

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** F. MacGregor (PCA), A.Fernando (J.A), F. Robinson (J.A)]

## **Civil Appeal SCA 12/2016**

**(Appeal from Supreme Court Decision CS 36/2013)**

**Out of Magistrates' Court Decision 38/2013**

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Germain Camille

Appellant

Versus

Pierre Morin

Respondent

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Heard: 23 August 2018

Counsel: Mr B. Georges for the Appellant

Mr J. Camille for the Respondent

Delivered: 31 August 2018

## **JUDGMENT**

F. Robinson (J.A) *The relevant procedural and factual background*

1. This is an appeal from a judgment of the Supreme Court, given in its appellate jurisdiction, in which the Appeal Judge ordered Germain Camille, the present appellant, to pay Pierre Morin, the present respondent, the sum of 305,000.00/- rupees with interest at the legal rate with effect from the date of the judgment.
2. Before the Magistrates' Court, the respondent, (the plaintiff then), claimed from the appellant, (the defendant then), the return of 280,000.00/- rupees and moral damages in the sum of 25,000.00/- rupees.
3. The respondent in his plea averred that the sum of 400,000.00/- rupees was advanced to the appellant in

two separate amounts of 200,000.00/- rupees each; and that the totality of the sums advanced would be paid back to him. The respondent also pleaded that the "loans" were partly repaid over a period from 2005, to June, 2011, in varying amounts and at different dates to the total sum of 120,000.00/- rupees, with the last payment made in June, 2011, and all payments stopping altogether after that.

4. On the claim of 400,000.00/- rupees, the appellant, in his plea, accepted that he received that sum from the respondent, in two separate amounts, but claimed that this was not as a loan but as a gift for advising and guiding the respondent on the sale of his La Digue property and as a token of appreciation for the many good deeds that the respondent had done for him.
5. The case in the Magistrates' Court turned on the question of whether the sum of 400,000.00/- rupees given by the respondent to the appellant was a loan or a gift. The trial Magistrate's assessment of the credibility of the appellant played an essential role in her judgment. The trial Magistrate analysed the evidence as follows.
6. The sum of 400,000.00/- rupees was advanced to the appellant by the respondent, but that there was never any condition to repay. This she based on her finding that the version of the appellant was the more plausible one; and on a careful consideration of the demeanour of the respondent. The following passages are to be found in the judgment —

"Now, following the above findings, did the plaintiff in or about the month of October 2003 advanced to the defendant two installments amount of S.R. 200,000./- each on the condition that the totality of each amount would be paid back to the plaintiff.

Upon analysis of the evidence as per above-stated findings, the Court finds that the answer to the first issue is that as admitted by both parties, the said sum of S.R. 400,000/- was advanced to the defendant by the plaintiff but the second limb of the first issue inter alia "on condition of repayment to the plaintiff" is in the negative for the evidence transpires otherwise as per above analysis and also noting very carefully the demeanour of the plaintiff before the court."

7. Then the trial Magistrate considered whether the evidence had proven a gift by the respondent to the

appellant of the sum of 400,000.00/- rupees? To this question the trial Magistrate considered the law in relation to gifts referring to Article 931 of the Civil Code of Seychelles Act. She found that the appellant and the respondent had accepted that the 400,000.00/- rupees had exchanged hands; and that the gift had been made by delivery (Article 931 *alinéa* 2). She noted that in view of the special relationship between the respondent and the appellant, the respondent had intended to help the appellant and had given him the money as a gift.

8. The respondent's (the appellant then) appeal to the Supreme Court covered two issues, which were considered together. First, the respondent contended that the trial Magistrate erred in fact and in law in finding that he gave 400,000.00/- rupees to the appellant (the respondent then) as a gift rather than as a loan. Secondly, it was urged before the Supreme Court that the trial Magistrate was wrong in law in her consideration of the law in relation to gifts in light of the evidence.
9. The Appeal Judge reviewed the evidence and found that the trial Magistrate could not have, on the basis of the evidence before her, come to the conclusion that the respondent had given the total sum of 400,000.00/- rupees to the appellant as a gift. In that regard the Appeal Judge concluded that the respondent had given the said sum to the appellant as a loan rather than as a gift; and that the sums paid by the appellant to the respondent were part payment of the loans.

### ***The proceedings before the Court of Appeal of Seychelles***

10. The appellant in his Memorandum of Appeal, dated 12 April, 2016, raised 6 grounds of appeal challenging the findings of the Appeal Judge. At the appeal the appellant pursued only grounds 2.1 to 2.3 of the grounds of appeal on the specification that the other grounds of appeal are covered in the submissions of Mr. Georges on his behalf.

### ***The Analysis***

11. This court has considered the grounds of appeal, the Skeleton Heads of Arguments submitted on behalf of the appellant and the respondent, respectively, and the oral submissions of both Counsel.
12. The principal issue is did the Appeal Judge have a proper basis for concluding that the trial Magistrate

had gone plainly wrong in her assessment of the evidence when she concluded that "*the claims of the plaintiff ... has not been made out on a balance of probabilities*"?

