BAZERQUE M.G.M. V.S THE STATE

2022 SCJ 306

SCR No.9075 (3/53/17)

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Marie Gilberte Marjorie Bazerque

Appellant

v.

The State

Respondent

JUDGMENT

This is an appeal against the sentence of fifteen months' imprisonment imposed by the learned Magistrate of the Intermediate Court on the appellant after finding her guilty of issuing cheque without provision in breach of section 330B (1) of the Criminal Code and coupled with section 44 (1) (b) of the Interpretation and General Clauses Act.

The appellant is challenging the sentence passed on her on three grounds which read as follows:

1. *The sentence is manifestly harsh, excessive and wrong in principle.*

2. *The Learned Magistrate erred in not contemplating to give the Appellant a Community Service Order despite the unrebutted evidence adduced by the Appellant to the effect that she is very ill and is blind and despite the fact also that she could take judicial notice of the fact that the Appellant was blind.*

3. *The Learned Magistrate erred in not considering that a Community Service Order and/or a suspension of the custodial sentence to contemplate a Community Service Order would in all circumstances meet the ends of justice.*

In going into the merits of this appeal, it is appropriate to summarise the proceedings before the trial Court. The prosecution had, in view of the repeated absence of the three material witnesses, namely, witnesses Nos. 3, 4 and 5, to rest its case on two pieces of evidence only, namely, the statement under warning taken from the appellant during the course of the investigation and the bounced cheque the appellant had issued. It arises out of the appellant's statement that he was confronted with the allegations of witness No. 3 made in his capacity as director of Biosphere Trading Ltd. His allegations were to the effect that on 22/11/2007, he approached Je T'aime Marketing Co Ltd of which the appellant was the Director, in order to get an export permit from the Ministry of Agriculture for the purpose of exporting monkeys. He met with the appellant who asked for an advance of Rs 1million and for a further sum of Rs 1 million after approval of the permit.

At the material time, Biosphere Trading Ltd had paid in all Rs 1,060,000 to the appellant. But, as Je T'aime Marketing Co Ltd did not obtain any export permit, the appellant, purporting to reimburse the sum of Rs 1,300,000, issued a cheque drawn on the Mauritius Post Cooperative Bank (MPCP) bearing number 21956969. The cheque was presented to the bank on several occasions, but it was returned with the mention "not arranged for".

In the same statement, the appellant denied the version of the declarant as put to her and gave her own version of the circumstances in which she issued the bounced cheque. Thus, she explained that in March 2005, one R. Tranquille contacted her and informed her that Mr witness No. 5, a Barrister, was looking for a consultant who could secure an export permit for a company. She met the Barrister in his office and it was agreed that she would get a commission of Rs 500,000. It was also agreed that she would enter into an agreement for the sum of Rs 1 million and pay the sum of Rs 500,000 to the said R. Tranquille once the permit is obtained.

In 2007, witness No. 3 contacted her and she learnt then that witness No. 5 had taken from him the sum of Rs1,060,000. She was surprised on learning that as she had received Rs 275,000 only out of which she had remitted Rs 150,000 to R. Tranquille. She was pressed

to reimburse the sum of Rs 1,060,000 and interests amounting to Rs 240,000. Under the instructions of witness No. 5, she remitted the bounced cheque, which was in the sum of Rs 1,300,000 to witness No. 4 on the condition that the cheque would be cashed after she would have credited her bank account. As pointed out earlier, none of those three witnesses turned up at the trial. However, at the sitting of 04/04/2013, witness No. 4 made a statement in Court to the effect that the money had been refunded and that he did not want to proceed with the case.

The appellant, as she was entitled, remained mute at the trial.

The learned Magistrate acting on the evidence put before her found the charge proved and convicted the appellant. She then proceeded to a hearing on sentence when the appellant deponed under oath in mitigation of sentence to tender her apologies and point out that she was very ill and blind. She also stated that she had reimbursed the amount of the cheque. Learned Counsel for the appellant submitted before the learned Magistrate that in view of her statement under oath in mitigation of sentence and the fact that 10 years had elapsed since the commission of the offence, a non-custodial sentence would meet the end of justice.

