Soosainathan s/o Dass Saminathan v Public Prosecutor
[2003] SGCA 45

Case Number : Cr App 9/2003

Decision Date : 04 November 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Kew Chai J; Yong Pung How CJ

Counsel Name(s) : Subhas Anandan and Anand Nalachandran (Harry Elias Partnership) for appellant; Christopher Ong Siu Jin (Deputy Public Prosecutor) for respondent

Parties : Soosainathan s/o Dass Saminathan — Public Prosecutor

Criminal Procedure and Sentencing – Appeal – Findings of fact by trial judge – Approach to be taken by appellate court where there are inconsistencies in evidence

Evidence – Burden of proof – Accused claimed that another person had taken the deceased from his bedroom – Whether the accused bore the evidential burden to prove this particular fact in order to raise reasonable doubt.

Evidence – Witnesses – Credibility – Inconsistencies in testimony in court – Whether trial judge was entitled to find that the prosecution witness was credible

Lai Kew Chai J:

This was an appeal against the decision of Woo Bih Li J in which he found the accused ("Soosainathan") guilty of the following charge:

> That you, Soosainathan s/o Dass Saminathan, on the 5th day of August 2002, between 12.00am and 6.14am at Blk 629 Hougang Avenue 8 #09-82 Singapore, committed murder by causing the death of one Anjeli Elisaputri, a 6 month-old Indonesian female infant, and you have thereby committed an offence punishable under Section 302 of the Penal Code (Chapter 224)

2 At the time of his arrest, Soosainathan was just under 41 years old, single and unemployed. He was the owner of Blk 629 Hougang Avenue 8 #09-82 ("the Flat"). At 6.14am on 5 August 2002, police officers from the Hougang Neighbourhood Police Centre were despatched to attend to the disappearance of a six month-old female infant named Anjeli Elisaputri ("the baby"). The complainant was the baby's mother, an Indonesian female named Widiyarti Binti Kartanom ("Widiyarti").

3 The police officers found the baby in a bin at the bottom of a rubbish chute connected to the Flat. Her body was wrapped in a green towel and covered by a brown coloured bedsheet. The baby was found hog-tied. Her wrists and ankles were bound together in a 'hogtie', behind her back, with a white ligature. She was pronounced dead at the scene by a paramedic. The baby's death was due to a severe head injury caused by a fall from a height, with primary impact upon the top of her head.

The Prosecution's case

4 The prosecution proceeded on s 300(b) and (d) of the Penal Code. Its version of events was that Soosainathan had taken the baby from Widiyarti while she was sleeping in the guestroom of the Flat. He brought the baby to his bedroom, tied her up and administered drugs to her in order to keep her quiet. He then proceeded to sexually assault her. When Widiyarti confronted him the next morning and asked where the baby was, he told her to follow him downstairs to report the matter to the police. He then left the Flat.

5 This was a ploy to get Widiyarti out of the Flat. While she was downstairs calling the police, Soosainathan returned to the Flat and wrapped the baby in a green towel and a brown bedsheet. He then dropped her down the rubbish chute which was located in the Flat's kitchen. The baby died as a result of a head injury suffered during her fall down the rubbish chute.

The Defence's case

6 Soosainathan admitted that he had taken the baby into his bedroom. However, he claimed that Widiyarti subsequently took the baby from his bedroom while he was sleeping. She was accompanied by a man (referred to as "Mr X" by the trial judge). The defence argued that it could have been Widiyarti and Mr X who had dropped the baby into the Flat's rubbish chute.

Widiyarti's evidence

7 The prosecution's primary witness was Widiyarti. Her evidence was that on 4 August 2002, she and the baby were staying in the guestroom of the Flat. At about 11.30pm, Soosainathan (whom Widiyarti referred to as "Cho Cho") unlocked and opened the guestroom door. He took the baby away from her, brought the baby into his bedroom and closed the bedroom door.

8 Widiyarti allowed Soosainathan to take the baby because she was afraid that he would scold her if she tried to stop him. When she heard the baby crying, she knocked on the bedroom door and asked Soosainathan to return her daughter to her. The baby stopped crying after a while. Widiyarti then sat down in the living room to wait for Soosainathan to return baby to her. She knocked again on the bedroom door at about 2.00am. She subsequently fell asleep on the living room sofa and woke up at about 5.00am.

