

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC ...
CR62 /2018

REPUBLIC
(*rep. by Hermanth Kumar*)

Prosecution

and

JUSTIN LEON
(*rep. by Clifford Andre*)

1st Accused

HABIBUR RAHMAN
(*rep. by France Bonte*)

2nd Accused

Neutral Citation: *R v Leon & Anor* (CR 62/2018) [2021] SCSC 201 (16 April 2021)

Before: Vidot J

Summary: Trafficking in persons contrary to S3(1) of the Prohibition of Trafficking in Persons Act, 2014.

Heard: 24-10-19, 25-10-19, 28-10-19 10-04-20 and 21-09-20

Delivered: 16 April 2021

ORDER

JUDGMENT

VIDOT J

The Charges

[1] The Accused have been charged as follows;

Count 1

Statement of Offence

Trafficking in person contrary to and punishable under section 3(1) of the Prohibition of Trafficking in Persons Act, 2014.

Particulars of Offence

Mr. Justin Leon, Director of J & R Builders, of Pointe Conan, Mahe, during periods between the month of November 2017 to October 2018 at Mahe employed a person namely Mr. Milton Golder of Bangladeshi, National as a mason into his construction company recruited through HD Jobs Agency of Seychelles. During the time of employment of Mr. Milton Golder of Bangladeshi National in the said company, he has been abused and coerced by his employer namely Justin Leon, the Director of J & R Builders by not paying the agreed salary and food allowances every month, not providing proper accommodation for him to stay and ill treating of the employee for the purpose of exploitation.

Statement of Offence

Trafficking in person contrary to and punishable under section 3(1) of the Prohibition of Trafficking in Persons Act, 2014.

Particulars of Offence

Mr. Haribu Rahman, a Bangladeshi National, having a Gainful Occupation Permit as Chairman and Chief Executive Officer with HD Jobs Agency situated at Victoria House, Mahe, living at Les Mamelles, during the month of October 2017 recruited and brought a worker namely Mr. Milton Golder, a Bangladeshi national into Seychelles to work as a mason into the construction company namely J & R Builders by deception in terms of the work and financial incentives in the said company in Seychelles in doing human exploitation.

The Evidence

(i) Prosecution Case

[2] Mr. Milton Golder is a Bangladeshi national. He is a mason by trade and was recruited by the HD Jobs Agency of which the second Accused is alleged to be the Chairman and Chief Executive Officer to work with J & R Builders, owed by the first Accused (as per

exhibit P6). Mr. Golder testified that that was not the first time that he has been employed in the Seychelles. He had prior to that been employed by STAR Seychelles (hereafter “STAR”). Actually, Mr. Golder came to know of the second Accused when he was working at STAR

[3] At that time, when he was working at STAR, the second Accused had informed him that he had an agency in the Seychelles that recruits foreign workers for employment in Seychelles. After his Gainful Occupation Permit (“GOP”) with STAR expired he left Seychelles. When he was in Bangladesh, he was contacted by the second Accused’s friends, Messrs. Yousuf and Jahil, who asked whether he would want to return to Seychelles to work. He said he would do so only if his brother secured employment in Seychelles as well.

[4] As a result he was asked by Jahil, whom he met in Dakar, to make certain payments in order that the agency will engage in all necessary formalities to enable him to come to work in Seychelles. These sums included agency and GOP fees. The sums were deposited into Jahil’s bank account in Bangladesh and the latter confirmed that he would then transfer the money to the second Accused. He was also made to fund his own airfares. In order to raise enough money for all these fees he had to borrow from friends and lending institutions.

[5] Following the formalities, he then arrived in Seychelles on 31st October 2017. He was handed over to the first Accused who brought him to Pointe Conan. The latter brought him to a house which condition was substandard and not fit for human habitation where he was to reside. Whilst there he was mistreated and required to clean the house and around the house. He also had to cook food for the first Accused’s dogs. Whilst he was working in the first Accused enterprise he was mistreated and Accused always threatened that if he continued to complain he would be sent home. That threat upset him as he had taken loans to come and work in Seychelles.

[6] Mr. Golder also testified that starting the second month the first Accused started to short pay him and that went on in the third month. He was mentally being affected. He had to file a case with the Employment Tribunal that forced the first Accused to pay him as per

contract. He was psychologically affected as a result of these mistreatment that he started to harbour suicidal dispositions. He had to report to the psychiatric unit. This is confirmed by Dr. Anna Yurkina of the Ministry of Health.

