Varatharajah Rajaselvan v Public Prosecutor
[2009] SGHC 103

Case Number : Cr M 11/2009

Decision Date : 27 April 2009

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : The appellant in person; Francis Ng (Attorney-General's Chambers) for the respondent

Parties : Varatharajah Rajaselvan — Public Prosecutor

Criminal Procedure and Sentencing

27 April 2009 Judgment reserved.

Chan Sek Keong CJ:

1 This is a criminal motion filed on 27 February 2009 by the applicant for leave to appeal out of time against his conviction on five charges involving the possession and sale of 1,270 pieces of counterfeit Indian bank notes of 500-rupee denomination ("Indian notes"). The charges were as follows:

(a) in District Arrest Case No 35420 of 2006 ("DAC 35420/2006"), for possession of 450 pieces of counterfeit Indian notes on 5 August 2006 at about 2.30pm, having reason to believe the same to be counterfeit and intending to use the same as genuine, an offence punishable under s 489C of the Penal Code (Cap 224, 1985 Rev Ed) ("PC");

(b) in District Arrest Case No 42714 of 2006 ("DAC 42714/2006"), for selling as genuine 100 pieces of counterfeit Indian notes on 2 August 2006 between 1.00pm and 2.30pm, having reason to believe the same to be counterfeit, an offence punishable under s 489B of the PC;

(c) in District Arrest Case No 42715 of 2006 ("DAC 42715/2006"), for selling as genuine 120 pieces of counterfeit Indian notes on 3 August 2006 between 1.00pm and 2.30pm, having reason to believe the same to be counterfeit, an offence punishable under s 489B of the PC;

(d) in District Arrest Case No 42716 of 2006 ("DAC 42716/2006"), for selling as genuine 300 pieces of counterfeit Indian notes on 4 August 2006 between 1.00pm and 2.00pm, having reason to believe the same to be counterfeit, an offence punishable under s 489B of the PC; and

(e) in District Arrest Case No 42717 of 2006 ("DAC 42717/2006"), for selling as genuine 300 pieces of counterfeit Indian notes on 4 August 2006 between 4.00pm and 5.00pm, having reason to believe the same to be counterfeit, an offence punishable under s 489B of the PC.

2 The applicant pleaded not guilty to the charges. The Prosecution called 11 witnesses to testify against him on the charges. The applicant elected to defend himself and cross-examined ten of the 11 witnesses. His defence was called, and he elected to give evidence. His defence was basically that he received the Indian notes from one Bachu in the course of his business, and that he did not know that the Indian notes were counterfeit as he had checked them with an ultraviolet light. He testified that he was a commission agent for a company called Greenwest International Equity Corporation ("Greenwest") based in Europe with a branch in Bangkok, and that Bachu, through a courier, gave him the Indian notes to pay for the supply of goods by his principal. He accepted the

Indian notes as payment because he would make a profit of $1.00 on each note.

3 At the conclusion of the trial (which lasted three days) on 16 November 2006, the district judge ("the DJ") found him guilty as charged and sentenced him as follows:

(a) in DAC 35420/2006, to five years' imprisonment; and

(b) in DAC 42714/2006 to DAC 42717/2006, to four years' imprisonment on each charge.

The sentences in DAC 42714/2006 and DAC 42715/2006 were ordered to run consecutively, and the other charges to run concurrently, thus giving a total of eight years' imprisonment with effect from 7 August 2006.

4 Although the applicant's application was filed 27 months out of time, he had written to the Registrar of the Supreme Court earlier on 3 November 2008 (about 24 months out of time) for an extension of time to file his appeal, and to explain why he did not appeal in time and why he should be allowed to appeal out of time. He gave the following reasons:

(a) Having "expended all [his] arguments" at the trial, he "felt quite impotent" without the aid of any counsel.

(b) Following an "epiphany" in December 2007, his perusal of the trial papers showed that there was a discrepancy between the report from the Commercial Affairs Department ("CAD") which referred to 1,270 Indian notes and a report from the Health Sciences Authority ("HSA") which referred to 1,290 Indian notes. He argued that this discrepancy "should serve to technically disprove the [Prosecution]'s evidence".

