THE ATTORNEY-GENERAL

v.

SILVAN SILVA

SUPREME COURT
ISMAIL, J., WEERARATNE, J.,
AND RATWATTE, J.,
S. C. 48/80
M. C. KANDY 155/26
DECEMBER 7, 1981.

Perjury by witness — S 188 Penal Code — S. 41(2) and 161(2) of the Administration of Justice Law No. 44 of 1973

A witness should not be dealt with under s. 161(2) of the Administration of Justice Law (substantially the same as s. 440(1) of the Criminal Procedure Code — cf. Oaths and Affirmations Ordinance) unless the evidence is inherently or palpably false. The question of perjury must be determined on certainties. In short a witness should not be dealt with under s. 161(2) unless he is guilty under s. 188 of the Penal Code and then too the Court must necessarily act in accordance with established legal principles as for instance making known to the witness the gist of the accusation against him and this must contain a statement of the facts constituting the alleged offence, and he should be afforded the opportunity of being heard. The charge cannot be based in a matter like this on depositions other than those in the proceedings.

The burden of proof which should be applied is proof beyond reasonable doubt. The Judge must be 'clear beyond doubt' but it is not necessary that this very language must be used.

The false evidence need not be on a material point in the case. The provision cannot be availed of when there is a conflict of evidence of witnesses.

Cases referred to:

(1) Kanthar Murugesu v. Kanthiah Sivaguru (1926)28 NLR 215.
(2) In re Seemon (1945) 46 NLR 142.
(3) Subramaniam v. The Queen (1956) 57 NLR 409 (P.C.).
(4) Samaratunga v. The Queen (1958) 60 NLR 25 (P.C.)

APPEAL from judgment of the Court of Appeal.

P. S. C. de Silva Additional Solicitor-General with G. L. M. de Silva S. C. for the State.
Daya Guruge for the respondent.

Cur. adv. vult.

December 18, 1981
WEERARATNE, J.

This is an appeal by the Attorney-General from a judgment of the Court of Appeal allowing the appeal of the witness-appellant who was summarily charged and convicted in the High Court of Kandy for committing perjury by giving false evidence within the meaning of section 188 of the Penal Code an offence under Section 161(2) read with Section 41(2) of the Administration of Justice Law No. 44 of 1973.

The main case from which this matter stems is one in which two accused were indicted in the High Court for offences of robbery (Sections 380 and 383) of a Postal Mail Bag containing Rs. 12,000/- in cash when it was in transit from the Anuradhapura Post Office to the Maradankadawela Post Office.

W. A. Silvan Silva, the respondent in the present appeal was at the relevant time a peon attached to the Cashier's branch of the Anuradhapura Post Office. It was at this section that bundles of currency notes were stacked into mail bags by the relevant officers. There was evidence that the respondent had also helped in stacking bundles of notes into the mail bags as well as in tying up and sealing the bags prior to despatch. Then on the morning of the robbery the C. T. B. bus which usually carries the mail bags containing the money was stopped by two masked and armed men. One of the robbers searching for the bags had mentioned "Maradankadawala," from which it was presumed that he was in the process of selecting that particular bag.

Postal Peon W. A. Silvan Silva the respondent in this appeal, was a witness for the prosecution at the High Court trial referred to above. He is the younger brother of the first accused W. A. Seemon Silva. It was a part of the prosecution case that the first accused Seemon Silva would have known from his brother the respondent that on the 21st September morning a mail bag containing Rs. 12,000/- would be conveyed by the C. T. B. Mail bus to Maradankadawela.

The learned High Court Judge noticed the respondent under Section 161(2) of the Administration of Justice Law No. 44 of 1973 to show cause why he should not be dealt with for perjury for giving false evidence.

> "If any person giving evidence on any subject in open Court in any judicial proceeding under this Law gives, in the opinion of the court before which the judicial proceeding is held, false

evidence within the meaning of section 188 of the Penal Code, it shall be lawful for the court summarily to punish such witness as for contempt of court. Whenever the power given by this section is exercised, the Judge shall record the reason for imposing such punishment."

