STATE v GEORGE SHIU RAJ and Anor (AAU0081 of 2005S)

COURT OF APPEAL — CRIMINAL JURISDICTION

BARKER, HENRY, SCOTT JJA

7, 14 July 2006

Criminal law — criminal procedure — no case to answer — relevant and admissible evidence touching on all elements of offence — Criminal Procedure Code s 293(1).

Evidence — admissibility — witness evidence — obtaining money by false pretense — unfettered discretion to discharge an accused — intent to defraud — Court of Appeal Act s 21(2) — Crimes Act 1961 s 347 — Penal Code s 309(a).

The first Respondent (R1) was a Cabinet Minister and Minister for Multi Ethnic Affairs. The second Respondent (R2) was a travel agent and managing director and co-owner of Hunts Travel Service Ltd (Hunts). R1 took two official trips to India and he was entitled to business class air travel reservations. R1's ministry made the travel arrangements and R2's agency provided the service. R1's staff processed the government local purchase orders (LPO's) and the original and pink copy was issued to R2's agency. It made an invoice and the ministry paid. The staff that made the travel arrangements and payments was not aware that R1 traveled in economy class to India. The staff that traveled with R1 was not aware that the government had made payments for R1 to travel in business class because they did not participate in the travel arrangements process. After a government audit investigation discovered the process and queried the ministry, R1 returned the difference in the air fares.

The Respondents were jointly charged on two counts of obtaining money by false pretense. The Appellant submitted that there was no case to answer and the judge held in an oral ruling that there was no case to answer on either count and he recorded findings of not guilty in respect of the Respondents. The State appealed and the issues were whether: (1) the judge had an unfettered discretion to discharge an accused at the conclusion of the prosecution case; (2) the Respondents committed the offence; and (3) there was intent to defraud.

Held — (1) Unlike the general discretion given in some jurisdictions, for example, by s 347 of the Crimes Act 1961 (NZ), s 293(1) of the Criminal Procedure Code (CPC) imposes a duty on the trial judge to ask the question "is there evidence the accused committed to offence"? If the answer to that question was in the negative, the judge was obliged to record a finding of not guilty. If the answer was in the affirmative, the trial must proceed. Section 293(1) of the CPC does not allow for some kind of overall discretion to stop a trial.

(2) There was no evidence to establish two essential elements of the offence: namely, (1) that the alleged representation induced the payment of the cost of the business class fares; and (2) there was intent to defraud.

(3) As the judge observed throughout, R1's actions were transparent. There was evidence to the effect that there was no instruction or advice given to those concerned that what was done was not permitted, or that there had to be some form of accounting by a minister in respect of his actual expenditure of an entitlement. Furthermore, there was no evidence that this particular entitlement was at the time not seen as simply an emolument of office. It was also relevant that the government has not been put to the expenditure of more than the value of R1's entitlement for the travel.

Appeal dismissed.

Cases referred to

Sisa Kalisoqo v Reginam (unreported, Crim App 52/1984); *State v Mosese Tuisawau* (unreported, Crim App 14/1990A), cited.

D. Goundar for the Appellant

H. Nagin for the first Respondent

M. Raza for the second Respondent

Barker, Henry, Scott JJA.

Introduction

[1] The Respondents were jointly charged on two counts of obtaining money by false pretence under s 309(a) of the Penal Code. Their trial commenced in the High Court on 5 September 2005 before Winter J and assessors. Following conclusion of the prosecution case on 8 September, both Appellants through counsel submitted that there was no case to answer. On 10 September, in an oral ruling the judge held that there was no case to answer on either count and accordingly, pursuant to s 293(1) of the Criminal Procedure Code, recorded findings of not guilty in respect of both Respondents. The State now appeals under s 21(2) of the Court of Appeal Act.

Summary of evidence

[2] Counsel for the State helpfully provided the court with a summary of the evidence adduced by the prosecution, which we now adopt.

[3] At the relevant dates, the Respondent Mr Raj was a Cabinet Minister. He held the portfolio of Minister for Multi Ethnic Affairs. The Respondent Mr Pal was a travel agent. He was the Managing Director and co-owner of Hunts Travel Service Ltd, at Suva.

