

Selvarajoo s/o Malayappan Krishsamy v Public Prosecutor
[2004] SGHC 39

Case Number : Cr Rev 15/2003
Decision Date : 25 February 2004
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : M Ravi (M Ravi and Co) for petitioner; Amarjit Singh (Deputy Public Prosecutor) for respondent
Parties : Selvarajoo s/o Malayappan Krishsamy — Public Prosecutor

Criminal Procedure and Sentencing – Revision of proceedings – Adducing fresh evidence at criminal revision – Whether procedure to adduce fresh evidence adhered to – Power of court to allow adduction of fresh evidence despite failure to adhere to appropriate procedure – Whether petitioner satisfied the three conditions when seeking to adduce fresh evidence

25 February 2004

Yong Pung How CJ:

1 This was a petition for a criminal revision of the decision of District Judge Teoh Ai Lin. The petitioner was convicted on one charge of cheating and dishonestly inducing a delivery of property under s 420 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC"). He was sentenced to 12 months' imprisonment and served his sentence. He then petitioned to quash his earlier conviction.

The facts

2 The petitioner was a freelance housing agent. In 1992, he met R Pillaisay Jaganathan ("Mr Jaganathan") and Nagosri Uthirapathy Pillai ("Mrs Jaganathan"), a married couple, and offered to help them in a mortgage refinancing transaction. The application for the refinancing transaction was submitted to the Rochor Road branch of Overseas Union Trust ("OUT") on 12 November 1992 and was completed on 17 November 1992. Prior to the completion of the transaction, the petitioner had a telephone conversation with Mrs Jaganathan in which he mentioned to her that he expected payment for his assistance. It was undisputed that Mrs Jaganathan had agreed to such a payment, although the sum to be paid was not confirmed.

3 Sometime after 17 November 1992, the petitioner telephoned Mrs Jaganathan regarding his commission payment. He asked for a sum of \$21,000 and mentioned that this sum was to be shared with one Lim Geok Lan ("Mdm Lim"), a bank manager at OUT. After some bargaining between the petitioner and Mrs Jaganathan, a sum of \$14,000 was agreed upon. Mrs Jaganathan later testified that she only agreed to pay the \$14,000 because Mdm Lim's name was mentioned. Mrs Jaganathan added that she had not informed her husband about the matter, as he would not have agreed to pay such a large sum.

4 Mrs Jaganathan then met the petitioner at the road near her house and passed him a cheque signed by her husband, dated 20 January 1993, in the sum of \$14,000. She testified that her husband usually signed his cheques in blank. The handwriting on the cheque was that of Mrs Jaganathan's daughter ("Geetha"). Geetha testified that she usually filled out the cheques for her parents because her handwriting was neat. She added that Mr Jaganathan would usually pass the cheques that he had signed to Mrs Jaganathan, who would in turn ask Geetha to fill them in for her.

5 Subsequently, the petitioner fell out with Mr and Mrs Jaganathan. Since then, the parties have not been on good terms. About one or two years later, Mrs Jaganathan met Mdm Lim to enquire about redeeming the current mortgage refinancing loan and obtaining a new one. In the course of their conversation, the petitioner's name was mentioned. Mrs Jaganathan informed Mdm Lim that the petitioner had said that Mdm Lim had a share in the \$14,000 payment that was made to him. Mdm Lim denied this. Mdm Lim testified that she was upset about what Mrs Jaganathan had told her and raised the matter with the petitioner. The petitioner denied that he had so informed Mrs Jaganathan and claimed that it was all a misunderstanding. A few days later, the petitioner called Mdm Lim and apologised for having used her name, promising not to do it again.

6 The petitioner denied that some of these incidents had occurred. He claimed that Mrs Jaganathan had agreed to pay a 4% commission to him in the presence of her husband. He also claimed that Mr Jaganathan had signed a commission agreement to this effect and that he had never told Mrs Jaganathan that the commission was to be shared with Mdm Lim. The petitioner testified that Mr Jaganathan signed the cheque for \$14,000 at the petitioner's house. The petitioner's wife also testified that Mr and Mrs Jaganathan had come to the petitioner's house on two occasions. On the second occasion, the petitioner's wife claimed that she had seen Mr Jaganathan signing a cheque and handing it to her husband. The petitioner also denied promising Mdm Lim that he would not use her name again. He added that he had only apologised to Mdm Lim to save his friendship with her.