The wording of section 161(2) is substantially the same as section 440 of the Criminal Procedure Code, which was taken from the Oaths and Affirmations Ordinance No. 9 of 1895, which in clause 1 provides a prompt punishment for perjury by way of summary proceedings. It is implicit therefore that such proceedings should be resorted to only when evidence is inherently or palpably false. Hence the question of perjury must be determined on certainties. In short a witness should not be dealt with under section 161(2) unless guilty under section 188 of the Penal Code. However in exercising the procedure described in Section 162(1), the Court must necessarily act in accordance with established legal principles, as for instance that the court must make known to the defendant the gist of the accusation against him, which must contain a statement of the facts constituting the alleged offence, and an opportunity to be heard. The burden of proof which would have to be applied would be proof beyond reasonable doubt. It is not open to Court to base charges in a matter such as this on despositions other than those in the proceedings.

There appears to be nothing in the record to indicate that these basic principles just referred to have not been followed by the Judge of the High Court nor has any comment been made by counsel for the respondent on this aspect of the matter. A long line of authorities has established that the provision cannot be availed of when there is a conflict of evidence of witnesses. It is important to note that the false evidence need not be on a material point in the case *vide Kanthar Murugesu v. Kanthiah Sivaguru*(1).

It would be convenient at this stage to deal with the facts relating to the charge of perjury against the respondent. The learned High Court Judge, as was required of him, informed the respondent of the gist of the accusation which formed part of his evidence, and in regard to which he formed the opinion that it was false. When translated into English it reads as follows:—

> "These money bags are tied and sealed also by the Cashier and the C.O. I do not assist them in that matter. The Cashier and the C.O. used to close the room and put the money into bags and seal them. I do not go to that room. On other days too I do not assist in packing or sealing the money. I am speaking of

the position in 1972. Then I had no connection at all in putting the money into the bags. I have no connection even now. Before September 20th I as the Cashier's peon, have never assisted in packing or sealing the money."

Learned Additional Solicitor-General submitted that the trial judge did not base his findings on the fact that the respondent had gone back on his evidence. He stated that the item in regard to which the trial judge had found the respondent guilty was on material relating to his duties in the Cashier's branch, where he was the peon. It was further submitted that the respondent tried to make out in his evidence that he had no knowledge of what occurred, and what his duties were. In this connection we have the evidence of the official witnesses. H. W. Paripurnam at the relevant time was serving as the Post Master (Grade I) and was also in charge of cash. There was also in that section on the 20th September 1972 one S. Tharmalingam the Checking Officer. The Cashier's peon W. A. Silvan Silva (the defendant) also helped Paripurnam in regard to his duties. He helped Paripurnam when the latter counted the money and bundled them into bundles of Rs. 10,000/- and Rs. 12,000/-. The peon tied the bags of money together, which are then kept on the Cashier's table and sealed by the peon Silvan Silva. Paripurnam finally checks the seals, and the checking officer initials it. This method is in accord with the Postal Dept. Regulations. To a question in cross-examination Paripurnam denied that the counting of the money and the sealing of the bags were done in a separate room. P. Thangavelu was the Administrative Officer working in the Anuradhapura General Post Office. On the 20th Sept. 1972 he was on duty. He stated in evidence that the respondent's work on the 20th and 21st September '72 as the Cashier's peon was assisting the cashier. It was the duty of the Cashier's peon, to tie the bags of money and seal them. He also helps the Cashier to pack the money. This witness states that he was watching Silvan Silva helping to seal the bag that contained the money. R. Shanmugalingam was attached to the Anuradhapura Post Office. He states that the respondent was the Cashier's peon. The Cashier's peon helps the Cashier to balance the previous day's accounts, and to close the remittances to Post Offices. What he means by "closing the remittances" is counting the money, bundling it and getting the Cashier's peon to put the bundles into the cash bag. All this is done in front of the Cashier by his peon. He knows that the respondent was the Cashier's peon in September 1972. In answer to a question whether it is correct that the Cashier without giving the peon to handle the money, closes the room with the help of his assistant and collects and bundles the money, the witness replied that the cashier's room has two sec-

tions. It is difficult to keep the door closed always. There is a section which is used to handle money. The witness stated that the duties of this peon from 3 to 4.30 p.m. is shown in the duty list as "assisting to close remittances."