(c) The DJ had ruled, on the first day of the trial on 1 November 2006, that the Indian notes be sent to the Reserve Bank of India ("RBI") in Mumbai for testing, but, on the second day of the trial on 10 November 2006, the DJ informed him that the Prosecution had decided not to do so. As this was contrary to the DJ's ruling, the applicant queried the DJ, who "cited his incapacity on the issue; stating in response that his was only an arbitrary role".

(d) As the Prosecution did not produce any directive from the Attorney-General's Chambers (regarding the decision not to send the Indian notes to RBI) to the court, this "obliged [the applicant] to assume the perversion of justice by the [Prosecution], and postulate that the RBI analysis results being inimical to the [Prosecution]'s case [were] expediently suppressed to enable [his] conviction to proceed unhindered".

(e) If there was indeed such a directive from the Attorney-General's Chambers, it would be construed as being "highly irregular" as it was "tantamount to executive interference in the independant [*sic*] exercise of judicial authority".

5 Upon the receipt of this letter, the Registrar advised him of the proper procedure to follow. Hence, the applicant filed this motion which is supported by his affidavit dated 27 February 2009 in which he reiterated the matters set out in sub-paras (a) to (d) of [4] above.

6 After filing the motion, the applicant filed written submissions dated 26 March 2009 in reply to the Prosecution's written submissions, in which he repeated his earlier statements, and also made the following allegations:

(a) "Disturbingly enough, [he] found that the compilied [*sic*] 'Notes of Evidence', ostensibly signed by [the DJ], to be incomplete and at gross variance in key points from what had transpired at trial Court on the said dates".

(b) The notes of evidence are "contextually selective in [their] representation and [appear] to be a subtle adaptation of actual trial transcripts. Certain portions of trial examinations and testimony of witnesses had been excluded wholly or in part in the hope of adversely influencing the Court to favour the [Prosecution's] Submissions to deny [his] criminal motion."

7 At the hearing of this criminal motion, the applicant made the following additional arguments to show that there was merit in his appeal:

(a) He was not aware that the Indian notes were counterfeit.

(b) The HSA witness (PW9), who testified that the 1,270 Indian notes were counterfeit, was not competent and did not have the expertise to determine whether the notes were counterfeit because she had no experience in testing Indian bank notes.

(c) The Indian notes should have been sent to RBI for testing. The DJ had adjourned the matter for hearing because, after looking at the HSA report, the DJ felt that the Indian notes should be tested by RBI in India. The Prosecution had asked for extra time for the Indian notes to be sent for testing in India, hence the hearing was adjourned to 10 November 2006 even though the applicant had asked for an earlier hearing date.

(d) The Prosecution had not proved that the counterfeit Indian notes belonged to the applicant due to the lapse of time and because the Indian notes had changed hands before the applicant was arrested.

8 In reply, the Prosecution made the following points:

(a) It was proved, and the DJ accepted, that a chain of evidence had been established to show that the counterfeit Indian notes belonged to the applicant.

(b) The Prosecution had proved at the trial below that the applicant had reason to believe that the Indian notes were counterfeit because:

(i) the applicant admitted to the investigating officer that he was part of a syndicate;

(ii) when he was confronted by a moneychanger with the allegation that his Indian notes were counterfeit, he offered to pay money to the moneychanger in order to settle the matter;

(iii) even after his Indian notes were rejected by one moneychanger, he tried to sell them to another moneychanger, thereby indicating that he had more than ample basis for believing that the Indian notes were counterfeit; and

(iv) he refused to offer any explanation when he was cautioned under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"), which entitled the DJ to disbelieve his defence in court.

(c) A ruling by the DJ that the Indian notes had to be sent to India for testing would have

been irregular. If testing was not done in India, the DJ would still have to make a finding of fact based on the available evidence. At the trial, the DJ heard the testimony of the forensic scientist from HSA who had examined the Indian notes (PW9). He would also have read the HSA report before making his finding that the Indian notes were counterfeit.

(d) The applicant's argument, that the DJ ordered the Indian notes to be tested in India after looking at the HSA report, had no basis, as the alleged order was made on 1 November 2006 even before PW9 had given evidence in court on 10 November 2006.

(e) The proceedings below were not adjourned to 10 November 2006 as a result of the DJ's order for the Indian notes to be tested in India. Instead, at an earlier pre-trial conference, 1 November 2006 and 10 November 2006 along with two other hearing dates were allocated for the trial of this matter.