Now, a reading of the sentence of the learned Magistrate reveals that the latter addressed all the aspects of the sworn evidence of the appellant in mitigation of sentence. But, she did not consider it necessary to ask for a social enquiry report prior to sentencing the appellant. In fact, she found that in view of the seriousness of the offence and the antecedents of the appellant, which are indicative of a tendency to commit cognate offences, the appellant did not deserve a non-custodial sentence.

At the hearing of the appeal, learned Counsel for the appellant argued all the three grounds of appeal against sentence together. He submitted that the approach adopted by the learned Magistrate to sentencing was wrong inasmuch as she should have asked for a social enquiry report. In trying to substantiate his contention, learned counsel for the appellant highlighted the fact that the appellant's sworn evidence in mitigation of sentence was not seriously challenged and that the complainant did not depone before the trial Court to substantiate the charge. On the contrary, one of the prosecution witnesses, namely witness No. 4 intimated to the trial court that as the cheque had been refunded, he did not wish that the case

be proceeded with. He contended that as no evidence had been adduced to confirm those facts, a social enquiry report was warranted.

Now, it is clear that the learned Magistrate attached much of importance to the seriousness of the offence and propensity of the appellant to commit similar offences. It is apparent that in so doing, she opted for a custodial sentence as a matter of reflex and indiscriminately without giving due weight to the mitigating factors invoked by the respondent. As a matter of fact, she brushed aside the mitigating factors the appellant invoked for the only reason that there was no medical evidence to substantiate her contentions and concluded that there was nothing other than a custodial sentence to meet the ends of justice. True it is that the appellant relied solely on her word, but that could not be a good reason not to take into account her personal circumstances invoked, especially as there was no indication of the prosecution seriously challenging the truth of what she said and her good faith. Furthermore, she had full latitude and ways and means including a social enquiry report as requested by learned counsel for the appellant to ascertain the genuineness of the appellant's complaint about her health. As for the reimbursement of the cheque, she was in presence of the unchallenged statement made in court by witness No. 4 to that effect. Therefore, given the particular circumstances of the present case, despite the seriousness of the offence committed and the propensity of the appellant to commit similar offences, the learned Magistrate wrongly ignored the mitigating factors invoked by the appellant.

At this stage, it is appropriate to recall that there is authority propounding the principle that the Court should refrain from imposing custodial sentences as a matter of reflex and indiscriminately in all cases: **vide Heera v The State** [2012 SCJ 71]. It has also been held that section 7 of the Constitution which provides protection from inhuman punishment incorporates in it the principle of proportionality of the sentence. The test of proportionality was to be measured by reference to foreseeable hypothetical cases in which the imposition of the minimum sentence would be startlingly inappropriate and shocking: *vide* **Balraj Madhub v D.P.P** [2007 SCJ 282].

Following the observations made above on both the facts and the law, we consider that the custodial sentence imposed by the learned Magistrate cannot stand as no proper consideration was given to the mitigating factors invoked by the appellant. In the circumstances,

we have deemed it appropriate to call for a Social Enquiry Report on the appellant in order to determine the appropriate sentence.

After taking into consideration the Social Enquiry Report we have received, despite the seriousness of the offence committed and the antecedents of the appellant, we are of the view that a fine would be an appropriate sentence that would meet the ends of justice taking into account that the appellant is “practically blind” and requires constant assistance.

For the above reasons, we quash the sentence of fifteen months’ imprisonment and impose on the appellant a fine of Rs 10,000 plus Rs 100 as costs.

J. B. G. Marie Joseph
Judge

G. Jugessur-Manna
Judge

09 September 2022

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Judgment delivered by Hon.G.Jugessur-Manna, Puisne Judge

FOR APPELLANT : **Mr R.Ramsaha, Counsel**
Mrs A.Jeewa, Attorney

FOR RESPONDENT: **Mr A.A.Ramdahen, Senior State Counsel**
Miss K.Parson, State Attorney