[4] In 2003, Mr Raj took two official trips to India on an invitation from the Indian government. In accordance with a guideline adopted by parliament in 1996, ministers travelling on official business were entitled to business class air travel reservations. The administration section of Mr Raj's ministry made the travel arrangements. After obtaining competitive quotes in accordance with the procedure, Mr Pal's agency was selected to provide the service. Reservations for the travels were made at Mr Pal's agency. The government local purchase orders (the LPO's) were processed by Mr Raj's staff and the original and a pink copy were issued to Mr Pal's agency. Mr Pal's agency then invoiced the ministry. Upon receiving the invoices, the accounts section of the ministry made payments to Mr Pal's agency. The staff that made the travel arrangements and payments were not aware that Mr Raj traveled, not in business class, but in economy class to India. The staff that traveled with Mr Raj were not aware that the government had made payments for Mr Raj to travel in business class because they did not participate in the travel arrangements process.

[5] On count one, the prosecution led evidence that a month before the travel, Mr Raj had made arrangements with Mr Maharaj (a priest) to take him to India at Mr Raj's expense. On 24 December 2002, Hunts Travel Ltd issued an itinerary for business class travel for Mr Raj, and economy class travel for Mr Raj's wife and Mr Maharaj. On 30 December 2002, a government local purchase order in a sum of $8363 was issued to Hunts Travel Ltd for a business class air ticket for Mr Raj only. On 31 December 2002, Hunts Travel Ltd invoiced the government for a business class air ticket for Mr Raj only. On the strength of this invoice, the government paid Hunts Travel Ltd. On 3 January 2003, Hunts Travel Ltd issued three economy class air tickets to Mr Raj, his wife and Mr Maharaj on Mr Pal's instruction.

[6] On count two, the prosecution led evidence that on 26 November 2003, Hunts Travel Ltd quoted $8203 for business class travel for Mr Raj but the itinerary was for economy class travel. On 23 December 2003, a government local purchase order in the sum of $8203 was issued to Hunts Travel Ltd for a business class travel air ticket for Mr Raj. On the same day, Hunts Travel Ltd invoiced the government for business class travel for Mr Raj. The government paid Hunts Travel Ltd on 23 December 2003. Hunts Travel Ltd then issued an economy class air ticket to Mr Raj. The difference in the airfare was paid to Mr Raj by way of a cheque drawn from a Hunts Travel Ltd account. Mr Raj cashed this cheque at a supermarket in Rakiraki. Hunts Travel Ltd made another invoice, the actual cost of the service for economy class travel for its own records.

[7] After a government audit investigation discovered the above process and queried the ministry, Mr Raj on 11 and 24 August 2004 respectively, returned the difference in the air fares to the government. The refund amounts were the subject of the charges.

[8] The first ground of appeal is that the judge misapplied s 293(1) of the Criminal Procedure Code. It provides:

> 293(1) — When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing, if necessary, any arguments which the barrister and solicitor for the prosecution or the defence may desire to submit, record a finding of not guilty.

[9] Mr Goundar submitted that the proper test under s 293(1) is whether there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the offence — the weight and credibility of such evidence not being matters for assessment.

[10] This approach is based on and is in conformity with the judgments of this court in *Sisa Kalisoqo v Reginam* (unreported, Crim App 52/1984) (*Sisa Kalisoqo*) and the *State v Mosese Tuisawau* (unreported, Crim App 14/1990A).

[11] We did not understand counsel for the Respondents to challenge this as being the correct approach to a s 293(1) application as a general principle, although it was submitted that if the evidence were inherently vague or incredible that would not meet the test. While there may be extreme cases where evidence could be so classed for example if it is arrant nonsense, or manifestly contrary to reason, and therefore warranting the application of s 293(1), such a qualification cannot be used to extend the enquiry into an overall assessment of reliability or credibility.

[12] Mr Goundar then submitted that the judge, in the course of his ruling, had erred in two respects in his approach. First, the judge stated that he had an "unfettered" discretion to discharge an accused at the conclusion of the prosecution case. We agree this is not strictly correct. Unlike the general discretion given in some jurisdictions, for example by s 347 of the Crimes Act 1961 in New Zealand, s 293(1) imposes a duty on the trial judge to ask the question "is there evidence the accused committed to offence?". If the answer to that question is in the negative, the judge is obliged to record a finding of not guilty. If the answer is in the affirmative, the trial must proceed. Section 293(1) does not allow for some kind of overall discretion to stop a trial.

[13] The second complaint is a reference in the ruling that the rationale for the provision as being to protect against the unsafeness of a conviction having regard to the evidence and the law. Associated with that was a further passage in which the judge asked himself if there was any credible reliable evidence that would make it safe to convict.