The decision below

7 The district judge observed that the Prosecution's case rested on Mrs Jaganathan's evidence. She found that despite some immaterial inconsistencies in Mrs Jaganathan's testimony and the danger of malice in her evidence as a result of the falling out between the parties, Mrs Jaganathan was largely an honest, consistent and non-malicious witness. The district judge analysed Mr Jaganathan's evidence with caution, taking into account the fact that the parties had fallen out and that, consequently, there was a danger of Mr Jaganathan tailoring his evidence to corroborate his wife's. Nevertheless, the district judge found that Mr Jaganathan was a truthful witness. She noted that Mr Jaganathan did not corroborate his wife's testimony regarding the commission sharing (an important issue around which the charge against the petitioner revolved). The district judge held that if Mr Jaganathan had been malicious, he would have embellished his evidence to support his wife's claims on the commission sharing.

8 On the other hand, the district judge took issue with the petitioner's testimony and highlighted the various discrepancies and improbabilities therein. She noted that in light of Geetha's evidence, it was highly improbable that Mr Jaganathan would have signed the \$14,000 cheque in the petitioner's presence. In this respect, the district judge also found that the petitioner's wife had tailored her evidence to corroborate the petitioner's. Additionally, the district judge found that the petitioner's account of his dealings with the Jaganathans and of how the commission agreement came about was unconvincing. She found that this cast doubt on the petitioner's veracity.

9 The district judge also had to consider a variety of other issues, including the inconsistencies in the petitioner's evidence as opposed to Mdm Lim's, the petitioner's conduct when he was charged, the admissibility of his February 2001 statement to a Corrupt Practices Investigation Bureau ("CPIB") officer and the inconsistencies between this statement and the petitioner's testimony in court. After she had considered the various issues before her, the district judge found that the elements that must be proved in a charge under s 420 PC had been fulfilled. Consequently, she convicted the petitioner on the charge and sentenced him to a term of imprisonment of 12 months.

10 The petitioner then filed, but later withdrew, a notice of appeal against the conviction. He completed the 12-month term of imprisonment.

The petition for criminal revision

11 The petitioner made several submissions in support of his petition. Almost all of these submissions revolved around the fact that the petitioner had now managed to find the commission agreement that he had mentioned at trial. He contended that the substantial basis of his conviction was his inability to produce the original or a copy of the commission agreement signed by Mr Jaganathan and highlighted the instances in the district judge's grounds of decision where the commission agreement was mentioned. He contended, in general, that the discovery of the commission agreement undermined the basis of his conviction. As such, he argued that his petition for criminal revision should be allowed due to the serious injustice that had been caused to him.

12 As the petitioner's submissions revolved largely around the point relating to the discovery of the commission agreement, I dealt with his submissions in the following manner:

- (a) whether the commission agreement was admissible as fresh evidence; and
- (b) in the event that the commission agreement was admissible as evidence, whether the petition for criminal revision should be allowed.

Admissibility of the commission agreement as fresh evidence

13 My immediate observation with regard to this petition was the fact that the petitioner had not applied by way of a criminal motion to adduce the commission agreement as evidence. Instead, he had submitted the commission agreement together with his petition for criminal revision and a supporting affidavit. The appropriate procedure in so far as the adduction of fresh evidence is concerned would be by way of a criminal motion. Indeed, this was the procedure adopted in *Juma'at bin Samad v PP* [1993] 3 SLR 338, *Chan Hiang Leng Colin v PP* [1995] 1 SLR 687, *Chan Chun Yee v PP* [1998] 3 SLR 638 and *Tan Sai Tiang v PP* [2000] 1 SLR 439, all cases in which an adduction of fresh evidence was sought.

14 In any case, despite this procedural irregularity, I retained the power to admit fresh evidence where such evidence was necessary. In this respect, s 257(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") would be the relevant provision with regard to admitting fresh evidence at this stage. Section 257(1) CPC reads as follows:

In dealing with any appeal under this Chapter the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a District Court or Magistrate's Court.

15 Although s 257(1) CPC refers to the adduction of fresh evidence at an appellate stage, the section is equally applicable in the context of a criminal revision by virtue of s 268(1) CPC:

The High Court may in any case, the record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge, in its discretion exercise any of the powers conferred by sections 251, 255, 256 and 257.

16 However, I hasten to add that this power remains a discretionary one. Inefficient petitioners

or litigants who blatantly fail to comply with the appropriate procedure to adduce fresh evidence, that is *via* a criminal motion, should not be allowed to abuse s 257(1) CPC as a “backdoor” means of adducing fresh evidence.

