Beeharry v Republic

(2010) SLR 470

Pesi PADIWALLA for appellant
J CHINNASAMY for respondent

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Domah, JJ

The appellant, accused in the court below, was convicted by the Supreme Court on a charge for trafficking in a controlled drug contrary to section 5 coupled with section 14(d) and 26(1)(a) of the Misuse of Drugs Act 1994 as amended by Act 14 of 1994 and punishable under section 29 and the Second Schedule of the 1994 Act. The particulars of the charge were that he had in his possession 201.6 grams of cannabis resin which gives rise to a rebuttable presumption that he was in possession of same for the purpose of trafficking.

The appellant put up 15 grounds of appeal. However, on anxious consideration, we took the view that the points raised under grounds 10, 11 and 12 should be resolved as a threshold exercise before we could proceed, if at all, to determine the rest of the grounds, should that become necessary in the light of the determination under grounds 10, 11 and 12. The controversy arises from the fact that even if the charge under which the appellant was convicted was section 14(d), paragraph (d) was not that under which he had been arraigned and along which the hearing had been conducted up until the close of the case for the prosecution and the defence. The charge read section 14(c) which refers to heroin and not section 14(d) which refers to cannabis resin.

Grounds 10, 11 and 12 are:

1. The learned Judge erred in law in amending the charge at the stage of address by the appellant and arbitrarily concluding that no harm was done to either side.

2. The learned Judge erred in law in not inviting the appellant to consider whether he wished to call further witnesses or recall witnesses in view of his arbitrary amendment.

3. The learned Judge's findings that "the amendment was therefore neither fatal to the proceedings nor prejudicial to the accused but rather in the interest of justice" is flawed in law and speculative.

The record shows that it was at the stage of the final submission that counsel for the appellant raised a point of law of defective charge: namely, that the prosecution case should there and then abort on account of the fact that the charge was laid under section 14(c) when it should have been section 14(d).

At page 438 of the brief we read:

> My Lord, more interestingly, the case should be stopped before Judgment is given. ... And on that issue alone I say, my Lord, the case must be stopped here and now.

It is in the course of his submission that the Attorney-General responded and attempted to salvage the situation. He moved for an amendment in the following terms with the ensuing objection. At page 441, we read:

> My Lord in respect of the charge not standing up ... if 14(c) appears to relate to another class of drugs and not the one in issue then we move that section be amended. -
>
> Mr Padiwalla: No this is not an address this is a motion now
>
> Mr Govinden: My Lord is entitled to do that.
>
> Mr Padiwalla: No, my Lordship, I am objecting to that, my Lord. The time for amendments is gone and finished. I mean one cannot stand up now and make an amendment now at this point in time.

What then followed is an exchange between the court and counsel on the multiple issues that arose thereby: inter alia (i) the precise text of the law applicable to the point of law raised; (ii) the power of amendment of the court; (iii) whether amendments may be made at all stages of the proceedings before judgment; (iv) if the answer was in the positive, on which terms so as not to cause prejudice to the defence. On each of those points of law, everybody seemed to have been caught unawares, including the Court. Finally, the Attorney-General commented that section 7(1) (sic) is applicable and no injustice was caused. Nothing was further heard on the matter. The matter rested there and the Attorney-General then resumed his submissions on other aspects of the case. In fact, he must have meant section 187(1) of the Criminal Procedure Code.

Everyone seems to have forgotten about both the motion which had been made and the objection which had been raised. In the normal course of things, there must have been full arguments on the points of law and facts raised, culminating in a formal ruling. However, there was neither any invitation to make submissions nor any ruling for that matter. The assumption of the Attorney-General was regarded as the final word. No opportunity was given to counsel for the appellant who had raised the objection of defective charge to obtain a ruling on the point.

Prejudice to the defendant is an important element to consider on the grant or denial of an amendment to a defective charge. The Attorney-General who was appearing for the prosecution stated that there was no prejudice caused to the appellant. Even if he may have been expressing an obvious view, the fact remained that the prejudice which the law speaks about is the prejudice to the appellant and the latter should have been heard on the subject.

The next we hear about the issue of amendment to the defective charge and section 187(1) of the Criminal Procedure Code is when the Judge states in his judgment:

> It should be observed from the outset that a wrong section of the law was cited in the charge sheet and leave to amend at the last minute under section 187(1) of the Criminal Procedure Code, Cap 54, sought and granted ...

As may be seen, the record does not show any granting of the amendment. Following the motion for amendment and the objection, there never was any proper submission by either party. Nor was there any ruling delivered.

That to us is not procedurally in order. True it is that the powers of amendment of a court are wide. But they are not absolute. Counsel for the appellant has argued before us that the exercise was arbitrary. There has been a procedural lapse. There is also an error on the face of the record when the Judge states that the amendment was granted.

On Grounds 10, 11 and 12, which we consider as the threshold grounds for the determination of the appeal, we remit the matter to the Supreme Court to give a ruling on the motion for amendment which was formally made and formally objected to. This may only be done after hearing both parties in law and on the facts.

True it is that the Judge commented that –

> That amendment was therefore neither fatal to the proceedings nor prejudicial to the accused but rather in the interest of justice.

However, he could not have so stated without a proper submission from both sides, more especially without having heard counsel for the appellant on a matter raised by him. The rule of law demands not only that we should properly trace as a court of law the actual source of our law but also demarcate the scope and limit of our power under that law; and having demarcated it we should undertake a judicious exercise of the power conferred upon us. That may only be done after hearing the parties concerned, more particularly, the party due to be adversely affected in the exercise of that power.

For the reasons given above, we remit the matter to the Judge who heard the case to hear the parties in law and on the facts and give his ruling on the motion for amendment in light of the objection raised. The outcome of this appeal will depend upon the outcome of that ruling.

Record: Court of Appeal (Civil No 28 of 2009)