[7] In fact the doctor prepared a report (Exhibit P8). Mr. Golder was admitted at the psychiatric unit of Victoria Hospital for observation on 12th October 2018 with a history of feeling tension and suicidal thoughts. However, examination concluded that he showed no signs of formal mental disorder and his suicidal attempt was attributable to a situation of crisis.

[8] Jeanette Moumou is a Senior Public Health Officer who visited the residence where Mr. Golder was staying at Pointe Conan. She produced as exhibit P4 a letter she wrote to the first Accused in respect of an inspection she conducted at the premises. She described it as an illegal accommodation for two expatriates. It was stated in the GOP application that Mr. Golder was to be accommodated at a house at Glacis belonging to a Mrs. Desouza. She noted that the house does not meet the Public Health Authority requirements for gainful occupation permit workers. She noted that all facilities including kitchen, toilet and bathroom were in the same open area.

[9] She had queried from the first Accused as to why workers were being housed in such premises and pointing out that according to the permit they were to be accommodated in a public health approved house. The first Accused had replied that the workers were living at Glacis but would only live at Pointe Conan when they come in late from work and he is busy and cannot drop them off. That actually was not the case as the accommodation at Pointe Conan was the permanent residence of Mr. Golder.

[10] Elsia Vidot of the Employment Department recalled assisting an officer of the Immigration with matters pertaining to this case. The issue to be resolved was the complaint by Mr. Golder regarding unpaid salary. That was done in the presence of the first Accused, Mr. Milton and his brother. An agreement was reached between the parties for settlement of dues. That is confirmed by Bernadette Gill from ARID (an NGO) who assisted the virtual complainant in respect of his plight. She assisted Mr. Golder in filing a grievance with the Ministry of Employment. She added that throughout the negotiation

with the Ministry of Employment, she and Mr. Golder were being constantly threatened by the first Accused. Mr. Leon was making death threats to Mr. Golder

(ii) The Defence Case

[11] The defence did not call any witnesses and neither did the Accused testify. They elected to remain silent and therefore no adverse inference shall be drawn from that decision. However, following from the questions put the prosecution witnesses in cross examination, the defence case was clear.

[12] Mr. Leon suggested that the issue regarding non-payments of salary and other dues were resolved by the Employment Tribunal. The parties went for mediation and the disputed sums were paid after the parties agreed on the terms of the settlement as evidenced by exhibits D1 and D2. Since the matter was settled, therefore there cannot be a claim of trafficking in persons as charged. Counsel for the first Accused also disputes allegations of providing uninhabitable housing conditions to the virtual complainant. He argues that Mr. Golder chose to reside at the accommodation at Pointe Conan on his own volition. Counsel maintains that the first Accused had alternative accommodation at Glacis. Jeannette Moumou, Public Health Officer with the Ministry of Health confirmed that the first Accused had secured a house from a Mrs. De Souza, wherein he was supposed to house his foreign employees. He mentioned that initially Mr. Golder was to stay in the accommodation at Pointe Conan for the night of his arrival in Seychelles, but thereafter, the latter remained at that accommodation. At other times he would stay at Pointe Conan when he would finish work late.

[13] The second Accused's defence is that he was merely employed for HD Jobs Agency and though he does not refute suggestions that he was involved in the recruitment of Mr. Golder, he was doing so on behalf of that employment agency. He also denies that he was in any way responsible for any alleged mistreatment that Mr. Golder would have received at the hands of Mr. Leon of J and R Builders. As far as he is concerned he only recruits on behalf of prospective employers. He charges fees for that service. However, he made no misrepresentation to the virtual complainant. Mr. Golder as regards his terms of employment and in particular as to his salary and allowances. .

The Law

[14] The Accused are charged with contravening section 3(1) of the Prohibition of Trafficking in Persons Act (Act No. 9 of 2014) and punishable under section 5(2) of the Act. Section 3 (1) of the Act provides;

“A person who recruits, transports, transfers, harbours or receives another person by any of the following means-

(a) Threat;

(b) Use of force or other forms of coercion;

(c) Abduction;

(d) Fraud;

(e) Deception; including any misrepresentation by words or conduct as to financial incentive or promise of reward or gain and any other conditions of work;

(f) Abuse of power or of another person’s position of vulnerability; or

(g) Giving or receiving of payments or benefits, knowingly or intentionally, to achieve the consent of a person having control over another person;

For the purpose of exploitation, commits the offence of trafficking in persons and shall on conviction be liable to imprisonment for a term not exceeding 14 years, or such imprisonment and a fine not exceeding SR500,000.00

Section 3(2) of the Act provides;

“Where it proved to satisfaction of the Court any of the means referred to in subsection (1)(a) to (g) has been used in committing the offence of trafficking, it shall not be a defence that the trafficked person consented to such act.

