosecution should have been challenged in an attempt to weaken the case for the prosecution rather than to allow these pieces of evidence to slip in uncontested.(Judgment at page 118)

Although the evidence of the prosecution witnesses was subject to cross-examination, no material inconsistencies were forthcoming in respect thereof. Surprisingly, such pieces of prosecution evidence which, if contested, would have "damaged or destroyed" the relevant circumstantial evidence, were not contested by the advocate for the appellant at the time the witnesses testified or during cross-examination. The advocate for the appellant intimated that this was part of the defence strategy ... We will leave it at that.

We are satisfied that the trial Judge did direct himself as required by law and set out in paragraph [4] (1) above. He did ascertain that there were no other circumstances "weakening or destroying" the inference of guilt. At page 7 of his judgment, he records that he did scrutinize the evidence of all prosecution witnesses, including the evidence of Dr A Jakaria and his report marked P2:

> Having thus carefully analysed the evidence, it is clear that the prosecution has based its case on circumstantial evidence. The evidence that a carton box arrived from Thailand to Seychelles given by witness Kevin Didon is corroborated by the evidence of three prosecution witnesses, namely, Inspector Francoise, Aaron Zialor and Maurice Gonthier. ... ... As such this Court is satisfied that these pieces of evidence could be safely accepted by the Court.

We have no valid and cogent reason to differ.

In the *Onezime* case, Judge Sauzier found that the statement to the police did "destroy" the inference for the reason that "The Magistrate had failed to direct himself properly on these issues, and the conviction on the first two counts was quashed, the conviction on the third count was upheld".

But Kevin Barbe was dissatisfied with and aggrieved by the judgment. He submitted this, his present appeal, against conviction on four grounds:

1. The decision of the trial judge to convict the appellant for importation of a controlled drug is unsafe and one which cannot be supported by the evidence.

2. The learned judge erred in holding that the Government analyst Dr Dackaria did display the contents of the two packets in open court as he should have normally done during the course of the trial.

3. The learned judge erred in inferring the mens rea of the appellant based on insufficient pieces of circumstantial evidence that had been challenged by the appellant especially conflicting evidence given by the prosecution witnesses.

4. The learned judge failed to take into account the fact that a key witness in the case, who was the consignor of the parcel seized by Customs at the Airport, failed to give evidence in the trial.

As regards the skeletal heads of argument, hereinafter the arguments, they are regulated in rule 24(1) (a) to (k), Seychelles Court of Appeal Rules 2005, ie fourteen sub-rules. The notice of appeal and the arguments from the two parties were lodged within the times fixed in the Court of Appeal Rules. The arguments of the appellant are dated 26 July 2010 and those of the respondent dated 2 August 2010.

The appellant's argument

The appellant considers Ground 1 together with Ground 4. We believe that it would be more appropriate to consider Ground 1 together with Ground 3. Be that as it may, Ground 1, as formulated, is of a general nature and cannot stand on its own. It has to be substantiated by at least one specific and material point, pertaining to law or fact, recorded in the proceedings and alleged to be erroneous. In any event, the arguments for the appellant appear to create even more confusion...

As regards Ground 4, the appellant complains that he has been denied the opportunity to benefit from the evidence of the key witness who failed to give evidence in the trial. The attorney should bear in mind that the prosecution conducts its cases independently and has no obligation to consult the accused or his advocate. However, in cases where the prosecution has provided the defence with a "docket" containing, inter alia,a list of its witnesses to be called, and it subsequently decides that the testimony of that particular witness will not be required, there arises an obligation to make that witness available to defence for questioning. This does not arise in the instant case and we find no merit in Grounds 1 and 4, jointly or individually.

In Ground 2, the appellant alleges that DrJackaria failed to produce the two packets of the controlled substance according to the correct procedure. We have read carefully the account relevant to the production of two white envelopes containing the control substance. We consider that in the circumstances of this case in the procedure whereby the said exhibits were produced in a manner which has not adversely affected the appellant's case, no injustice was done to the appellant.