17 In exercising this power, then, our courts have applied the three conditions of non-availability, relevance and reliability, as enshrined in *Ladd v Marshall* [1954] 3 All ER 745. Interestingly, the petitioner failed to make any submissions regarding these three conditions. Nevertheless, I proceeded to examine the three conditions in order to determine if all of them were fulfilled in this petition before deciding whether the commission agreement should be admitted in evidence. In this respect, the relevant portion of the holding in *Ladd v Marshall* (*per* Denning LJ at 748) bears repetition:

In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

This aspect of the judgment in *Ladd v Marshall* was adopted in *Juma’at bin Samad*, with the added caution that the circumstances in which an application to introduce fresh evidence will be allowed are extremely limited. Most recently, these conditions were affirmed in *Tan Puay Boon v PP* [2003] 3 SLR 390. With these in mind, I turned to apply the three conditions to the facts of this petition in order to determine if the commission agreement should be adduced in evidence.

Non-availability

18 Under this first condition, the petitioner had to show that the fresh evidence that he sought to adduce could not have been available with reasonable diligence for use at trial.

19 In his affidavit, the petitioner stated that he was unable to find the commission agreement during the trial because he had moved residences four times. However, it was apparent from the notes of evidence that the petitioner had kept the said commission agreement with him after Mr Jaganathan had signed it. He also claimed at trial that the commission agreement could have been seized by the CPIB when they came to his house with a search warrant and took away some documents. The petitioner maintained at trial that the CPIB did not return any documents apart from the petitioner’s passport. However, I observed that despite the claim that the CPIB could have been in possession of the commission agreement at the time of the trial, the petitioner did not cross-examine the investigating officer from the CPIB regarding the whereabouts of this commission agreement.

20 If the commission agreement had been of such importance to the petitioner’s case at trial, he should have been more diligent when he was offered the chance to cross-examine the CPIB investigating officer. Additionally, the trial itself stretched for a period of five to six months. During this period, the petitioner would have had ample time and opportunity to uncover the commission agreement. If the petitioner had been more diligent during this period of time, he would have been able to find the commission agreement as easily as he seemed to have at the time of this petition. This lack of diligence was especially glaring considering that the commission agreement was allegedly so crucial to the petitioner’s defence at trial.

21 It was rather odd that the petitioner ran a new argument as to why he was unable to find the commission agreement, *ie*, that he changed residences four times. For one, the petitioner did not mention this fact at trial. This indicated that the petitioner was now shifting from his original position and finding some excuse or other to explain away his lack of diligence at trial. For another, there was nothing in the petitioner's skeletal arguments that explained or proved that there had *indeed* been four changes in residence that resulted in the commission agreement being misplaced. All that the petitioner provided was a bare assertion in his affidavit. This was not enough.

22 It was therefore clear that the petitioner was not able to satisfactorily explain why the commission agreement could not have been obtained with reasonable diligence at trial. As such, the petitioner failed at the very first hurdle of the *Ladd v Marshall* test. Nevertheless, even if the petitioner passed this first hurdle, he still failed with regard to the next condition.

Relevance

23 The second hurdle of the *Ladd v Marshall* test requires the commission agreement to have had an important influence on the result of the case at trial, if it had been produced during the trial. The petitioner argued that the district judge relied heavily on the non-production of the commission agreement to convict him on the charge. Although the petitioner did not make this argument in relation to the condition of relevance, as understood within the meaning of *Ladd v Marshall*, this was the only argument that came closest to assisting the petitioner at this stage.

24 However, I found that the petitioner's argument was not substantiated on a perusal of the district judge's grounds of decision. Although the district judge made references to the commission agreement in her grounds of decision, the absence of the commission agreement was not the *basis* of her decision. At this juncture, it would be helpful to refer to s 420 PC:

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.

and the charge against the petitioner at trial:

You, Selvarajoo s/o Malayappan Krishsamy Male, 49 years old S0011421I are charged that you, on or about the 20th day of January 1993, at 26 Colchester Grove, Singapore, did cheat one Nagosri Uthirapathy Pillai [Mrs Jaganathan] of a sum of \$14,000 by deceiving her into believing that one Lim Geok Lan, a Bank Manager in the employ of Overseas Union Trust Limited, had a share of the said \$14,000 given as a reward for approving a mortgage loan of \$350,000 when in actual fact the said Lim Geok Lan had no share and by such deception you have dishonestly induced the said Nagosri Uthirapathy Pillai into delivering to you a sum of \$14,000 vide DBS cheque No: 220849, which she would not have done so had she not been so deceived and you have thereby committed an offence punishable under Section 420 of the Penal Code Act [*sic*] Cap 224.

