Mustapha V. Jayatilake

471/1966

Present: Manicavasagar, J.

S. MUSTAPHA, Appellant, and H. D. P. JAYATILAKE (H. Q. Inspector), Respondent

S. C. 354/1966—M. C. Mannar, 2062

Offence of transporting illicit immigrants—Burden of proof—Sanction of Controller— Requirements concerning such sanction—Joinder of charges under Criminal Procedure Code, s. 181—Immigrants and Emigrants Act (Cap. 351), as amended by Act No. 68 of 1961, ss. 9, 10, 15, 45 (2).

In a prosecution for transporting illicit immigrants in contravention of the Immigrants and Emigrants Act, the onus of rebutting the presumption created by the Act that the accused had the knowledge that the transported persons were immigrants is on the accused. The presumption may be rebutted if the accused's explanation cannot prima facie be rejected as improbable and the prosecution fails to demonstrate that the evidence of the accused is false.

When a plaint is filed for an offence under the Immigrants and Emigrants Act, the prosecutor must take special care to list the sanction of the Controller as an exhibit, and to see that the document bears the date on which the sanction was granted. The Magistrate, too, should cause an entry to be made, in the journal, of the filing of the sanction, and the date on which it was tendered.

Charges of transporting an immigrant knowing that he had entered Ceylon unlawfully or remained in Ceylon unlawfully may be tried at one trial by virtue of the provisions of section 181 of the Criminal Procedure Code.

APPEAL from a judgment of the Magistrate's Court, Mannar.

A. H. C. de Silva, Q. G., with *Malcolm Perera*, for the accused-appellant.

Cecil Goonewardene, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 30, 1966. **MANICAVASAGAR, J.**—

The appellant was convicted of the offence of transporting by car two persons, not citizens of this country, (I shall refer to them as immigrants) who admittedly entered this country or remained here in contravention of certain provisions of the Immigrants and Emigrants Act (Chapter 351, Volume XI, amended by Act 68 of 1961). The act of transport was admitted by the appellant. The only issue is whether the appellant had the knowledge that these men are immigrants. The Act creates the presumption that the accused had this knowledge, and the onus of rebutting this presumption is on the appellant.

The appellant's evidence is that on 8.6.65 he conveyed for hire in car No. E. N. 4738 a Muslim man from Madampe to Tharakundu. He reached Tharakundu at about 11 p.m. : whilst returning to Madampe the same night he was stopped at Murunkan by 3 persons who were on the road. Two of the persons were Sikkander and Munniyandi, the immigrants referred to in this case. The appellant said he questioned them, and they wanted to get to Anuradhapura, and agreed to pay petrol expenses which he accepted. After he had gone some distance with the immigrants he was stopped by army personnel : he was assaulted by Lt. Arthanayake and 2 or 3 other army men, and lost consciousness. He recovered in the military camp at Chilawathurai, and was assaulted there by Lt. Arthanayake. He was handed over to the Mannar Police at the Police Station at about 11.45 p.m., and produced in Court by the Mannar Police on 10.6.65 at 2 p.m. His evidence is that he did not know that the 2 men were immigrants :

prima facie his story cannot be rejected as improbable : it may well be true or it may well be a fabrication.

The prosecution sought to demonstrate that the appellant's evidence is false, and fabricated to escape the consequences of his unlawful act. They relied on the direct evidence of Sikkander, and on certain circumstances which pointed to the falsity of the appellant's version.

Sikkander's evidence is that about 8 p.m. on 8.6.65 Munniyandi and he, the two of them had arrived with several others by boat from India on the night of 7.6.65, came to Murunkan bazzar for their meals: in the town they saw the appellant seated in a car : the latter questioned them, and he told the appellant that they had come from India, and wanted to get to Colombo. The appellant wanted Rs. 50 from each of them which they agreed to pay in Colombo ; they had only Rs. 10 with them. The appellant took them in the car in which there were 4 others : on the way the army men signalled to the car to stop: the appellant did not stop but drove very fast; the car was pursued, and over-taken by the military jeep, and its further progress was obstructed. The appellant then asked those in the car to run away, and some of the passengers escaped into the jungle : Lt. Arthanayake arrested the two immigrants and the appellant.