13. The following passage is found in the judgment of the Appeal Judge —

"[24] ... The Court therefore had to be very cautious when considering the evidence of the Respondent as against that of the Appellant in order to establish its veracity and reliability".

14. The Appeal Judge then considered the evidence on both sides and concluded —

"[30] In the final analysis I find and conclude that the Learned Magistrate did not address her mind fully to the facts revealed by the evidence and therefore came to the wrong conclusion that the money was a gift rather than a loan. It is obvious to this Court and for reasons stated earlier above that the total amount of SR400,000.00 was not a gift made by the Appellant to the Respondent but it was rather loans to be repaid to the Appellant by the Respondent".

15. Mr. Georges on behalf of the appellant contended that the Appeal Judge was not entitled to take this interpretation because the trial Magistrate believed the evidence of the appellant, and based her findings, as she said, on the basis of "*noting very carefully the demeanour of the plaintiff before the Court.*". The trial Magistrate said that much of the respondent's evidence — "*was not at all convincing in his claims before the Court hence why the Court does not believe his version that he lent the money as claimed to the defendant on condition of return later*".

16. We were reminded by Mr. Georges of certain well-known remarks in the Court of Appeal dealing with the role of an appellate court in an appeal against findings of facts by a trial court. *Searles v Pothin*<sup>1</sup>, which referred to the formulation of the Court of Appeal in *Akbar v The Republic*<sup>2</sup>, observed that the role of an appellate court in an appeal against findings of facts by a trial court is not to "*rehear the case. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial*

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<sup>1</sup> Civil Appeal SCA07/2014 (Judgment was delivered on 21 April, 2017)

<sup>2</sup> Criminal Appeal SCA5/1998 (Judgment was delivered on 3 December, 1998)

*judge's findings of credibility are perverse*". See also, for example, *Roy Beeharry v The Republic*<sup>3</sup>, which illustrates the same proposition. Mr. Camille contended on behalf of the respondent that the Appeal Judge had applied the test cited in the above referenced authorities and gave reasons.

17. The above referenced authorities find support in the recent decision of the Judicial Committee of the Privy Council in *Beacon Insurance Co. Ltd v Maharaj Bookstore Ltd*. [2015] 1 LRC 232, (cited by Mr. Georges), where when dealing with an appeal from Trinidad and Tobago on the principle regarding an appeal based on findings of facts it stated —

"13 More recently, in *In re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 , Lord Neuberger (at para 53) explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:

"This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it...

15 There are further grounds for appellate caution. In *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477, 2014 SC (UKSC) 12 , Lord Reed (at para 4) cited observations adopted by the majority of the Canadian *Supreme Court* in *Housen v Nikolaisen* [2002] 2 SCR 235 , para 14:

"The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged...".

18. In *Yuill v Yuill* [1945] P. 15, the Court of Appeal observed "[w]here a judge has accepted the evidence

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<sup>3</sup> Criminal Appeal SCA28/2009 (Judgment was delivered on 13 April, 2012)

*of a witness or witnesses on one side of a case on a careful consideration of his or their demeanour, and has given judgment accordingly, an appellate court can reverse the decision, but only in the rarest cases, and when it is convinced by the plainest considerations that it is justified in holding that the Judge has formed a wrong opinion" : (Hvalfangerselskapet Polaris A/S. v. Unilever, Ld. And Others (1933) 46 Ll. L. Rep. 29, was applied).*

19. In the present appeal we ought to think that the Appeal Judge had applied the test cited in the above referenced authorities before concluding that the trial Magistrate had gone plainly wrong in her assessment of the evidence. The Appeal Judge was of the opinion that the trial Magistrate had not subjected the evidence to an adequate scrutiny before expressing the views which she did in relation to the issues which she had formulated. In that regard he was satisfied that the matter had then become at large for the appellate court. The Appeal Judge referred at length to the evidence given in the present appeal and said "[29] *Moreover, if the money given by the Appellant to the Respondent was a gift no question of refund would arise. The Respondent admitted that he made certain repayments to the Appellant either by various bank transfers, foreign payments and cash. That corroborated the testimony of the Appellant that the Respondent started repaying him the loans which he reckoned to be to an amount of SR120,000.00 and he thereafter stopped. Does one refund a gift of money by instalments? I find that this is not the case, repayment by instalments are made towards money borrowed.*"
20. The Appeal Judge believed that this was a fit case for him to intervene for the reasons given above inasmuch as the trial Magistrate should have found that the money was a loan and not a gift; and that, in this respect, should have found that the sums of money paid by the appellant to the respondent were repayments of a loan.

### ***The Decision***

21. We are unable, in the circumstances, to find fault with the decision of the Appeal Judge, which we uphold. We dismiss the appeal. We make no order as to costs.

F. Robinson (J.A)

**I concur:.** .....

F. MacGregor (PCA)

**I concur:.** .....

A. Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 31 May 2018