9 The established tests in determining whether I should exercise my discretion to allow the criminal motion under s 250 of the CPC are, first, the sufficiency of the explanation for the delay, having regard to the length of the delay and, second, whether there is a real prospect of success if leave is granted (see *Lim Hong Kheng v PP* [2006] 3 SLR 358 at [37]).

10 In my view, this application fails on both tests. The applicant has not given an acceptable explanation for his undue delay of at least 24 months. His argument, that he was not represented by counsel and could not afford to be so represented, is not sufficient as he did not need counsel's advice just to file a notice of appeal. Moreover, he conducted his defence quite competently and cross-examined ten of the Prosecution's 11 witnesses. His letter dated 3 November 2008 to the Registrar of the Supreme Court, in which he set out his reasons for wanting to appeal, showed that he was quite inventive in making the best of a bad case. He complained that he could not get any assistance from the prison wardens, but that could not possibly be true because he did manage to write to the Registrar of the Supreme Court.

11 As regards the second test, I find that this appeal has absolutely no prospect of success, even though the DJ has not written his grounds of decision. Having read the notes of evidence, it is clear to me that the DJ did not believe the applicant's versions of the events which could exculpate him. When he was charged with the five charges and cautioned under s 122(6) of the CPC to give a statement under s 122(5) of the CPC, he refused, and thereby opened himself to being disbelieved at the trial. Furthermore, the evidence against him was overwhelming. From 2 to 4 August 2006, he sold some of the Indian notes to two employees of a moneychanger (PW4 and PW5) at New Bugis Street who then sold some of the Indian notes to another moneychanger (PW3) over a period of three days. PW3 suspected that the Indian notes (which were new) were counterfeit when he felt that they were thicker and smoother than a genuine note and saw that the face of Gandhi appeared cartoonish. He informed PW5 of his suspicions. On 5 August 2006, he asked three experienced fellow moneychangers (PW6, PW7 and PW8) to look at the Indian notes and they confirmed his suspicions. PW3 then informed PW5 of his finding. On the same day, when the applicant came back to sell more new Indian notes to PW5, both PW3 and PW4 confronted him with the fake Indian notes. The police came, arrested the applicant and found more Indian notes (450 pieces) in his bag.

12 The applicant also told the investigating officer (PW1), whilst they were in the police car, that he had received the Indian notes from a foreign agent whom he believed was from a well-organised syndicate doing money laundering, that his role was to exchange Indian rupees to Singapore dollars, and that the syndicate would pay him $1.20 to $1.80 per piece of currency note. He was told not to exchange the Indian notes at Mustafa Centre as that area was covered by other agents. He tried to exchange the Indian notes with moneychangers at Desker Road unsuccessfully, but managed to do so

at New Bugis Street (where he was eventually arrested).

13 However, at the trial, he gave an entirely different account of how he came into possession of the Indian notes (see [2] above). He said he went with the courier, sent to him by Bachu, to change the Indian notes at New Bugis Street. After that, he called Bachu, who owed money to Greenwest, to pay up his debt and Bachu sent him more Indian notes. In brief, his defence was that he was an innocent receiver of the Indian notes whilst acting as a commission agent.

14 This was a nice story which the DJ obviously did not believe since the applicant had never mentioned the existence of Bachu to the police prior to the trial and did not produce any evidence of the existence of Greenwest, much less his relationship with Greenwest.

15 Now let me deal with his arguments specifically, since they had a semblance of plausibility until one reads the notes of evidence.

16 The first argument relates to the alleged discrepancy of 20 Indian notes between the report from CAD which referred to 1,270 Indian notes and the HSA report of PW9, which referred to 1,290 Indian notes (see [4(b)] above). There is no merit in this argument as the police had indeed seized 1,290 Indian notes from the moneychanger and all of them were found to be counterfeit by PW9. The Prosecution's explanation of the "discrepancy" was that the investigating officer had established that the extra 20 Indian notes were not sold by the applicant, and so the applicant was only prosecuted in connection with 1,270 Indian notes.