9 At about 6.00am, Widiyarti again knocked on the bedroom door and asked for the baby. Soosainathan opened the door and told her that the baby was still sleeping. She did not believe him as she could look into the bedroom, but did not see the baby. She saw two pillows on the bed, which was covered by a brown coloured bedsheet. She also saw a black coloured bag on a chair. After Widiyarti repeatedly asked where the baby was, Soosainathan said that someone had come and taken the baby away.

10 Soosainathan then suggested that they report the matter to the police. He walked out of the Flat and asked Widiyarti to follow him downstairs. She refused to do so. After Soosainathan left the Flat, she gathered her belongings and walked down the stairs to the ground floor of the block. She used a public phone to inform the police that her daughter was missing. Before the police arrived, Widiyarti disposed of an Indonesian passport that she had in her possession by throwing it into a dustbin. She had intended to give the passport to her husband ("Jalil") in order to allow him to travel to Batam. Jalil was an overstayer in Singapore. They had planned to settle down in Batam. While she was waiting for the police to arrive, she saw Soosainathan walking down a staircase from the Flat.

11 The police officers arrived at the scene about 10 minutes later and questioned Widiyarti, after which they proceeded to the Flat. The iron grille was locked even though Widiyarti did not lock it when she left the Flat. She used a key to unlock the grille and the officers searched the Flat. However, the bedroom door was locked. When Soosainathan returned to the Flat, the officers told him to open the bedroom door. Widiyarti told the police that the black coloured bag and the brown bedsheet were no longer in the bedroom.

12 Widiyarti stated that before Soosainathan had taken the baby from her, she had spoken to Jalil once over the telephone. Jalil told her that he would not be coming to the Flat to visit her.

Widiyarti claimed that she did not quarrel with Jalil over the phone on this matter.

Soosainathan's evidence

13 Soosainathan was the only witness for the defence. He was a friend of Jalil, and thus allowed Widiyarti and her daughter to stay in his home when they came over from Batam. He described his relationship with Widiyarti as that of brother and sister. He emphasised that he had no reason to harm the baby.

14 Soosainathan admitted that he took the baby from the guestroom at 11.00pm on 4 August 2002. However, this was done with Widiyarti's permission, who was still awake. He had taken the baby to his bedroom because Widiyarti was depressed and angry after she had quarrelled with Jalil over the phone. He went to sleep at about 11.45pm.

15 At about 12.30am, Widiyarti and Mr X came into the bedroom. She took the baby away, along with the pillow which the baby was sleeping on. In his cautioned statement recorded on 6 August 2002, Soosainathan stated that Mr X was Jalil. However, in his oral evidence, Soosainathan changed his testimony and said that Mr X was not Jalil, but was someone who looked like Jalil.

16 In the early hours of the morning of 5 August 2002, Widiyarti knocked on his bedroom door. When he opened the door, she asked him where the baby was. He told her that she and Mr X had taken the baby away the night before. When she became agitated, he told her that they should both go downstairs to report the matter to the police.However, when he left the Flat, Widiyarti was still looking for her slippers. He thus took the lift down to the first floor without her. While he was on his way to the police station, he received a call from the police on his handphone telling him that Widiyarti was in the Flat. He immediately returned to the Flat and found the police officers there. After the police searched the Flat, he was taken away and was subsequently placed under arrest.

The decision below

17 The judge below stated that he was irresistibly drawn by the relevant circumstantial evidence to the conclusion that Soosainathan was guilty of murder. He accepted Widiyarti's evidence. He found that it was Soosainathan who had dropped the baby into the rubbish chute, and had thereby caused the baby's death. In order to hide his guilt, Soosainathan concocted the existence of Mr X and gave a fabricated account of how Widiyarti had taken the baby from him. However, it soon became clear that Jalil had an alibi for that night. Soosainathan thus changed his position: Mr X was someone who looked like Jalil, but was not Jalil.

18 The judge also relied on other circumstantial evidence which together with the evidence of Widiyarti cumulatively proved Soosainathan's guilt. Such evidence is summarised below.