At page 7 of his judgment, the trial Judge states:

> Having thus carefully analysed the evidence it is clear that the prosecution has based its case on circumstantial evidence. The evidence that a carton box arrived fromThailand to Seychelles given by witness Kevin Didon is corroborated by the evidence of three prosecution witnesses namely Inspector Françoise, Aaron Zialor and Maurice Gonthier. ... ... this court is satisfied that these pieces of evidence could be safely accepted by court.

In any event, the advocate for the appellant has not identified the alleged resulting prejudice suffered. We find no merit in Ground 2.

In Ground3, the appellant complains that inconsistencies in the prosecution witnesses' evidence were sufficient to "weaken or destroy" the inference of guilt. The trial Judge did consider the alleged inconsistencies and found that none were

material enough to be fatal. We quote from the judgment:

> Although the evidence of these witnesses were subject to cross-examination by the accused counsel no inconsistencies were forthcoming in respect of these vital pieces of evidence. This court is satisfied beyond reasonable doubt that the prosecution has established the chain of evidence from the time the heroin was detected, analysed and subsequently produced and identified in open court.(Judgment, page 8)

The appellant has not substantiated his allegations and the trial Judge found accordingly. We find no merit in Ground 3.

The respondent's argument

Indeed, at the hearing, the respondent's advocate, H Kumar, submitted arguments on behalf of the Attorney-General's Office. They do not help to clear the confusion. Whereas there are four grounds of appeal, he refers to only three. Moreover, he totally ignores guidelines to the effect that the "heads of argument shall not contain lengthy quotations from the record or authorities" and "reference to authorities and the record shall not be general but to specific pages and paragraphs".Please see our reference, rule 24 Seychelles Court of Appeal Rules 2005 in paragraph [10] *ulto.* Ground 1 is spread over one and half pages of platitudes amounting to what appears to be an attempt to rehash the facts of the case. We do not comprehend the arguments pertaining to Grounds 2 and 3. They consist of one and a half identical lines *(mutatis mutandis),* namely: "The Issue raised by the appellant herein clearly addressed by the leaned Trial Judge by (sic) his judgment page on (sic) 119 & 120."For these reasons, we find no merit whatsoever in the arguments submitted by the respondent.

We must be very cautious before disturbing a finding of the trial Judge who has had the opportunity to observe the comportment and hear the evidence of witnesses. We prefer to follow the wisdom of "angels who fear to tread where devils dare without hesitation!" In this regard, we are comforted by the judgment of the House of Lords in *Benmaxv Austin Motor Co Ltd* [1955] 1 All ER 326. We quote excerpts from pronouncements and findings of two eminent Law Lords:

(i) ViscountCave:

> The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made ... This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes

been aid, between the perception and evaluation of facts ... ... A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what is evaluation . ... For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. ...

(ii) Lord Somervell of Harrow:

> ... The advantages enjoyed by the trial judge have often been stated and are, I am sure, familiar to all appellate courts. The difficult cases are those where there are circumstances on which appellant and respondent can each rely. The judge has based his decision on the way in which witnesses give their evidence. Unless there is no dispute at all he always does this. On the other hand, there are sentences in his judgment which indicate very probably, but not certainly, that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness he has relied on, or his general conclusion. I only refer to this in order to emphasise the impossibility, in my opinion, of laying down anything in the nature of a code as to the circumstances in which an appellate court should interfere either by reversing the trial judge or ordering a new trial. I agree that the appeal should be dismissed.

By reason of the matters aforesaid, we are satisfied that the appellant has had a fair trial and the finding of guilt against him based on circumstantial evidence is justified and should not be disturbed. We therefore dismiss the appeal and confirm the sentence of 11 years imposed by the trial Judge. We make no order as to costs.

One issue which we have raised in paragraph [2] *ulto*, concerns the procedure and circumstances whereby two counts inculpating Jean-Paul Bacco as co-accused were simply dropped. We need not repeat the particulars of the charges set out with sufficient clarity in paragraph [2].