Sikkander's evidence, if it is accepted, establishes that the appellant transported the 2 men in his car with the knowledge that they were immigrants. The circumstantial evidence relates to the conduct of the accused immediately before and after he was arrested by the military. They are as follows :—(1) instead of obeying the signal to stop, the appellant drove on at a fast speed; (2) when the passage of the car was obstructed by the jeep, he reversed the car; (3) the evidence of Sikkander that the appellant asked the passengers to escape into the jungle ; (4) the appellant threw the ignition keys of the car which the army men recovered; and (5) the hour of the night when the immigrants were being transported.

The Magistrate dealt fully with the facts, and the law, and reached the conclusion that the presumption against the appellant had not been rebutted; he accepted the evidence of Sikkander and the two

army witnesses. I have taken a view different to that of the Magistrate, on the facts, and I therefore propose to consider the evidence on this issue in some detail.

An important fact which has a bearing on the assessment of the evidence is that the appellant sustained injuries, some severe in nature : he had as many as 13 injuries: Dr. Shanmuganathan examined the appellant at 3 p.m. on 10.6.65 : an hour before that, the appellant was produced in Court, and his lawyer complained to the Magistrate that his client was badly assaulted by military personnel, and his shirt was blood stained. The medical opinion is that the injuries were inflicted either late on 8.6.65, or in the early hours of the morning of 9.6.65 ; he found the injuries well distributed over the body ; some of them could have been caused by a baton or stick, some by fist blows, and one by a kick ; he suspected a fracture of the ribs but the X-ray did not support his suspicion. The appellant was warded in hospital for about 2 weeks. His evidence is that he was assaulted by the army men at the time of arrest, and thereafter by Lt. Arthanayake at the military camp. The two army witnesses denied the charge of assault, and Sikkander said no assault took place in his presence, nor did he see the appellant with injuries or blood stains on his clothes. If the evidence of the prosecution witnesses be true, the inference is that the injuries were sustained after the appellant had been handed over to the Police. The appellant was delivered to the Mannar Police at about 11.45 a.m. on 9.6.65. The Doctor's opinion as to the time of the assault rules out the possibility of the injuries being sustained whilst in Police custody: but assuming that the Doctor's opinion in regard to time may not be quite accurate, there is the evidence of the appellant, and the statement by his lawyer at the first opportunity to the Magistrate, that the assault was by the army men. The question that arises is why should the appellant implicate them, if in fact he was assaulted by the Police : I do not see that he derives any advantage by giving untruthful evidence on this matter. The Magistrate, in his judgment reviewing the evidence on this issue, gives the benefit of the doubt to Lt. Arthanayake: in other words he holds that it is doubtful that Lt. Arthanayake assaulted the appellant. In my view the evidence points strongly to the probability of the

appellant's version : the evidence of the two army men, and Sikkander, therefore, is suspect, and on any question of disputed fact there should be corroboration from a reliable and independent source, if the prosecution version on the main issue is to be accepted.

I shall now turn to an examination of the evidence on the issue of knowledge. Sikkander's evidence invests the appellant with the requisite knowledge. But the defence invites me to reject his evidence. Why should Sikkander give untruthful evidence ? Prima facie he gets no benefit: whatever be the result of this case he would continue to remain in custody until he is deported. The defence submission is that as he has been in custody, and continues in custody from the time of his arrest, his evidence is tainted in that he could have been intimidated or promised some advantage : being an immigrant he would have reacted favourably to such pressure. The Magistrate was not unmindful of the force of this submission : nevertheless, he accepted Sikkander's evidence. I would be justified in reaching a contrary view only if I am satisfied that the intrinsic nature of Sikkander's evidence makes it suspicious and/or improbable. The suggestion by the defence as to the motive for giving false evidence cannot be rejected as fanciful, for pressure on a witness is not improbable, and he being an immigrant is likely to succumb to it. Sikkander, it should be remembered, denied any knowledge of the assault on the appellant: the latter's evidence is that the first assault took place at the place of arrest: if this be true, and I see no reason why the appellant should speak an untruth in regard to the place of assault, Sikkander must have seen the assault: is his ignorance pretended, and due to outside influence ? The answer to this question is obvious and lends strength to the defence submission that Sikkander's evidence should not be accepted.

This view does not conclude the evidence on this issue. The burden, as I observed, is on the appellant to rebut the presumption of knowledge.