Presence of drugs in the baby's blood

19 The baby's blood was tested positive for two types of sedative drugs: Chlorpheniramine and Diphenhydramine. The large doses found in the baby's blood – the level of Chlorpheniramine was over 25 times the normal therapeutic level – suggested that the drugs were administered to keep the baby quiet for a sinister reason. Both of these medicines were prescribed by the Hougang Polyclinic to Soosainathan on 17 June 2002, when he complained of a cough and cold.

DNA evidence

20 The baby's blood was found on a towel and on two pillows which were seized by the police from a bedroom in the Flat. Soosainathan's blood was also found on the towel, and on one of the pillows. This evidence pointed to the baby having been assaulted in Soosainathan's bedroom.

The brown bedsheet

21 Soosainathan could not satisfactorily explain why the mattress in his bedroom was not fitted with a bedsheet, even though he had several bedsheets in the Flat. There was a light blue bedsheet in the bedroom, but it was lying loose on top of the bare mattress. It was reasonable to conclude that the brown bedsheet which was used to wrap the baby's body was the same bedsheet that Soosainathan had used for the mattress in his bedroom.

Soosainathan's skill at tying knots

22 The knots which were used to 'hogtie' the baby were not typical, and a layman would not know how to tie such knots unless he was taught by someone else. While he was working as a rigger, Soosainathan had been trained in various methods of tying and slinging ropes.

Issues on appeal

23 Before us, counsel for Soosainathan argued that the judge erred in finding that Widiyarti was a credible witness in view of the discrepancies and illogical explanations in her evidence. The following points were made:-

(a) Widiyarti was worried about her baby but was content to wait over six hours in the living room, and still had the presence of mind to call the police.

(b) She was allegedly frantic in the morning, but was still lucid enough to dispose of her false Indonesian passport.

(c) She was initially a suspect in the investigation.

(d) A police officer, one Station Inspector Venubalan, ordered the rubbish chute to be searched because of "information provided by the complainant", which suggested that Widiyarti knew where the baby's body could be found.

(e) She was a scheming individual, capable of carrying out devious plans.

24 But the evidence highlighted the following points:-

(a) The suggestion to call the police came from Soosainathan, not Widiyarti. Furthermore, during those six hours, she knocked on Soosainathan's door repeatedly and asked him to return the baby to her. Part of the reason why she was in the living room for so long was because she had dozed off on the sofa while waiting.

(b) The fact that Widiyarti disposed of the fake Indonesian passport had no bearing on her frantic state of mind. Furthermore, her disposal was neither cunning nor innovative. She merely threw it into a dustbin. That was hardly evidence of the kind of mental clarity which counsel for Soosainathan imputed to her.

(c) The fact that Widiyarti was originally a suspect merely proved that the police conducted a

thorough investigation.

(d) Station Inspector Venubalan emphatically stated during cross-examination that Widiyarti did not say or hint that the baby's body was in the rubbish chute.

(e) That Widiyarti was willing to procure a false passport for her husband to return to Batam could in no way suggest that she was willing to murder her own infant daughter.

25 In our view, the judge was entitled to accept Widiyarti's versions of events, and to reject Soosainathan's evidence.

26 He had considered the inconsistencies in her testimony, and accepted that not every aspect of her evidence was accurate. Nevertheless, he found that she was a credible witness and accepted her version of events. In contrast, the judge found that Soosainathan had resorted to fabricating evidence in order to profess his innocence.

27 It was submitted on behalf of Soosainathan that the judge erred in finding that the evidential burden had shifted to the defence to prove that Widiyarti had taken the baby, and to show how the baby's body ended up in the rubbish bin. The contention was that the burden to prove its case beyond a reasonable doubt did not shift from the prosecution throughout the trial.

