BOODOO A. Y. v THE STATE

2018 SCJ 316

SCR 114288

THE SUPREME COURT OF MAURITIUS

In the matter of:-

Abdool Yusuf Boodoo

Applicant

v/s

The State

Respondent

JUDGMENT

This is an application for leave to appeal to the Judicial Committee of the Privy Council, the brief of which consisted of:

[a] a Motion Paper and Affidavit setting out the reasons for which, and the grounds on which, the applicant wished to be granted leave;

[b] The Information pursuant to which the applicant was prosecuted before the Intermediate Court where a charge of involuntary homicide by imprudence was preferred against him. The Information was particularised as the applicant (a medical practitioner) having, whilst performing a medical intervention on a patient at Victoria Hospital, occasioned a rupture which caused a major effusion of blood resulting in the death of the patient;

[c] The Judgment of the Intermediate Court convicting the applicant as well as the sentence meted out against him, being a term of imprisonment of 9 months;

[d] The grounds on which the applicant appealed to the Supreme Court (the Appellate Court); and

[e] the Judgment of the Appellate Court whereby the appeal was dismissed.

In the morning of 6 September 2018, day on which the case was fixed for hearing, both Counsel requested to see us in chambers and Counsel for the applicant informed us that her reading of the Court Record was that the case had been fixed for arguments to be heard on the issue as to whether the failure to enclose the proceedings of what occurred before the Appellate Court was fatal to the present application. Counsel for the respondent, on the other hand, stated that, according to him, the case was coming to be heard on the

issue of leave to proceed to the Privy Council, the matter of the non-enclosure of the Court Record of the Appellate Court having already been dealt with by this Court during the previous sittings.

We invited Counsel to offer arguments on both the issues of:

[a] the non-enclosure of the proceedings and whether it was fatal to the present application; and

[b] whether leave should be granted to appeal to the Privy Council.

On the first issue, the dates as well as the statements made in Court are important and we propose to set them out in chronological order:

[1] On 6 November 2017, Senior Counsel, Mr Sauzier appeared for the applicant and started arguing the application for leave to appeal to the Privy Council before a differently constituted bench. At some point in time, the learned Judges, *proprio motu*, raised a preliminary point as to whether, in view of the tenor of the grounds on which leave to appeal to the Judicial Committee of the Privy Council was being sought, the record of the proceedings setting out what took place before the Appellate Court and which would necessarily include the trial proceeding of the Intermediate Court ought not to have been enclosed in the present application for its proper determination.

[2] The learned Judges also queried whether the failure to enclose the Court Record of the Appellate Court would mean that the present application is fatally flawed.

[3] Counsel for the applicant stated that it would, indeed, have been better if the proceedings of the Appellate Court had been placed before this Court. However, he was of the view that this shortcoming was not fatal to the present application. He, therefore, moved for a postponement to be allowed to *'cure the defect'* by amending the affidavit to include the proceedings that were held before the Appellate Court.

[4] Counsel for the respondent was of the view that it would have been '*vital or essential'* for the proceedings of the Appellate Court to have been placed before this Court. However, he was also of the view that the failure to enclose the proceedings of the Appellate Court was not fatal to the application. According to him, it amounted to a defect in the preparation of the brief. Therefore, he did not object to a postponement in order to allow the applicant to cure the defect.

[5] The Court allowed the motion for postponement and fixed the matter on 14 November 2017 for the parties to finalise their stand and to make same known to the Court.

[6] On 14 November 2017, the case was called before the same bench and the learned presiding Judge observed that the Attorney for the applicant had forwarded a covering letter to him together with an uncertified copy of the proceedings which had taken place before the Appellate Court. He remarked that this course of action was improper and was not in keeping with established procedure. Counsel for the applicant apologised for the actions of the attorney.

[7] Counsel for the respondent, for his part, reiterated his stand that the failure to enclose the proceedings was not fatal

The Court record then reads as follows: *'In the circumstances, Court adjourns the matter to 12 December 2017 for mention before HH the Master and Registrar to be fixed for arguments before the same bench'.* In the context, this could only mean (a) that both Counsel being of the opinion that the failure to enclose the proceedings was not fatal to the present application, (b) that the matter having been fixed before the same bench of the Supreme Court for stand but that the attorney of the applicant having attempted to cure the defect failed to do so properly according to established procedure, and (c) that the matter was being referred to the Master and Registrar so that the needful could be done for the defect to be cured (i.e. for an amended affidavit and a certified copy of the proceedings to be properly filed) and for the case to be fixed for arguments on the issue of leave to appeal to the Privy Council. The Court Record cannot be read to mean that the matter was being referred to the Master and Registrar to be fixed for arguments on whether the non-enclosure of the proceedings of the Appellate Court was fatal or not to the present application.

The proceedings before the Master and Registrar on 12 December 2017 show that the attorneys for both sides were present and moved that the matter be fixed for arguments, following which, the case was fixed on 13 June 2018 for arguments. It is to be noted that the attorney of the applicant did not do anything to cure the defect by filing an amended affidavit and the proceedings of the Appellate Court in line with the original motion made by Counsel for the applicant in Court. There was equally no statement as to the purpose for which the motion to have the matter *'fixed for arguments'* was being made.

The case was called before a single Judge on 13 June 2018 and was postponed due to the absence of the other Judge who was scheduled to hear the case. Counsel appeared for the applicant but, once again, there was no attempt made to cure the defect of non-enclosure of the proceedings of the Appellate Court. The matter was called again before the Master and Registrar on 26 June 2018 and no motion was made to cure the defect. Finally, the case was fixed for arguments on 6 September 2018 by way of circular.