[14] Taken in isolation, we think these statements could be seen to confuse the s 293(1) duty with the function of an appellate court when reviewing a conviction. At that stage considerations of quality and reliability of evidence do arise, whereas under s 293(1) legal sufficiency is the test.

[15] The Respondents sought to meet these difficulties by emphasising a further passage in the ruling where the judge stated:

> In Fiji the judge's task has been described as assessing the case to see if the prosecution evidence in its totality touches on all the essential ingredients of the offence [adopted in *State v Woo Chin Chae* [2000] FJHC 133] my learned sister Justice Shameem described the test as whether at this stage there is evidence, relevant and admissible evidence, that the accused committed the offence. I adopt her honour's view that if there is some relevant and admissible evidence, direct or circumstantial touching on all elements of the offence then there is a prima facie case.

[16] However that is followed immediately by the further statement:

> In considering this application I accordingly need to have regard to the evidence and ask if there is any credible reliable evidence at the conclusion of the Prosecution Case that would make it proper and safe to convict.

[17] We have carefully considered the ruling in its entirety, and in particular in their proper context those matters relied upon of the State. We have also taken into account the helpful submissions made on behalf of the Respondents. In the end we are persuaded that there was an error of approach of the judge in effectively embellishing the test laid down in *Sisa Kalisoqo*, thereby constituting an error of law.

[18] The next issue which arises is whether, on a proper approach, it can be said there was no evidence that the Respondents committed the offences in question. The case for the Respondents is that there was no evidence to establish two essential elements, namely that the alleged representation induced the payment of the cost of the business class fares, and there was an intent to defraud.

[19] The facts relevant to the inducement issue are common to both Respondents. In the summary we have earlier set out, in both counts a government purchase order was issued to Hunts Travel Service to provide a business class passages for Mr Raj. Hunts Travel Service then invoiced the government for the amount expressed as being the cost of business class fares, and in due course it was paid the amount of the invoice. There was evidence from Mr Chand, Principal Administrative Officer, that payments to Hunts were made on the basis of the invoices, which had been certified because the specified service (provision of business class travel) had been provided. Accordingly there was evidence that the cost of business class fares had been paid by the government because it was held out that the cost of such services had in fact been provided. Whether the element had been proved to the requisite standard of proof remained for final determination.

[20] The crucial issue is the second element identified by the Respondents. The judge held there was no "safe" evidence to negative an honest belief of entitlement on the part of Mr Raj to retain the benefit of the difference between business and economy class travel if economy class travel was undertaken.

[21] The basis for this conclusion appears to be the guideline earlier referred to. The guideline itself states that "the class of travel shall be business class". The 1966 report on Parliamentary Emoluments and Benefits at para [427] had recommended that ministers on government business "be entitled to business class reservations." If the finding is that the minister as a matter of law, was entitled to obtain a business class reservation and then travel economy class but retain the difference in cost, we must with respect disagree. Neither the committee's recommendation nor the guideline can be so read as to create such a legal entitlement. That however does not determine the issue, as the recommendations and the guidance notes both have relevance.

[22] The issue is whether there was evidence of an intent to defraud on the part of Mr Raj, or put another way evidence negativing an honest belief of entitlement. It is common ground that Mr Raj was entitled to be provided with business class travel. On both occasions he travelled in economy class in company with departmental representatives. As the judge observed, throughout his actions were transparent.

[23] Importantly, there was evidence to the effect that there was no instruction or advice given to those concerned that what was done was not permitted, or that there had to be some form of accounting by a minister in respect of his actual expenditure of an entitlement.

[24] Furthermore, there was no evidence that this particular entitlement was at the time not seen as simply an emolument of office. Whether it was not intended to be such, is not the issue. It is also relevant that the government has not been put to the expenditure of more than the value of Mr Raj's entitlement for the travel.

[25] We therefore agree with the judge's conclusion that the prosecution failed to adduce evidence from which it could be inferred that the actions of Mr Raj in question were carried out with fraudulent intent.

[26] Mr Pal was charged as a party to Mr Raj's alleged offending, so his charges necessarily also fail. We observe however that Mr Pal is in an even stronger position. As the evidence now stands, there is no evidence from which it could be inferred that he was aware that Mr Raj was not entitled to personal use of the difference in value between the two classes of air fares, even if that lack of entitlement had been established.

[27] For the above reasons the appeals against the findings of not guilty in respect of both Respondents are dismissed.

Appeal dismissed.