28 This argument was without substance. In the first place, the judge did not hold that the burden to prove beyond reasonable doubt had shifted to the defence, nor did he hold that the evidential burden had shifted to Soosainathan to explain how the baby's body had ended up in the rubbish bin. He only stated that Soosainathan bore the burden of establishing that it was Widiyarti who had taken the baby. The exact words used by the judge in the grounds of decision were these:

> Be that as it may, what was more significant was that the accused did take the baby into his bedroom at about 11.30pm of 4 August 2002. This was not disputed. Therefore, *the evidential burden shifted to the accused to establish that at about 12.30am of 5 August 2002, Widiyarti and Mr X came to his bedroom whereupon Widiyarti took the baby away*, *although the legal burden remained always with the prosecution to prove its case beyond reasonable doubt*. [Emphasis added]

29 More importantly, the judge did not err in holding that the evidential burden had shifted to the defence. In *Ramakrishnan s/o Ramayan v Public Prosecutor* [1998] 3 SLR 645, the court held that an accused bears an evidential burden to raise the issue of alibi if he is relying on it as a defence. This was clarified in *Public Prosecutor v Chong Siew Chin* [2002] 1 SLR 117 to mean that the accused "had to raise a reasonable doubt" as to his presence during the alleged offence.

30 Furthermore, on the evidence, it was Soosainathan who urged the court to believe that Widiyarti and Mr X had taken the baby from the bedroom. In our view Soosainathan should bear the evidential burden of proving this particular fact, in order to raise reasonable doubt in the prosecution's case. Section 105 of the Evidence Act states:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

31 In this appeal, it was argued that the scientific and forensic evidence was "equivocal and did not definitively establish any irresistible conclusion". In particular, issue was taken with the forensic

pathologist's assessment that the baby had been sexually assaulted. Counsel for Soosainathan claimed that the forensic pathologist was not qualified to make such an assessment as this was his first experience with a case of this nature.

32 This argument was without merit. The forensic pathologist was Dr Gilbert Lau, a senior pathologist with the Institute of Science and Forensic Medicine. The mere fact that Dr Lau had never conducted an examination of a 'hogtied' six month-old infant with a torn hymen did not entitle Soosainathan to cast doubt on his professional opinion and judgment. Dr Lau's opinion had often been relied on in criminal cases. In fact, Dr Lau's professional opinion was upheld by the Court of Appeal in a recent case in which the trial judge disregarded Dr Lau's opinion and substituted it with his own: *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1.

33 Furthermore, the following important facts were established by the scientific and forensic evidence:

(a) The autopsy report concluded that the baby's death was due to a severe head injury which was caused by a fall from a height. This was consistent with the baby having been dropped down the Flat's rubbish chute.

(b) DNA testing showed that the baby's blood contained high levels of two sedative drugs: Chlorpheniramine and Diphenhydramine. Both of these drugs had previously been prescribed to Soosainathan.

(c) DNA testing revealed that two pillows found in Soosainathan's bedroom were stained with the baby's blood and the accused's blood was found on one of them.

(d) The baby's and the accused's blood was found on a towel hanging on a raffia string in the accused's bedroom.

(e) The autopsy report concluded that there was evidence of sexual interference, with tearing of the baby's hymen and vaginal penetration.

34 Soosainathan failed to provide a satisfactory explanation for the incriminating scientific and forensic evidence outlined above. His explanations were illogical and unconvincing. The judge was entitled to find that Soosainathan had fabricated evidence in order to exonerate himself.

35 On the presence of Chlorpheniramine and Diphenhydramine in the baby's blood, Soosainathan claimed that he had previously given one of the drugs to Widiyarti to use. She had allegedly put it into an Eye-Mo bottle. The suggestion was that the drugs were found in the baby's blood because Widiyarti had previously used the Eye-Mo bottle to administer the drugs to the baby when she was ill.

36 We agreed with the judge that this was a fabrication. Save for Soosainathan's assertions, there was no evidence that the baby was ill. He admitted that he had never seen Widiyarti use the Eye-Mo bottle on the baby. He could not explain the presence of Chlorpheniramine in the baby's blood, as that drug was not in liquid form and thus could not be stored in the Eye-Mo bottle. In fact, there was no evidence of any Eye-Mo bottle in the Flat when it was searched by the police.

37 Soosainathan claimed that the bloodstained items found in his bedroom had been planted there by Widiyarti before the police arrived. His version of the events was that, when Widiyarti came into the bedroom to take the baby away, she also took a pillow from his bed. She re-entered the bedroom about an hour later and took a towel which was hanging from a raffia string and threw it into

a pail in the bathroom. She proceeded to hang a green towel in its place before leaving the bedroom. When Soosainathan left the Flat to call the police, Widiyarti placed the bloodstained pillow on his bed. When the police arrived, they threw the pillows and mattress onto the floor, and emptied the contents of the bathroom pail.