At page 7 of the record of proceedings, there is an exchange between the advocates for the parties and the Judge:

> Mr Labonte (for the Republic): My Lord, the matter is for hearing and we are ready to proceed. But we move to make amendment. Previously there were two accused, one was discharged, so count 1 and 2 fall. Only count 3 stands now.
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> Mr Gabriel (for the accused): No objection.

Court:Motion granted. Amendment effected accordingly.

Mr Labonte:May the amended charge be put to the accused.
(Charge put to the accused)

Thus, following a *viva voce* request for an amendment and not for a "withdrawal", worded as follows: "But we move to make amendment",the two charges inculpating Jean-Paul Bacco as co-accused were withdrawn and the appellant left as the sole accused charged, with importation. This is a most unorthodox procedure.

In fact, the correct procedure required that an application for leave to "withdraw" and not to "amend" be submitted by way of motion, supported by an affidavit of the facts and reasons for withdrawal. The trial Judge would then have to hear the parties and give his ruling. Such a procedure is not unknown to both advocates. In this very instant case, the advocate for the appellant did in fact submit two notices of motion in respect of applications for bail. They are dated 1 September 2008 and 24 September 2008. The appellant also filed papers in respect of two applications for leave to appeal out of time, but why two? All the papers have been admitted and marked as exhibits.

In the case of *Republic v Rose*(1977) SLR 39,

> The accused was prosecuted by the Police for an offence committed against the complainant who was however advised by the Magistrate that she should elect whether to proceed civilly of criminally because, whether the accused were convicted or acquitted of criminal office charged, she would forfeit her right to claim damages from them. The complainant thereupon agreed to withdraw the case and the accused were discharged. On revision at the instance of the State. ... The leave to withdraw the charge and the discharge of the accused were set side, and the case was remitted for trial by the Magistrates' Court.

In the judgment, it is further stated that:

> ...a complainant has no right to withdraw from the prosecution. If the public prosecutor wishes to withdraw he must seek the leave of the Court under section 65 of Cap. 45 except where he is instructed by the Attorney General so to do. This procedure does not affect the right of the Attorney General to enter a "NolleProsequi', under the provisions of section 61 of Cap. 45.

Our attention has been drawn to the decision in *Wise v R* (1974). That decision must be distinguished from that in *Republic v Rose*. The facts are different and in the latter case, it was decided that the convictions should notstand as "...there were matters where the appellants might have benefitted from professional assistance..."It could be argued that the accused had somewhat been led astray... Further, the court was being particularly vigilant to protect the appellant's interests and a re-trial was ordered before a different magistrate.

The appeal has been dismissed and the appellant is serving his sentence of

11years. This notwithstanding, we are not satisfied that justice has been done and the case shelved for good. The leaders of this country have solemnly proclaimed that we have declared "war on drugs". To ensure that the police have the means to win that war, a police task force, the NDEA, under the command of a foreign expert has been set up at great cost to society.

Sadly, this case illustrates an appallingly poor investigation and prosecution. We fail to see why the case against Jean-Paul Bacco was not further investigated. A simple investigation at Airtel would have revealed who was the owner of telephone bearing number 765664 at the material time and would have clarified whether calls were made to that number on 9 April 2008, as claimed by PW5.

Again, a comparison of the handwriting in P13, P15 and P16 would have given indications as to who made the invoice. The court cannot draw its own conclusions from a comparison of handwriting without the assistance of an expert.

Having dismissed the appeal (paragraph [18]), and bearing in mind our remarks at paragraphs 26 and 27 herein, we also consider it appropriate to invite the Attorney-General to consider:

- that the investigation in case CR SCA No 24of 2009 be resumed principally for the purpose of determining the role of Jean-Paul Bacco and/or any person, other than the appellant, in the importation of the controlled drug; that role may have been as an accomplice, aider, abettor, conspirator, etc., ... in respect of which the appellant has been found guilty;

- that any person(s), other than the appellant, whom the investigation reveals should be brought to justice, shall be inculpated and prosecuted in the Supreme Court, according to law;

- that the resumed investigation be entrusted to an investigator who was not directly involved in the initial investigation, prior tothe inculpation and trial of the appellant.

Record: Court of Appeal (Criminal No 24 of 2009)