

Ratnasabapathy V. Assen

497/1966

Present: Alles, J.

N. RATNASABAPATHY, Appellant, and T. Z. A. R. ASSEN, Respondent

S. C. 1212/1965—M. C. Kandy, 44542

Offence of employing an illicit immigrant—Burden of proof—Distinction between "legal burden" and "evidential burden"—Immigrants and Emigrants Act, as amended by Act No. 68 of 1961, ss. 45 A (1) (c), 45 A (3).

In a prosecution for employing an illicit immigrant in contravention of section 45 A (1) (c) of the Immigrants and Emigrants Act, the presumption imposed by section 45A (3) that at the time of employment the accused had knowledge that the person employed was an illicit immigrant is sufficiently rebutted if a reasonable doubt is created about the truth of the prosecution case. Section 45 A (3) does not place upon the accused a burden of proving his innocence beyond reasonable doubt.

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

H. V. Perera, Q.C., with Mark Fernando, for accused-appellant.

F. C. Perera, Crown Counsel, for Attorney-General.

Cur. adv. vult.

June 21, 1966. ALLES, J.—

The accused-appellant in this case, a trader, carrying on business at 101, Colombo Street, Kandy, was charged in the Magistrate's Court of Kandy with the following offence:—

That he did employ another person, to wit, Kandiah son of Rajaih alias Kandasamy son of Periyasamy alias Kannusamy son of Periyasamy knowing that the said person had entered Ceylon in contravention of Section 10 of the Immigrants and Emigrants Act in breach of section 45A (1) (c) of the said Act, as amended by Act No. 68 of 1961 and thereby committed an offence punishable under Section 45A (1) of the said Act as amended.

The essential ingredients of the offence with which the accused-appellant was charged are as follows:—

(a) that the accused employed a person; (b) that the employee was an illicit immigrant; and (c) that at the time of employment the accused had knowledge that the person employed was an illicit immigrant.

There is no dispute with regard to the first two essentials and the only question that arises for determination in this case is whether the prosecution has established beyond reasonable doubt that the accused had the requisite knowledge that Kandiah was an illicit immigrant at the time of employment.

Kandiah gave evidence for the prosecution and stated that he was an Indian Tamil; he had come to Ceylon prior to 1961, married in Ceylon and had three children. He was previously a salesman at Neboda in the Kalutara District and was able to speak Sinhalese. He left for India leaving his family behind and returned again as a sly entrant in April, 1965. There is no doubt that he was an illicit immigrant; he was subsequently arrested in the accused's shop and detained by the authorities until his deportation to India.

Kandiah in evidence stated that he entered Ceylon at Mannar, came to Kandy in search of employment and on the subsequent day he came to the accused's place of business in Colombo Street. He told the accused that he was staying in Ceylon with his family and promised to obtain his ration book later. The accused then employed him as a salesman on a salary of Rs. 160 per month. He was an efficient employee and attended to the accounts as well. The accused promised to make him a permanent employee when

he obtained his ration book. He worked under the accused from April to August, 1965 quite openly until he was arrested by the police on 18th August 1965, as an illicit immigrant.

Inspector Fernando who arrested him says that when he came to the accused's shop he saw three persons behind the counter, one of whom was Kandiah. He questioned Kandiah and arrested him on suspicion. The accused gave evidence and said that he had no reason to suspect that Kandiah was not a citizen of Ceylon as he was able to speak Sinhalese quite fluently and that he employed him quite openly. At that time there were two other employees and they all slept on the accused's premises at night.

The learned Magistrate accepts the evidence of Kandiah—indeed that evidence supports the testimony of the accused that he had no reason to suspect that Kandiah was not a citizen of Ceylon, but in disbelieving the accused he has been influenced by the fact that in the "E" form maintained by the accused under the Employment Provident Fund (P1) the name of Kandiah has been omitted. This, he says, establishes the falsity of the accused's defence that he did not know that Kandiah was an illicit immigrant. The Magistrate, however, does not appear to have considered the evidence of the Inspector that at the time of his arrival there were three salesmen present on the accused's premises and this supports the accused's evidence that at the time of the arrest of Kandiah there were three salesmen employed in the shop. The accused stated that he entered in P1 only the names of permanent employees and according to P1 in August, 1965, only the name of one employee had been entered. Admittedly, therefore, besides Kandiah the name of the other employee has also not been entered in P1. It may be that the accused was contravening the provisions of the law in not including the names of temporary employees in the "E" form, but this does not affect his explanation for the non-inclusion of Kandiah's name and the name of the other employee in P1.

Again, the Magistrate says that when Kandiah refused to tell him earlier the place of his birth, his conduct should have put him on his guard. This is not an accurate statement of fact. According to the

accused Kandiah did not refuse to mention to him the place of his birth, but only told him on being questioned that he was a citizen of Ceylon from Nawalapitiya. Finally, the Magistrate comments unfavourably on the accused's conduct in not making efforts to obtain Kandiah's rice ration book. Considering the difficulties experienced today in obtaining suitable employees and as Kandiah proved himself to be a satisfactory employee, it is not surprising that the accused did not consider it necessary to pursue this question further and verify whether Kandiah had a ration book or not. If he had examined the evidence more closely, it is possible that he might have come to a different conclusion and acquitted the accused since it had not been established beyond reasonable doubt that the accused had the requisite knowledge when he employed Kandiah.

