

TIKIRI BANDA
v.
O.I.C. POLICE, GALAGEDERA.

COURT OF APPEAL
M. JAMEEL, J., T. N. ABEYWIRA, J. AND K. VIKNARAJAH, J.
C.A. 23/81 P.C.
PRIMARY COURT, GALAGEDERA No. 401
JULY 28, 1987.

Evidence—Charge under Penal Code s. 314—Evaluation of evidence—Failure to assess evidence of witness to whom the victim immediately reported the incident.

The accused who was the M.P. for Galagedera was alleged to have assaulted a bus driver allegedly for blocking the M.P.'s car for longer than was thought necessary. The driver and a witness called Saranapala gave evidence stating that it was the M.P. who assaulted the bus driver. The conductor who was called by the prosecution stated that the driver immediately after the assault uttered the Sinhala word "gassewwa" or "procured the assault" and added he was a Muslim implying he did not understand the Sinhala language, and was only repeating what the driver uttered. On behalf of the accused one Weerasekera gave evidence claiming he assaulted the bus driver because he did not stop at the bus halt but the other evidence was, that there were no waiting passengers at the halt at this time. The Primary Court Judge accepted the prosecution version and found the accused guilty.

Held—

The Judge had failed to evaluate the evidence of the conductor called by the prosecution which if he did would have cast serious doubt about the credibility of the prosecution evidence. Irrespective of the weakness in his case or the inconsistencies inter se between the several lines of defence taken the accused is entitled to the benefit of the serious doubt which the evidence of the conductor raises in the case presented for the prosecution.

APPEAL from judgment of the Primary Court Judge of Galagedera.

K. N. Choksy P.C. with J. C. T. Kotalewala and Somasara Dissanayake for accused-appellant.

Dr. Asoka Gunawardena D.S.G. with S. J. Gunasekera for the State.

Cur. adv. vult.

February 01, 1988.

JAMEEL, J.

On a review of the evidence it is abundantly clear that on the day in question, namely on 31.3.1980, the virtual complainant in this case, namely, W. L. Somachandra, a driver attached to the Kandy North

Depot of the Central Region Transport Board had received injuries to his face in the course of an incident which had occurred at some time between 12 noon and 1 p.m. on that day.

Two of the questions of fact that had arisen for decision by the Primary Court Judge were (1) Whose hand was it that had caused the injuries? and (2) In what circumstances were the injuries inflicted?

A question of jurisdiction of the court was also raised before us in this appeal.

On the evidence recorded there appears to be a strong conflict between the parties as to the identity of the author of the assaults. The virtual complainant and the witness Saranapala claim that it was the Accused who had assaulted the complainant that day. By the evidence led on its behalf, the Defence sought to show that it was the hand of the Defence Witness Weerasekera. Weerasekera very unambiguously claimed that he and he alone assaulted the complainant driver that day.

Between these two sharply conflicting versions the Learned Primary Court Judge has chosen to believe the complainant and rejected the evidence of Weerasekera to the effect that he was the assailant that day.

The complaint of the Defence is that in arriving at this decision the Learned Primary Court Judge has rejected as inadmissible the evidence of the witness for the prosecution whose evidence if it had been admitted and duly considered in its correct perspective may well have rendered the Defence version more probable than that of the prosecution. It was further contended that at the least it would have raised a substantial doubt as to the prosecution version. The evidence relied on was that of the conductor of the bus driven by the complainant. The bus had been stopped in order to provide room for the car of the accused to proceed with ease, on this narrow Galagedera/Hataraliadde road. The Accused is a Member of Parliament for Galagedera.

The Prosecution alleges that the attack was motivated by the fact of a slight delay on the part of the complainant in stopping his vehicle and so blocking the accused for longer than was necessary. It is the Prosecution case that the Accused had been angered by this delay

and had beckoned to the complainant and had assaulted him as he came up to the Accused's car to query as to why he had been summoned. No other motive was suggested. Indeed, it was conceded by the complainant that right up to that moment the relationship between them had been quite cordial. The complainant has stated in evidence that he has run errands for this Accused in spite of the fact that he himself was a member of a Trade Union sponsored by a political party opposed to that of this M.P. The witness Saranapala, a time-keeper attached to the Central Region Transport Board, who happened to be travelling in that bus at that time claimed to be an eye-witness to the assault and he identified the M.P. as the assailant.

It was conceded by the complainant that shortly before he reached the place of incident he had passed a bus halting place. It was his position that there were no persons awaiting this bus at that halt, but only some passengers who wished to get off the bus. The driver also conceded that as at that time the bus was not carrying its full complement of passengers.

On the other hand Weerasekera said that he and several others had been waiting at that halt, but that the complainant, as was his normal practice sped past the halt without stopping for them. When the bus stopped for the M.P. they had all rushed up and while the others had boarded the bus he himself had gone up to the M.P.'s car and lodged a complaint against the complainant concerning his wanton disregard of the persons waiting at bus halts. According to Weerasekera the driver had then come up there and demanded "Who is the dog who has complained against me?" Provoked by this reference to a dog, Weerasekera says he assaulted the complainant.

It is in the context of this conflict in the two cases that one has to examine the evidence of the conductor. So also its unwarranted-rejection. The Learned Deputy Solicitor-General conceded that the conductor's evidence is both admissible and relevant and that it is not hearsay and so should not have been rejected on that score.

