Privy Council Appeal No. 45 of 1987

Tricanipillay Canarapen *Appellant*

v.

Jubilee Insurance Company Limited *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD LOWRY
SIR ROBIN COOKE

*[Delivered by **Lord Griffiths**]*

The appellant was the owner of a building at Avenue John Kennedy, Vacoas. The respondent insured the building and the appellant's stock in trade against fire. On 15th October 1977 at about 3.30 p.m. a fire started which destroyed the building and the stock in trade. The appellant claimed the sum of Rs.100,000 from the respondent which was the sum for which the building and the stock in trade were insured under the policy of insurance issued by the respondent.

The respondent refused to pay and so the appellant commenced an action to recover the sum of Rs.100,000 to which he claimed to be entitled under the policy. The loss was agreed between the parties at Rs.98,356.45; but the respondent disputed liability upon two grounds, first that the fire had been occasioned by the wilful act and/or with the connivance of the appellant and accordingly he was not entitled to any benefit under the policy, and second that the appellant had not commenced the action within three months of the rejection of his claim by the respondent and accordingly was not entitled to any benefit under the policy.

The judge rejected both defences and gave judgment for the appellant for the agreed sum. The Court of

 Appeal allowed the appeal of the respondent insurance

company holding that it had discharged the burden of proving that the appellant had at least connived at the setting of the fire. Having arrived at this conclusion the Court of Appeal did not consider it necessary to consider the second ground of defence based upon the alleged failure to commence proceedings timeously.

The appellant now appeals against the judgment of the Court of Appeal on the first ground of defence and the respondent does not now challenge the judge's rejection of the second ground of defence.

The appellant occupied part of the building as a furniture shop and he let part to a Mr. Coopamah as a bar restaurant on the ground floor with residential accommodation on the first floor. The respondent's case was that the appellant, in order to rid himself of Mr. Coopamah as a tenant, had instigated a young employee Idriss Gopal to burn down the building. It was not suggested that the motive was to defraud the insurance company with whom the defendant had insured all his properties for the previous fifteen to twenty years without ever having made a prior claim; nor was it disputed that the appellant, who was aged 61, was a man of previous good character.

There had been an earlier judicial enquiry into the cause of the fire conducted between 18th May 1978 and 9th May 1979 and a record of those proceedings was put in evidence at the trial. That report concluded:-

> "From the evidence adduced at the hearing, I suspect that there has been foul play - and that it was Idriss Boodhoo Gopal who set fire to the premises in question."

However, no criminal proceedings were brought against Gopal or any other person.

The evidence called before the judge was very much a re-run of the evidence called at the enquiry seven years earlier. Perhaps not wholly surprisingly there were some discrepancies in the recollections of the witnesses. The judge found the following facts:-

> "The Defendant company adduced evidence as to the circumstances in which this fire broke out and destroyed the building. From such evidence I find that the fire started and spread throughout the building at an alarming speed. It must have been what Scientific Officer Beeharry called 'an assisted fire'. I find also that the conduct of worker Idriss Gopal immediately prior to the fire was such that it can be reasonably inferred that he played an active part in setting it.
>
> The name of Idriss Gopal was mentioned on the day of the fire itself, and later, on the same day

the Plaintiff helped the police to trace him out. On the same evening he was arrested for purposes of the enquiry, by then he had had a bath, a shave and a hair cut. At the relevant time Gopal was working for the Plaintiff who had instructed him to repair the roof of the building, as such the Plaintiff had bought and had caused to be conveyed there, 100 shingles. According to the Plaintiff, Gopal had been working for him for 7 to 8 years; and, earlier, on the day of the fire, between 12.00 noon and 1 p.m., he had checked the latter's work and talked to him. According to witness Coopamah, Gopal had started working for the Plaintiff when the latter bought the building, which would be around 1966.

The plaintiff denied having done the needful for the release of Gopal from police custody, but Assistant Superintendent of Police Ramjooawan said the plaintiff had contacted him for Gopal's release.

I find also from the evidence on record that the relationship between the plaintiff and his tenant Coopamah were difficult and that the plaintiff who, at a certain stage, wanted to sell, or to erect a new building, would not have been free to do so without safeguarding the rights of his tenant.

Counsel for the Defendant submitted that upon those facts, the Court should draw inference that Gopal had set fire to the Plaintiff's building with the latter's connivance, to get rid of Mr. Coopamah's tenancy.

It may very well be that the Plaintiff wanted Mr. Coopamah to vacate his building but to go so far as to say that he gave secret approval to Gopal to set fire to his own building, with all its consequences, is a proposition which, as the evidence stands, has not been proved; nor would it be warranted on my part to draw such an inference. The second ground fails as well."