Mr. H. V. Perera, Q.C., for the accused-appellant, has submitted that the learned Magistrate has misdirected himself on the question of law in regard to the burden of proof. In the course of his judgment, the learned Magistrate has expressed the view "that on the prosecution establishing that Kandiah was a person who had entered Ceylon in contravention of the provisions of the Act and that the accused had employed him, the prosecution had discharged the burden of establishing that the accused knew that Kandiah was an illicit immigrant. The burden was on the accused therefore to show that he did not know that Kandiah was an illicit immigrant when he employed him." He thereafter proceeds to consider the evidence and has concluded that the accused has failed to rebut the presumption arising under Section 45A (3) of the Act.

In approaching the case in this wise the Magistrate appears to have lost sight of the fact that one of the essential ingredients of the offence under Section 45A (l) (c) of the Act is that the burden of proving the requisite knowledge is on the prosecution. This, according to Cross on Evidence (2nd Edition, 1963) is the legal or persuasive burden, a burden that never shifts in the course of the trial and the burden borne by the party "who will lose the issue unless he satisfied the tribunal of fact to the appropriate degree of conviction". Section 45A (3) of the Act is in the following terms:—

"When a person is charged with an offence under sub-section (1) or sub-section (2), it shall be presumed that he acted knowing that the entry of that other person into Ceylon was or would have been, or that the other person had entered Ceylon or was remaining in Ceylon, as the case may be, in contravention of a provision of this Act or of any Order or regulation made thereunder, and the burden of rebutting the presumption of such knowledge shall lie upon the person so charged."

This Section refers to what Cross terms as the "evidential burden"—the burden of producing sufficient evidence to raise a particular issue to require the Judge to consider the evidence when he comes to decide whether the legal burden has been discharged. If this distinction between the "legal" and "evidential" burden is not borne in mind it might result in an unfair burden being placed on the accused to prove his innocence. This never was the law of this country and the Privy Council in *King v. Attygalle* [1 (1936) 37 N. L. R. 337 at 338,] in unmistakable terms laid down the proposition that "It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime is committed". The legal burden of proving knowledge may be discharged if the prosecution leads acceptable evidence from which the Court can draw the inference that this essential requisite of the prosecution case has been established. If no evidence is led on this matter by the prosecution, a presumption arises under Section 45A (3) of the Act that the accused had the requisite knowledge and the evidential burden of dispelling that burden lies on the defence.

Lord Denning who refers to this "evidential burden" as a "provisional burden" in the course of an illuminating article on Presumptions and Burdens (Vol. 61 L. Q. R. 379) says that this burden need not necessarily be discharged by calling evidence.

"The other party may seek to repel the inference by argument, or by submitting that the facts proved only raise a suspicion as distinct from a legitimate inference; or by contradicting the evidence; or by giving evidence of other facts to explain why the fact in issue should not be inferred; or by raising suspicions which counter-balance the

presumptions..... If at the end of the case the evidence is so evenly balanced that the Court cannot come to a determinate conclusion, the legal burden comes into play and requires the Court to reject the inference."

In other words if the evidential burden creates a reasonable doubt about the truth of the prosecution case, the legal burden has not been discharged and the accused is entitled to be acquitted. In this case the evidential burden has been discharged by the defence by proof of the following facts: the evidence of Kandiah, who stated that he did not disclose to the accused that he was an illegal immigrant; Kandiah's fluency in the Sinhalese language as a result of which the accused could not have suspected that Kandiah was an illicit immigrant; the accused's explanation as to why he did not enter Kandiah's name on P1; the open manner in which Kandiah was employed and finally the evidence of the accused which, if it was fairly considered by the learned Magistrate, should have been sufficient to rebut any inference created by the prosecution evidence.

Finally, Mr. Perera submits—a submission with which I am in agreement—that even if the Court considered the evidence of the accused to be untrue, if it appeared to be reasonable, the accused is entitled to an acquittal unless the prosecution can prove beyond reasonable doubt from other facts, in conjunction with the accused's explanation or not, that either the accused had the guilty knowledge or that the explanation of the accused is false. This is the ratio decidendi in the judgment of Akbar J. in *Schokman v. Mohamed* [1 (1933) 35 N. L. R. 14.], where the accused was charged with failing to give information to the proper authority of the fact that a person was lying affected with small pox in premises in which he was resident, in contravention of Section 6 of the Contagious Diseases Ordinance, which placed the burden of proving that he had a lawful excuse for failing to give information on the accused. In the words of Akbar, J. "owing to the presumption of innocence in favour of the accused, the explanation, being reasonable on the face of it, would have the effect of causing a doubt in the mind of the trial Judge which must be reckoned in favour of the accused."

Applying the above principles to the facts of this case, I am of the view that since the learned Magistrate has misdirected himself on the burden of proof, the appeal should be allowed and the accused is entitled to be acquitted.

Appeal allowed.