17 As to his argument, that the Prosecution had not proved that the counterfeit Indian notes belonged to him due to the lapse of time and because the Indian notes had changed hands before he was arrested, it is equally without merit. All the moneychangers involved in the transactions were called to give evidence and it was established that the applicant's Indian notes were distinctive in that they were brand new and in very good condition.

18 There is also no merit in the argument that PW9 was not competent to examine the Indian notes. PW9 had worked for HSA for four years and part of her work was to examine questionable currency notes. In her testimony she described how she went about examining the Indian notes, using the list of security features which were found on RBI's website. The 1,270 Indian notes seized from the applicant failed every one of these security features.

19 With respect to the applicant's allegation that the DJ had ruled that the Indian notes were to be tested in India after looking at the HSA report and had adjourned the hearing so that such testing could be done, the notes of evidence show otherwise. At the end of the first day of the trial on 1 November 2006, the DJ adjourned it for further hearing on 10 November 2006. The Prosecution then made the following application:

> [Prosecution]: Applying for 3 bundles of notes marked "P13" "P14" "[P15 to P17]" to be released to the Prosecution to have them sent to the Bank of India for reports to be prepared regarding the genuineness of these notes. This case was fixed on an urgent basis because the [applicant] is in remand, and was assigned to me only on 11 Oct 2006 … I undertake to return the notes. I will be applying for the case to be adjourned for two months as we need to send the notes to India. The Investigating Officer will bring them there and back.

[Court]: "P13" "[P]14" "[P15 to P17]" released to [P]rosecution on the usual undertakings.

It would appear from the recorded notes that the case had been fixed for hearing on an urgent basis and, even though the Prosecution had by the time of the trial obtained the HSA report, it was not entirely sure about the case against the applicant. Otherwise, the Prosecution's request for the release of the Indian notes in order to send them to India for examination would be inexplicable.

20 Be that as it may, the trial resumed on 10 November 2006 without the Prosecution producing a report from RBI. The applicant alleged that the DJ informed him that the Prosecution had decided not to send the Indian notes to RBI for examination. As this was contrary to the applicant's understanding of the DJ's ruling, the applicant queried the DJ on the Prosecution's failure to comply with the DJ's order. The DJ (as alleged by the applicant) then "cited his incapacity on the issue; stating in response that his was only an arbitrary role". However, as this account of the exchange is not recorded in the notes of evidence, it has led the applicant to allege that the notes of evidence were "incomplete and at gross variance in key points from what had transpired at trial" (see [6(a)] above) and he has continued to remain suspicious of the integrity of the notes of evidence. It is not difficult to understand his state of mind as the notes of evidence did not record what had happened after the Indian notes were released to the Prosecution and when they were returned to the court. There is no record of any explanation given by the Prosecution as to why it did not send the Indian notes to RBI. This is a pity, because it would seem unlikely that the Prosecution had not given any explanation at all or that the DJ had not asked for any explanation.

21 However, piecing together what the applicant has alleged, it seems to me that if what he said had indeed occurred, it did not occur in the way as described by him, due to either his faulty memory after such a long lapse of time or the likelihood of his trying to interpret his exchange with the DJ in his own favour. As I indicated during the hearing, the only reasonable explanation was that the Prosecution must have informed the DJ that it was not necessary to send the Indian notes to RBI for examination as PW9 would be called to testify on her findings, and when the applicant protested, the DJ must have replied that his role was only that of an arbitrator, and not "arbitrary" as the applicant had alleged.

22 The last argument of the applicant is that he did not know that the Indian notes were counterfeit as he had merely received them from Bachu in payment of a debt due to his principal. He exchanged the Indian notes only because he could make some money from the exchange. In my view, the evidence shows that the applicant had reason to believe that the Indian notes were counterfeit. First, his early attempt to change some of them at Desker Road was unsuccessful. Second, if he were merely an innocent recipient of the Indian notes as an agent, there would be no reason for him to examine the notes under an ultraviolet light. Third, when confronted by PW3 and PW4, he did not express surprise but agreed to pay $750 to buy back the Indian notes so that he could sell them at another location. Fourth, he gave no explanation as to how and why he came into possession of the Indian notes when he was cautioned five times under s 122(6) of the CPC.

23 The applicant seems an astute person from the way he presented his arguments before me. It is a pity that he did not use his intelligence in a lawful activity. For the foregoing reasons, the criminal motion is dismissed.