In arriving at his conclusion the judge had the advantage of seeing the appellant subjected to a long and searching cross-examination during which it was directly suggested to him that Gopal had set fire to the premises on his instructions to get rid of his tenant. This was an allegation of the utmost gravity for it involved setting fire to the building with petrol or a similar substance at a time when there were both staff and customers in the bar. There was not a shred of direct evidence to support this allegation which was based upon the supposed motive to get rid of his tenant. There had been no proceedings between the appellant and his tenant for the last seven years and the judge had the chance to evaluate the sincerity of the appellant's denial of such a motive when it was put to him in the witness box. The judge also had the

opportunity to evaluate the apparent credibility of the appellant in his denial of the charge of arson.

Despite these advantages enjoyed by the trial judge the Court of Appeal felt justified in drawing the inference of arson, that the judge refused to draw after seeing and hearing all the witnesses.

The Court of Appeal accepted the primary facts found by the judge as set out in the extract from his judgment cited above. They commented upon the fact that the judge had apparently not accepted certain parts of the appellant's evidence, namely his opinion that Gopal had not set fire to the building and that he had not instructed him to repair the roof but only to repair a water closet outside the building. The judgment then continued:-

> "In the light of the findings of fact, counsel for the appellant has urged that the learned Judge was wrong to draw the conclusion he did even on a balance of probabilities.
>
> Counsel for the respondent has argued that the standard of proof applicable to the appellant in a case of this nature where a criminal act or else complicity in a criminal act is alleged against the respondent, the standard of proof which the appellant had to discharge would have been that which applies in a criminal prosecution. And counsel prayed in aid the case of *Jeffreys v. Jeffreys* (1873) MR 36 regarding proof of adultery in divorce cases. Divorce is a matter of public order and cannot be assimilated to other civil proceedings. We agree with counsel for the appellant that the standard of proof which lay on both parties for their respective contentions always remained that applicable in civil proceedings, that is to say a standard that is based not on conclusive proof but rather on a balance of probabilities.
>
> It seems to us that, given the fact that it was the appellant which had, either by cross-examination or else by independent testimony, elicited all the facts found and which we have highlighted seriatim above and, further, given the nature of the burden of proof applicable in the proceedings, the balance of probabilities was clearly in favour of the appellant in his defence that the respondent had at least connived at the setting of the fire. It is difficult to imagine what kind of further proof the appellant could, in the circumstances, be reasonably expected to produce."

The Court of Appeal were right to reject the submission that the burden on the insurance company was the criminal standard of proof. But, nevertheless, bearing in mind the gravity of the allegation, which was arson of an occupied building, a high degree of

probability was required to discharge the civil burden of proof see *Hornal v. Neuberger Products Limited* [1957] 1 Q.B. 247 and *Watkins and Davis Limited v. Legal and General Insurance Company Limited* [1981] 1 Lloyd's Rep. 674. The Court of Appeal make no reference in their judgment to the higher degree of probability required before a court accepts so grave an allegation as proved nor do they make any reference to the advantage that a trial judge enjoys in resolving such a dispute after having seen and heard the witnesses for himself, see *Thomas v. Thomas* [1947] A.C. 484.

The Court of Appeal do not say what particular matters weighed with them in coming to a different conclusion from the judge and which justified disregarding the obvious advantage the judge enjoyed as a result of seeing and hearing the witnesses. It may perhaps be inferred that they doubted the credibility of the appellant because they commented that the judge did not accept his opinion that Gopal had not started the fire and his denial that he instructed Gopal to repair the roof. But it is a common experience in the courts that those accused of crime, even if innocent, will sometimes tell untruths in an attempt to distance themselves from the accusations. The judge heard this evidence and it was for him to decide upon its significance.

What else justifies the inference that the appellant told Gopal to set fire to the building? The fact that an employee commits an apparently motiveless act of arson on the employer's premises is manifestly insufficient to justify the inference that he did it at the request of the employer. What else can support the inference in this case - only the suggested motive to get rid of the tenant? There are a number of obvious objections to this suggested motive. Firstly the fire would not achieve the objective, for the appellant would remain under an obligation to rehouse the tenant in any reconstructed building; secondly there had been no proceedings between the tenant and the appellant for seven years; and thirdly the inherent improbability that a man of good character and mature years would resort to such a wicked act as to order his employee to set fire to an occupied building for such a motive.

The judge was fully justified in refusing to find that the insurance company had discharged the burden of establishing arson on such evidence and their Lordships are unable to perceive any ground which would entitle an appellate court to interfere with his finding. Accordingly their Lordships will humbly advise Her Majesty that this appeal should be allowed with costs in the Court of Appeal. The respondent must pay the appellant's costs before their Lordships' Board.