Privy Council Appeal No. 55 of 1992

Police *Appellant*

v.

Rajandah Coomar Kristnamah *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 8TH JUNE 1993. DELIVERED THE 12TH JULY 1993

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD BRIDGE OF HARWICH
LORD LOWRY
LORD SLYNN OF HADLEY
MR. JUSTICE GAULT

*[Delivered by **Lord Slynn of Hadley**]*

On 29th November 1990 the respondent was convicted by the Intermediate Court of Mauritius of knowingly selling 14.93 grams of gandia to Imran Noordally in breach of section 28(1)(b) and (2)(b) of the Dangerous Drugs Act 1986. It was further found that he was a drug trafficker within the meaning of section 38 of that Act.

At the trial Noordally, called for the prosecution, whilst admitting that he had bought gandia for Rs2700 denied that he had bought it from the respondent; the respondent denied selling it to him. Evidence was, however, given by one police officer that the respondent had admitted orally that Rs2700 found at his house were the proceeds of selling the gandia and by another police officer that the respondent had made two written statements after caution. In the first written statement, signed by the respondent, it was said to be admitted that the respondent had sold 47 packets of gandia to Noordally and that the proceeds of sale had been found at the respondent's house. The first statement of 180 lines was said to have been recorded between 6.50 a.m. and 7.40 a.m., a period of fifty minutes. In the second statement the respondent was said to have admitted showing the police the place where the gandia had been hidden and the place where the transaction had occurred.

At his trial the respondent denied having made the statements. He had signed them, though they were not read over to him, because he had been beaten and because threats were made to his family.

On his appeal to the Supreme Court the written statements were challenged and it was said that they were not voluntary. He was forced to sign the statements which had already been prepared. They were not corroborated by other evidence.

When counsel for the prosecution began to reply, the Court at once asked whether counsel believed that the statement of 180 lines was recorded in only fifty minutes, particularly when it took eight minutes to read the statement. Counsel conceded that it was impossible. He is recorded as saying "This goes to the root of the conviction because without the confession there is no case. It is obvious that the statement cannot be that of the accused because it is physically impossible".

Counsel was then asked by the Court to write one page of the statement and he was given a stop watch in order to record the time he took. Counsel took ten minutes to write one page. He conceded that the recording officer would have taken at least twice that time since the appellant would have had to be told of the facts alleged against him and would have had to dictate his answer.

Counsel accepted that since the prosecution case rested mainly on the first confession statement, which could not have been recorded in the time alleged, it was totally unsafe to rely on the confession.

The Court in its judgment quashing the conviction said:-

> "We fully agree with learned Counsel for the Crown whose courageous and honest stand deserves the congratulations we are pleased to place on record."

The Police, represented by the Director of Public Prosecutions, appealed with leave of the Supreme Court. At the conclusion of the hearing, their Lordships dismissed the appeal, for reasons to be given later, and ordered the appellant to pay the respondent's costs before the Board. Their Lordships' reasons for their decision now follow.

The appellant relied on a number of different grounds but essentially they turn on two matters:-

(a) Could the Court presume or take judicial notice of the length of time needed to write a statement of this length?;

(b) Was the Court entitled to "cause an experiment to be performed by Counsel for the Crown", when he was not sworn, was not an expert and could not be cross-examined?

A main issue both at the trial and on the appeal was whether the two statements (and in particular the long one) really were the statements of the accused. The credibility of the witness who said that he had recorded the statement in fifty minutes was thus in issue.

It is abundantly plain from the record of the proceedings and from the judgment that the Court simply could not believe that a statement of this length could be taken down "in a painstaking handwriting" from an accused who was giving the information and who no doubt had to be questioned, and that the statement could also be read over to him, all in fifty minutes. This is not a matter of legal presumption or judicial notice in a formal sense. It was a matter of common sense which the court was not required to abandon when deciding on credibility. It was obvious that the statement could not have been recorded in fifty minutes. That cast doubt on the validity of the whole statement as a voluntary statement of the respondent. When the Court asked counsel to time the writing of a page they were merely driving the point home. The time he took only underlined what was clear from the beginning.

The appellant has relied on the advice of their Lordships' Board in *Kessowji Issar v. The Great Indian Peninsula Railway Company* (1907) 23 T.L.R. 530 where the Board expressed its strong disapproval of the fact that the appellate court had gone to a railway station to inspect a train in order to see whether a passenger of ordinary carefulness would have had difficulty in alighting safely from the train. He also relied on *Paparo v. Joint Venture Cogefar-Spie Batignolles* (1985) MR 236 where the Court of Civil Appeal of Mauritius criticised a judge who, in his judgment, referred to an experiment which he had conducted in the absence of the parties with an exhibit, using four pieces of string, a ring and a pair of scissors.

Without in any way departing from what was said by the Board in *Kessowji Issar*, their Lordships consider that this is an entirely different case. There the court was relying on its own impression of the site rather than deciding the case exclusively, as it should have done, on the evidence adduced. In this case there was no experiment of the type criticised in *Paparo*. The court merely tested in the presence of both parties the clear conclusion as to credibility dictated by commonsense. Counsel, in saying how long it had taken him, was not giving evidence as an expert witness and there was no need to tender him for cross-examination, if indeed there is any conceivable reason why, on what happened, the respondent's counsel should have wished to cross-examine him. Members of the Court could perfectly well have tested the time needed to write a page by doing it themselves. To get counsel to do it was no more objectionable.

The appellant contends next that the concession of counsel should have been disregarded and that the Court should have looked to see whether the oral confession or other evidence was enough to justify a conviction. Their Lordships do not agree. Once it was obvious that the statement (which the appellant consistently said had not been made by him but was prepared ready for him to sign) could not have been written in the time alleged, then it was right to disregard it. It was undoubtedly the bedrock of the prosecution case. Counsel was right to concede that without the statement the conviction could not stand, indeed he had no proper alternative.

In the circumstances their Lordships agree with the conclusion of the Supreme Court that the conviction had to be set aside. In those circumstances it is unnecessary to consider the objection raised by the respondent as to the *locus standi* of the Police and as to the existence or otherwise of a right of appeal to their Lordships' Board.