The witness was summoned to produce the "Official Instructions Guide" marked "Y" containing rules applicable to all Post Office employees including peons. It contains the duties of Cashier's peons, one of which is referred to as "Assist Closing Remittances." The work of the Cashier's peon in closing remittances have been referred to in detail by this witness as well as witness Paripurnam.

The evidence of Paripurnam is to my mind strongly corroborated by the Administrative Secretary Thangavelu who would have been fully aware of the duties and the general practice of the Post Office, and the Cashier's division. There is further corroboration by witness Shanmugalingam as well as by the production of the document marked "Y" which refers to the duty of the respondent as the Cashier's peon to "Assist Closing Remittances" details of which are spoken to by the above mentioned witnesses. On the face of this strong array of evidence we find the respondent states that it was not part of his duties to attend to the work involved in assisting the closing of remittances.

At the inquiry it was open to this respondent to state what his duties were, if they were not what the official witnesses in their evidence outlined as his specific duties both by oral and documentary evidence.

The Court of Appeal in setting aside the conviction of the appellant stated that the learned trial judge had dealt with the appellant using the phraseology of Wijewardene, J. in the case of *In re Seemon*(2) where the learned Judge stated that the petitioner had told the Court "deliberately something different from what was recorded by him," and that he had reached the decision that the petitioner had made a deliberate attempt to mislead the Court, and gave false evidence within the meaning of Section 188 of the Penal Code.

In this connection the Court of Appeal stated that the trial judge had found that the appellant had given false evidence based on the circumstances which fall short of the overriding principle that the power given to a trial judge is one which would only be used when the judge is "clear beyond doubt" in the words of Lord Oaksey in the case of *Subramaniam v. the Queen*(3)

cited with approval in *Samaratunga v. the Queen*[4]. The complaint of the Court of Appeal is that "the learned trial judge has nowhere said that the appellant's evidence is clear beyond doubt to be false evidence." In regard to this point we find that the trial judge has at the very outset set out in his judgment that Peon Silvan Silva in giving evidence as a witness in the case had admitted he was on duty at the Anuradhapura Post Office as the Cashier's peon on 20th September 1972, which is the day on which the relevant postal bag to Maradankadawala was packed with currency notes. He admitted that his hours of work were from 8.30 a.m. to 4.30 p.m., but denied that he performed any duties in connection with the "closing of money remittances."

I have earlier in this judgment referred in some detail to the evidence of the officials of this post office, i.e. Paripurnam the Cashier, Thangavelu the Administrative Officer, and Shanmugalingam who produced the "Official Instructions Guide," which sets out the duties of the employees, including that of the Cashier's peon who has to "Assist Closing of Remittances," the implication of which was explained to the court in detail. It would thus be seen that the evidence of the Cashier Paripurnam is amply corroborated by the other two official witnesses as well as by the relevant documents referred to earlier setting out the appellant's duties which requires him, *inter-alia,* to stack the currency notes as well as tie and seal the bags containing the cash. The trial judge clearly stated that he did not base his findings on the fact that the appellant had gone back on his evidence. The item in regard to which he found the appellant guilty was on material relating to his duties in the Cashier's branch. As mentioned earlier the charge solely relates to the appellant's duties as the Cashier's peon.