The conductor had not seen the assault. He says he had been at the back of the bus and had also had to issue tickets to those who boarded the bus when it stopped for the M.P. This part of the conductor's evidence if believed would have lent credence to Weerasekera's story. Be that as it may, it is the other part of his evidence, which is, to my mind, much more significant. That is the

answer he gave to the question as to what the driver had said immediately on his return to the bus after receiving the assault. It must be borne in mind that the conductor was called to the stand by the Prosecution and this was a question put to him in examination in chief. That being so, it could be that the prosecutor was examining him on the basis of the statement made by this witness to the police. Alternatively, it could be that the prosecutor was fishing for corroboration or at least for consistency. The answer to this question is even more significant. It was, "THE M.P. THIS ACCUSED PROCURED THE ASSAULT, I AM A MUSLIM."

The evidence of this witness is recorded in Sinhala. In fact the typist has reproduced the word 'GEHUWA' meaning assaulted. The Learned Primary Court Judge has in his own hand struck this out and substituted therefore 'GESSEWWA' meaning procured the assault. There is therefore no doubt that had the witness given his evidence in Sinhala then the word he had used was 'GESSEWWA' or had he given his evidence in any other language then he had used a word or words which meant PROCURE THE ASSAULT and not merely ASSAULTED. The word 'GESSEWWA' would indicate that the accused 'Got it done' and not 'Did it'. Had the charge framed against the Accused been one under Section 314 read either with Section 32 or Section 102 of the Penal Code then this evidence would have been needed primarily to prove such a charge. But the charge in this case is one under Section 314 simpliciter. Thus, the evidence of the conductor assumes great significance for the question to be answered is 'Did the Accused CAUSE HURT?'. If the conductor is believed then the answer is 'NO' and the Accused will have to be acquitted of the charge framed against him.

Taken as a whole the answer given by this conductor is certainly very perplexing and quite naturally led the Prosecutor to ask the next question, namely, 'What do you mean?'. To that, the conductor vouchsafed no answer. Neither the prosecutor nor the court pursued that question any further. The question asked of the witness was directed at finding out not the physical state of the complainant at the assault but to find out what he had said soon after the incident. That is to say as to how the complainant had described the events that had occurred. What he then said would have been some of the first, if not the very first words uttered by the injured after receipt of the injuries and uttered within minutes of the incident. If 'GESSEWWA'

was the word then used it means that it was not the M.P. himself who had assaulted him but had procured the assault. In rejecting this evidence as being inadmissible, the Learned Primary Court Judge had shut his mind to the possible impact of this evidence on the credibility of the driver when he claimed that it was the hand of the accused that had dealt the blows on him. If the words then uttered by the complainant have been correctly and accurately reproduced by the conductor then that evidence is totally inconsistent with the evidence of the complainant, and the case for the prosecution.

All that the prosecutor did was to ask the single and simple question 'What do you mean?'. He has left this unexplained and unexplored even though the witness did not answer the query as to what he had meant by that answer. There was a need for further clarification and the Prosecution should have pressed for an explanation as this was an answer given to a question put in the course of the examination in chief of the witness called by the Prosecution. No attempt had even been made to rebut a possible inference that this same word had been used in the course of the statement this witness had admittedly made to the police in the course of their investigations.

The answer in question is *ex facie* inexplicable. Yet, its first half, namely, "The Accused M.P. procured the assault" is by itself perfectly intelligible and a direct answer to the question asked. The only question is as to whether the conductor correctly reproduced the words he had heard the driver utter as soon as he came back into the bus after the assault. In that event his words could be conclusive of the matter for all the other evidence put together would be insufficient to prove the charge under Section 314 read with Section 32 or even Section 102. The second part of the impugned answer, namely, "I am a Muslim" when taken by itself is equally intelligible and in all probability quite true, as to its contents. The Learned Deputy Solicitor-General suggested that the answer taken as a whole could mean that because he was a Muslim conductor he wished to convey that he did not understand what the driver meant when he used the word 'GESSEWVA'. The real question is whether the driver had in truth and in fact used that word for then it matters not whether the conductor did or did not understand the meaning of it. It would not even matter if the conductor could not recognise it as a Sinhala word, provided he has repeated exactly the word he had heard the driver utter. The importance of the evidence of the conductor is not in the assessment of his understanding of the meaning of the words he heard but as to

the exact words themselves and accordingly as to his trust-worthiness in respect of such reproduction. The record does not contain any material to show that the conductor was speaking a falsehood when he said that the driver had said that the M.P. had ('GESSEWWA'), procured the assault. If his statement to the police had been significantly different, then he could have been contradicted. Not treating his evidence as relevant and admissible and so shutting out its impact and not considering its significance on the conflicting issues before the court militates against the conviction on the charge framed. Had this evidence been considered in its correct context then it would have greatly assisted the court in resolving not only the conflict between the two versions placed before the court but also the primary question of the reliance to be placed on the evidence of the driver and the only eye witness, Saranapala. More particularly as to the assessment of their evidence in the light of the contradictions inter se. It may well add to rather than detract from the doubts that arise as to whether the charge of voluntarily causing simple hurt has been duly proved. Irrespective of the weakness in his case or the inconsistencies inter se between the several lines of defence taken the Accused is entitled to the benefit of the serious doubt which the evidence of the conductor makes in the case presented for the prosecution.

Accordingly, the Accused is entitled to an acquittal on this ground alone. In the circumstances, it is not necessary to determine the other matters raised during the course of the argument, namely, as to whether the Primary Court had jurisdiction to try a case under Section 314 wherein the virtual complainant is a servant or officer of a public corporation and/or whether the fact of the Learned Attorney-At-Law who appeared for the virtual complainant along with and assisting the police in this prosecution, addressed court on the facts after the closure of the recording of all the evidence led in the case (and that too after the address of the Attorney-At-Law for the Accused) would vitiate the trial.

Accordingly, the Accused is acquitted.

ABEYWIRA, J.—I agree.

K. VIKNARAJAH, J.—I agree.

Conviction set aside

Accused acquitted.