The question which arises, at this stage, concerns the effect of the non-enclosure of the proceedings of the Appellate Court as at 6 September 2018 and we feel that the question of non-enclosure having been raised, *proprio motu*, earlier by another bench ought to be considered by us now. We have it that as at 6 and 12 November 2017, the stand of both Counsel was that the failure to enclose, in the brief, the proceedings of the Appellate Court was not fatal for the purpose of determining the application. However, since then, 10 months have gone by and the matter was called on no less than three occasions during which the legal representatives of the applicant could have cured the defect but did not do so. The judgment of the Appellate Court which is being challenged having been delivered on 23 December 2016, we are of the view that the delay in processing the application and the latches in getting this case in shape are unconscionable. The Court has been lenient and has allowed the applicant ample time to set things right but the repeated failure to do so can only be taken as an abuse of the process of this Court.

However, the matter does not end here. We should also consider the grounds on which the applicant is purporting to appeal to the Privy Council should he be granted leave. These are to be found at paragraphs 8(a), (b) and (c) of his affidavit dated 29 December 2016 and read as follows:

> *"(a). Whether, in the absence of any conclusive evidence on record that the death of late Bibi Tasleema Bava Saib had been caused by the Caesarian section performed by the Applicant, the Appellate Court erred in upholding the Applicant's conviction, thereby depriving the Applicant of his constitutional right to personal liberty, when the criminal standard of proof required for the offence under Section 239 of the Criminal Code is that of beyond reasonable doubt.*
>
> *(b). Whether, after finding that a "faute lourde ou grossiere" is required for a doctor to be found criminally liable, the Appellate Court misdirected itself in coming to the conclusion that such "faute" could be attributed to the Applicant when no finding of "faute" was made by neither (sic) the Trial Court nor (sic) the Appellate Court, thereby resulting in depriving the Applicant of his constitutional right to a fair hearing and to the protection of the law.*
>
> *(c). Whether, in the absence of any expert opinion clearly establishing that the death of late Bibi Tasleema Bava Saib was caused by the intervention of the*

> *Applicant, both the Appellate Court and the Trial Court, in convicting the Applicant, misdirected themselves on material issues of fact and law, thereby resulting in a serious miscarriage of justice highly prejudicial to the Applicant."*
> (the underlining is ours)

It is clear from the above that the proposed grounds of appeal raise matters of mixed fact and law. It would be quite impossible to determine these issues without considering the record of the Appellate Court. This Court is not in a position to decide on whether serious issues have been raised in the grounds to warrant the granting of leave to appeal to the Privy Council in the absence of those Court records.

Taking into account all the surrounding circumstances of this particular case which have been set out above, we hold that the failure to enclose the record of the Appellate Court as at 6 September 2018 is fatal to the present application.

For the sake of completeness, however, we propose to briefly consider the application for leave itself which comforts us in our decision to refuse leave in this matter. The application was originally made under section 81(1)(a) of the Constitution which is meant to deal with appeals '*as of right from a final decision of the Supreme Court on the ground that it raises a question as to the interpretation of the Constitution'*. However, when it became clear that this heading did not quite cover the situation that the application purported to raise, a motion was made by the legal advisers of the applicant to amend the Motion Paper. There being no objection, the Motion Paper was amended to seek leave to proceed '*under section 81(1)(a) and 81(2)(b) of the Constitution read in conjunction with section 70(A) of the Courts Act'*. This amendment meant that the applicant was now, additionally, seeking relief on the ground that '*the question involved in the appeal is one that, by reason of its great general public importance or otherwise, ought to be submitted to the Judicial Committee'*.

The above amendment to the Motion Paper having been made, there were no further amendments made either to the affidavit or to the proposed grounds of appeal themselves. This situation created an incongruity in the application and this Court is quite unable to gather with certainty what are the issues that the applicant is purporting to take up and argue before the Privy Council.

At paragraph 8 of his affidavit, the applicant sets out his cause of action and the basis for his appeal. The following is averred in that paragraph: '*I wish to appeal, as of right, to the Judicial Committee of the Privy Council, under section 81(1)(a) of the Constitution'*.

Following the amendment of the Motion Paper, this paragraph was not amended so that it does not refer to any action being undertaken under section 81(2)(b) of the Constitution.

Furthermore, the grounds of appeal as set out in paragraphs 8(a), (b) and (c) of the applicant's affidavit and which have been reproduced above do not refer to any matters of great general public importance or otherwise which need to be dealt with by the Privy Council on appeal should the appeal have to be determined under section 81(2)(b) of the Constitution. Alternatively, should the matter be considered under section 81(1)(a), there appears to be no question requiring the interpretation of the Constitution which has been raised. At best, the issues which will be canvassed in the grounds of appeal concern whether the facts of the applicant's case have been properly assessed by the trial Court and by the Appellate Court.

In connection with the above, it would be apposite for us to reiterate the principles enunciated by the Privy Council to the effect that it does not sit as an ordinary Court of Appeal but would intervene where specific provisions of the Constitution, which have not been dealt with thus far, stand to be interpreted or where the law has been interpreted and/or applied in such a way that it would lead or tend to lead the jurisprudence of the country into an evil precedent. We are of the view that the present application fails the above test.

For all the reasons given above, the application is set aside.

With costs

N. Devat
Judge

P. Fekna
Judge

27 September 2018

Judgment delivered by Hon. P Fekna, Judge

For the Applicant	**: Mr H. B. A. Rojubally, Attorney-at-Law** **Ms L. D. Bismohun, of Counsel together with** **Mr M. Sauzier, SC**
For the Respondent	**: Mrs D. Dabeesing-Ramlugan, Principal State Attorney** **Mr D. C. D. N. Mootoo, Senior Assistant DPP**