Reverting to the Court of Appeal contention that the power given to a trial judge in a matter such as this could only be exercised when the judge is, "clear beyond doubt" does not, I am sure, mean that his order is vitiated if he does not use those magic words. I am certain that all that the Judicial Committee of the Privy Council intended when they used that expression is that the evidence when examined intrinsically must lead to a irresistible conclusion that the case against the accused is clear beyond doubt. That would not mean that no other adequate language or expression cannot be used. The English language is possessed of a variety of words and phrases which convey the same meaning. Hence when we find Wijewardene, J. stating that an appellant has told the Court "deliberately something different from what was recorded by him," and that he has reached the decision that the petitioner made deliberate attempt to mislead the court and gave

false evidence, it would mean nothing more than that Wijewardene, J. was satisfied beyond reasonable doubt of the falsity of the evidence given by the witness. By language such as this surely the judge has satisfied the burden of proof required in a case of this nature when the question is whether the witness was giving evidence falsely quite deliberately, in which event section 161 states that he should be convicted as for a contempt of Court. In the present matter the trial judge has adopted the language of Wijewardene, J. which can well be regarded as acceptable.

In fact when the trial judge adopting Wijewardene, J's language states that the appellant had been "deliberately lying" would it not surely be a far stronger expression of the guilt of the appellant than the expression "clear beyond doubt." We disagree with the finding of the Court of Appeal on this point.

It would then be seen that the learned trial judge has adequately dealt with the principles pertaining to the burden of proof in a case of this nature, as well as in regard to the criticism on the question of the lack of corroboration of the witness Paripurnam who as shown by me earlier has his evidence amply corroborated. The third reason given for setting aside the conviction is that in this instance it cannot be said that the statutory power has been safely exercised. In support of this contention the Court of Appeal judgment sets out *inter alia* that:—

(1) the witness is in the eyes of the judge an accomplice.

(2) He is the brother of the accused and therefore under the double stress of loyalty to his brother and that of a shadow of guilt falling over himself.

(3) All that the trial judge has really said which is alleged to be false evidence is nothing more than a denial of having assisted the Cashier in the packing and sealing of mail bags.

The judgment then sets out that "in a situation like that we do not think that it is a correct exercise of discretion on the part of the trial judge to have the witness tried for giving false evidence." It seems to us that reasons such as these are irrelevant and do not bear scrutiny. They are indeed insufficient to conclude that the statutory power has not been safely exercised by the learned judge of the High Court.

On the material placed before us it would appear that the respondent in order to meet a possible point that the respondent's

brother (the 1st accused) got a tip off from the respondent, deliberately gave false evidence in regard to his official duties. Learned Counsel for the respondent in making his submissions stated that the learned trial judge, in the course of his judgment, states that the accused-respondent had been the informant to his own brother and that there was no evidence to support this finding. We find that this was not the basis upon which the trial judge held that the accused-respondent was deliberately giving false evidence. It was also submitted that the evidence of Thangavelu did not constitute corroboration of the evidence of Paripurnam. This submission is without merit for the reason that Thangavelu, who was the Administrative Officer attached to the Anuradhapura Post Office had, in answer to Court, clearly stated what the duties of the accused-respondent were. In regard to this there can be no doubt that his evidence detailing the procedure confirms the evidence given by Paripurnam, as shown by me earlier in the judgment. The learned trial judge has in the course of his judgment carefully considered and detailed the relevant principles governing this case. He correctly states, "Dealing with a case of this nature is a very rare and well considered step taken by a Court."

For the reasons stated we set aside the judgment and order of acquittal and convict the accused of the charge. We accordingly allow the appeal of the Attorney-General.

In regard to sentence we have considered the fact that the respondent, a public officer aged 32 years will lose his job. He has apparently had a good record until this lapse occurred. In all the circumstances we sentence the respondent to two years rigorous imprisonment suspended for an operational period of five years. In addition we impose a fine of Rs. 500/- in default three months rigours imprisonment. The High Court is directed to comply with sub-sections 4 and 6 of the Code of Criminal Procedure Act No. 15 of 1979.

ISMAIL, J. – I agree.

RATWATTE, J. – I agree.

Appeal allowed.
Conviction by trial Judge approved.
Sentence varied.