38 Soosainathan's version of the events stretched credulity. He was unable to explain why the baby's blood was found on both pillows in his bedroom, and not only on the pillow which Widiyarti had allegedly taken with her. He was also unable to give the correct colour of the towel that Widiyarti had allegedly hung on the raffia string. Furthermore, it was highly unlikely that the police had tampered with the crime scene by throwing the pillows and towel onto the floor in the manner described.

39 Counsel for Soosainathan contended that the judge failed to consider the fact that "the most accurate estimated time of death by [the forensic pathologist] fell outside the alleged time of commission of the offence". The prosecution's case was that Soosainathan threw the baby down the rubbish chute while Widiyarti went downstairs to call the police from the public phone. As such, the time of the offence must have been at or about 6.00am, and not between 3.00 and 5.00am. which the forensic pathologist said was a possible time frame. This argument, however, ignored the entire evidence of the forensic pathologist. On re-examination, forensic pathologist unequivocally agreed that the death could also have occurred at about 6.00am in the morning, and that the time of death was only given as an estimate.

40 It was also submitted that the prosecution had failed to put its case to Soosainathan regarding the time of commission of the offence. He relied on the rule in *Browne v Dunn* [1893] 6 R 67, which has been accepted as an important principle of our law: see *Arts Niche Cyber Distribution Pte Ltd v Public Prosecutor* [1999] 4 SLR 111. The rule in *Browne v Dunn* requires that:

> [A]ny matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief`: *Cross & Tapper on Evidence* (8th Ed, 1995) at p 319.

41 The rationale behind the rule in *Browne v Dunn* was that a witness should not be impeached upon a matter which he has not had any opportunity to explain, by reason of there having been no suggestion that his story was not accepted. However, Soosainathan suffered no injustice from the prosecution's failure to put the exact time of death to him because it was always clear that his story was not accepted.

42 It mattered not that no attempt was made to impeach the credit of Soosainathan against the numerous statements which he had given to the police. The police recorded six statements from Soosainathan after his cautioned statement was recorded ("the additional statements"). During the trial below, the defence argued that the additional statements must have been consistent with his oral evidence because the prosecution had failed to use them to impeach his credit. The judge did not accept this argument, and held that it was unsafe to infer that every material aspect of Soosainathan's oral evidence had been disclosed in the additional statements. He also noted that Soosainathan did not ask the prosecution for the additional statements, nor did he apply to court for them.

43 Admittedly, there was no provision in the Criminal Procedure Code ("CPC") for the discovery by an accused of documents in the possession of the prosecution: *Tan Khee Koon v Public Prosecutor* [1995] 3 SLR 724. If an accused wanted to obtain copies of his own police statements, he

should have applied to the court under s 58(1) of the CPC for a summons to be issued: *Kulwant v Public Prosecutor* [1986] SLR 239, [1986] 2 MLJ 10. It was established that the proper time for such an application to be made was after the defence witnesses had finished giving evidence, as there was no longer any question of the defence tailoring evidence at that stage: *Tay Kok Poh Ronnie v Public Prosecutor* [1996] 1 SLR 185.

44 Accordingly, this ground of appeal was also without merit. The law presupposed that an accused who wished to obtain his own police statements would make an application for such statements. In the present case, Soosainathan never applied for the additional statements to be produced. It would not be right to draw an adverse inference against the prosecution under such circumstances.

Circumstantial evidence

45 At times, a prosecution's case would be based entirely on circumstantial evidence. As long as the cumulative effect of all the evidence leads to the irresistible conclusion that it was the accused who committed the crime, then his conviction must stand: *Ang Sunny v Public Prosecutor* [1965-1968] SLR 67, [1966] 2 MLJ 95. Like the trial judge, we were irresistibly drawn to the conclusion that Soosainathan was guility of the murder of the baby.

Conclusion

46 For these reasons, the appeal was dismissed.

Appeal dismissed