It was submitted that in assessing Sikkander's evidence there are certain circumstances which point to its improbability. It appears to me unlikely that Sikkander, who admits he was particular to hide his identity, would have told the appellant that he came from India : it strikes me as a story which is difficult to believe, for quite apart from Sikkander's admission that he was particular to hide his identity, for this is what any immigrant is most likely to do, it is unlikely he would have told the appellant, a stranger, that he was an immigrant from India : it was too grave a risk for any person in the situation of Sikkander to take. Another circumstance in favour of the appellant is Sikkander's story that Munniyandi and he had agreed to pay Rs. 100 to the appellant in Colombo; they had only Rs. 10 between them : is it likely that the appellant would have taken 2 strangers on trust, taken the risk of taking two unknown immigrants who may not keep their word ? Having regard to the money in their possession, and the distance from Murunkan to Anuradhapura—about 55 miles —does not the evidence of the appellant that the agreement was to transport them to Anuradhapura, and to supply 2 gallons of petrol sound true, rather than the evidence of Sikkander of a promise to pay in Colombo ?

These circumstances, coupled with the view I have taken on the question of assault, shake the credit of Sikkander, and I consider his evidence suspicious and unsafe to rely upon. It is well to remember that the prosecution relies strongly on Sikkander's evidence, and in the estimate I have formed of his evidence, I consider that the appellant's version is not a story which is improbable for it may well be true ; the circumstances relied on by the prosecution have not dispelled the probability of the appellant's evidence. I should add that the conduct of the appellant before and after being apprehended by the Military, assuming that these have been proved,—two of these have not been spoken to by Sikkander —are acts not inconsistent with that of an innocent man who has turned panicky.

I hold that the Magistrate erred in his finding on this issue. The conclusion I have reached disposes of this appeal. But as counsel

for the appellant made certain other submissions, I propose to discuss these very briefly.

The first is that there is non-compliance with Section 45 (2) of the Act, in that the prosecution was not instituted with the written sanction of the Controller of Immigration and Emigration. The written sanction of the Controller has been filed : it is undated, and there is no minute in the record of the case to show when it was filed. The submission is that it was not filed before or along with the plaint, but after. I think there is no justification from these facts to support this submission. The appellant was represented by a lawyer in the original Court, and he should have been wary enough to take this objection in limine, if in fact the sanction was filed after the instruction of the action ; it is too late now to found a submission on certain facts which point to carelessness, but not conclusively to the sanction being filed after the institution of the action.

Therefore I am justified in presuming that the right procedure was followed, and the sanction was filed with the plaint. Police officers must take special care when filing plaint in these cases, to list the sanction as an exhibit, and to see that the document bears the date on which the sanction was granted. Magistrates, too, should cause an entry to be made in the journal of the filing of the sanction, and the date on which it was tendered. Had these steps been taken it would have obviated the need to make the submission that was addressed to me in this case.

The appellant was charged on two counts : each count is that he transported each immigrant knowing that he had entered or remained in this country in contravention of certain provisions of the Act. Counsel's submission is that the transport of an immigrant who enters Ceylon in breach of Section 9 and/or 10 of the Act is an offence distinct from the offence of transporting one who remains in the country in breach of Section 15 of the Act: therefore, a charge which pleads these two distinct offences in the alternative is bad for uncertainty. No doubt entering this country in breach of Section 9 and/or 10 is an offence under the Act, whilst remaining here is a distinct and different offence: for a person may enter lawfully, but

remain here in breach of the requirements covering his stay. The essence of the charges in this case, it is important to bear in mind, is the transport: a prosecutor may well be not certain in his mind which of the two offences the proved facts will constitute. I think he should be careful in such a situation to plead in the alternative the offence which will have the support of the proved facts. The substantial question which has to be considered is whether an accused person has been prejudiced to the extent that it has caused a failure of justice : I take the view that Section 181 of the Criminal Procedure Code has been rightly used, and the appellant has not been prejudiced.

The last of the submissions is whether Lt. Arthanayake's power to arrest without a warrant, which I am satisfied he had, was exercised within the area specified in the order of the Minister published in the Gazette : this order brought the administrative District of Mannar as the area within which one in the position of Lt. Arthanayake could exercise the powers and duties under the Act. The arrest was 2 miles away from Murunkan on the Anuradhapura side. The submission is that there is no proof that the place of arrest fell within the specified area. I do not propose to express any view on this as it is not necessary to do so: assuming that the place of arrest fell outside, it cannot vitiate the conviction so long as the proved facts are sufficient to sustain the guilt of the appellant.

I set aside the conviction, and the sentence passed on the appellant, and acquit him. The car should be returned to him.

Appeal allowed.