25 From the charge alone, it was apparent that it was the petitioner's act of deceiving Mrs Jaganathan by representing that the \$14,000 was for the purpose of commission sharing between Mdm Lim and himself (and thereby dishonestly inducing Mrs Jaganathan to part with the \$14,000) that formed the basis of the charge (and the s 420 PC offence) and *not the absence of a commission*

agreement. The district judge found for a fact that the petitioner *had* made the representation to Mrs Jaganathan. She was therefore correct in convicting the petitioner on the charge. It was this particular finding of fact that was the basis of the district judge's decision and I found no reason to reject the district judge's finding. I accordingly upheld this finding.

26 The newly discovered commission agreement would have only assisted the petitioner on the charge if it could have been used to prove that the petitioner *had not made the oral representation* to Mrs Jaganathan regarding the commission sharing. However, the commission agreement was only a written agreement with regard to a 4% commission that had to be paid by Mr Jaganathan. It did not state anything more that could have led me to find that the petitioner had not made the oral representation to Mrs Jaganathan. Therefore, the existence of the commission agreement did not change the most important aspect of the district judge's grounds of decision.

27 Accordingly, the petitioner failed to show how relevant the commission agreement would have been to the decision at trial. Although fresh evidence that was sought to be adduced need not have been decisive to the ultimate decision at trial, it must *at least* have had an important influence on the result of the case: *Ladd v Marshall*. In this regard, I found that the commission agreement was incapable of having such an important influence on the result of the case, being a document that neither related directly to the charge and offence in question nor even served to raise a reasonable doubt in the Prosecution's case at trial.

28 As such, I found that the petitioner also failed at the second hurdle of the *Ladd v Marshall* test. Nevertheless, for the sake of completeness, I proceeded to consider the third condition.

Reliability

29 At this third stage of the *Ladd v Marshall* test, the court must determine whether the evidence sought to be adduced is apparently credible, although it need not be incontrovertible. For instance, the authenticity of the commission agreement could go towards showing reliability.

30 In this respect, by virtue of his affidavit under oath, the petitioner attested to the authenticity of the commission agreement. However, on a careful perusal of the notes of evidence and the commission agreement itself, I found that the commission agreement did not satisfy the reliability condition. The commission agreement was dated 12 November 1992. This was the date on which the petitioner had brought Mr and Mrs Jaganathan to OUT to apply for the mortgage refinancing loan. The loan itself was approved on 17 November 1992. However, at trial, the petitioner testified that it was not his practice to execute the commission agreement before the bank had presented a letter of offer (the bank had presented to the Jaganathans a letter of offer dated 17 November 1992). The petitioner also testified that he made Mr Jaganathan sign the commission agreement only after the bank had presented this letter of offer. I reproduce the relevant portions of the notes of evidence:

Notes of Evidence p 86, para A: Examination-in-chief of petitioner

Q: Did you execute commission agreement with anyone before go to bank?

A: First time go to bank, Mdm Lim interview both of them in my presence. *Normally when letter of offer is ready, then sign agreement for commission. That is my practice.* No point signing first day. Bank may not accept.

Notes of Evidence p 86, paras E to F: Examination-in-chief of petitioner

Q: All of you left?

A: Yes, they drop me at my house. A few days later Mdm Lim call me, application successful. Bank granted \$350,000. She said already called Mrs Nathan before me. One or two days we go back to sign. Before that I ask them to come to my house, sign commission agreement. I showed copy of agent commission agreement to the husband. Then he show to wife, wife read, then husband signed. Only husband signed.

Notes of Evidence p 96, paras B to D: Cross-examination of petitioner

Q: First meeting – you discuss commission?

A: I said 4% I'm agreeable.

Q: They didn't sign anything at this point?

A: First meeting no.

Q: Sign document second meeting?

A: Yes.

Q: After went to bank first time?

A: Right.

[emphasis added]

Here, the references to the "first meeting" in the notes of evidence were in relation to the date on which the petitioner brought Mr and Mrs Jaganathan to OUT *ie* 12 November 1992. This was also the date on which the application for the loan was made by Mr and Mrs Jaganathan in the presence of the petitioner and Mdm Lim.

31 From these pieces of evidence, it was clear that the commission agreement sought to be adduced did not sit well with the petitioner's testimony at trial. There was conflict in the relevant dates. Although this conflict might not have been enough to rule that the commission agreement was an inauthentic or a falsified document, it should be held against the petitioner, as he effectively caused the conflict with his inconsistent positions from the time of the trial to the current petition.

32 On top of this, I noted that in *Syed Jafaralsadeg bin Abdul Kadir v PP* [1998] 3 SLR 788 I had stated at [31] that "[a]dditional evidence should not be admitted unless it may be accepted as apparently credible without the need for further proof". In the present situation, the commission agreement was not apparently credible due to the crucial conflict in dates. Further proof would probably be required to show that the commission agreement was itself apparently credible. The situation being such, I found that I could not safely rely on the commission agreement as a credible document. Consequently, I found that the commission agreement failed to meet the condition of reliability.

33 In all, I found that the petitioner failed to overcome all three hurdles in the *Ladd v Marshall* test and was therefore unable to show why the commission agreement should be adduced as fresh evidence. Accordingly, I held that the commission agreement could not be adduced in evidence. With the commission agreement now incapable of being adduced, I found that the petitioner's *basis* for the criminal revision had disappeared. Thus, the petition for criminal revision must also be dismissed.

Nevertheless, even if the commission agreement was admissible in evidence, the criminal revision would still have been dismissed. I now explain why this would be the case.

In the event that the commission agreement is admissible as evidence, would the petition for criminal revision still be allowed

34 I had already found that the basis of the district judge's decision was not the commission agreement but the oral representation made by the petitioner to Mrs Jaganathan. The petitioner attempted to place undue importance on the commission agreement to elevate it as the focal point of the district judge's decision. However, from her grounds of decision, it was clear that the district judge convicted the petitioner for having deceived or dishonestly induced Mrs Jaganathan into handing over \$14,000 by representing that the sum was to be shared, as commission, by himself and Mdm Lim.

35 The district judge made a finding of fact that Mrs Jaganathan was truthful in her account of the petitioner's representation regarding the commission sharing. Additionally, she found that Mdm Lim's testimony corroborated Mrs Jaganathan's testimony in relation to the representation, albeit a weak form of corroboration. The testimonies of Mrs Jaganathan and Mdm Lim pertaining to the representation on commission sharing were more crucial to the district judge's decision, as opposed to the commission agreement. The petitioner was unable to show otherwise.

36 As such, even if the commission agreement were to be admitted as evidence, the petition for criminal revision would still be dismissed, as the petitioner's conviction was based on a different reason. The petitioner thus failed to show that some "serious injustice [had] been caused" to him as a result of the initial non-production of the commission agreement, warranting the exercise of this court's powers of revision: *Teo Hee Heng v PP* [2000] 3 SLR 168, which followed the Singapore Court of Appeal decision in *Mok Swee Kok v PP* [1994] 3 SLR 140.

37 That being stated, I must add that I observed a disturbing attitude that had been adopted by the petitioner. In his skeletal arguments, the petitioner had used rather strong, harsh and unwarranted language against the Jaganathans. In light of that, it was apparent that this petition for criminal revision was an attempt by the petitioner to seek personal revenge against the Jaganathans, rather than as a means to quash his conviction. For one, the petitioner's arguments revolved only around the uncovering of the commission agreement, an issue that clearly ran at a tangent to the district judge's *ratio decidendi*. For another, the petitioner alleged throughout his skeletal arguments that the Jaganathans had, among other things, "lied", "perjured", "misled the trial judge", displayed "vindictiveness" and gone "on a vengeance path". These were serious allegations that had been loosely made without any reasonable basis.

38 Further, the petitioner had accused the district judge of drawing "prejudicial conclusions" without explaining where such prejudice was found in the grounds of decision. All of these accusations were without merit. As much as a criminal revision should not be used as a convenient form of "back door appeal", it should also not be abused as an avenue to seek revenge or satiate the ego of a petitioner. Any suggestion of a trend in bringing appeals or criminal revisions for the main purpose of tarnishing the reputation of another party should be nipped at an early stage.

39 In conclusion, my reasons for dismissing this petition for criminal revision were two-fold. First, the commission agreement upon which the petitioner had based this criminal revision failed to meet the three conditions enshrined in *Ladd v Marshall* and therefore could not be adduced as fresh evidence. Second, even if the commission agreement could be adduced as fresh evidence, the district

judge's decision was not based on the existence or non-existence of the commission agreement. The district judge had come to her decision based on the charge the Prosecution had proceeded on at trial and she had made well-supported findings of fact that substantiated her conclusion. I found no cogent reasons to overturn her findings.

Petition dismissed.

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