[15] At the core of this reprehensible phenomenon is the aim of the traffickers to exploit and enslave their victims through a myriad of coercive and deceptive practices. According to the UNODC there are three elements of trafficking in persons which are;

(a) The act which could include recruitment, transportation, transfer; harbouring or receipt of persons;

(b) The means which includes threat or use of force, coercion, abduction, fraud, deception,, abuse of power or position of vulnerability, or giving payments or benefits to a person in control of a victim

(c) The purpose (or the intended action or means), namely exploitation which includes the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

[16] In **R v Alam (CO 67/2016) [2018] 946** (19 October 2018) it was observed that “*It follows that the offence of trafficking in persons, the prosecution must prove beyond reasonable doubt, the actus reus which is the act and includes recruitment, transportation, transfer, harbouring, or receipt The mental element of the offence, the prosecution has to prove is the intention to exploit either for sexual purposes, forced labour or services, slavery or practices similar to slavery, servitude.....*”

[17] The definition of trafficking in persons given in Prohibition of Trafficking in Persons Act, 2014 is not materially dissimilar from that provided in many international instruments such as UN Convention Against Transnational Organised Crime, 2000 (The Palermo Protocol). Similar definition was adopted the Council Convention on Action Against Trafficking in Human Beings 2005 (the Council of Europe Convention). In fact in the Palermo Protocol, trafficking is described as follows;

“..... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the

exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practice similar to slavery, servitude or removal of organs.”

[18] In **Queen v Wei Tang [2008] HCA 39** it was held ;

“The taking of the passports and the return air tickets from the complainants can, it is true be explained in other ways; likewise the confiscation of the funds lent to them to afford evidence upon arrival of an apparent capacity of self-support. However, the consequence of these steps was to remove from the complainants the wherewithal to enquire about or pursue their legal rights or to escape from the conditions in which they found themselves.”

[19] In **Trinity Term [2014] UKSC 47** On Appeal from [2012] EWCA Civ 609; Houniga (Appellant) v Allen and another (Respondents) before Lady Hale, Deputy, President Lord Kerr Lord, Wilson Lord Carnwath Lord Hughes Judgment given on 30 July 2014 (heard on 31st March and 1 April 2014)

Lord Hughes (with whom Lord Carnwath concurred) (minority decision) stated the following;

“ Human trafficking is a very serious crime, recognised both internationally and nationally. Those who practice it can expect, and receive in England and Wales, severe penalties. The position of those who can be transported is, however, more complex. First the line between (on the one hand) trafficking properly so called and (on the other) the often rapacious demand for money made by agents or persons who are only too keen to be transported to a western world country may sometimes be difficult to discern in a particular case. The latter situation is generally referred to as smuggling, to distinguish it from trafficking. Secondly, assuming that the case is indeed one of trafficking, properly so called, the question arises how offences committed by the trafficked person ought to be treated.”

Consideration of evidence and the law

[20] The first Accused is said to have abused and coerced Mr. Golder in that he did not pay the agreed salary and food allowances properly every month and not providing proper accommodation and ill treatment for the purpose of exploitation. Section 2 of the Prohibition of Trafficking in Persons Act defines coercion and exploitation as follows;

“coercion means use of force or threat thereof, and some forms of non-violent or psychological use of force or threat thereof, including –

(a) Threat of harm of psychological restraint of any person ;

(b) Any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;

(c) Abuse of any threat linked to the legal status of a person;

(d) Psychological pressure;

“exploitation includes

(a) Sexual exploitation

(b) Forced labour or services

(c) Subjecting a person to practices similar to slavery;

(d) Involuntary servitude;

(e) Fraudulent use of a person for removal of their organs or body parts; or

(f) forced marriage.

(a) Case against the First Accused

[21] It is not disputed that Mr. Golder was not paid his salary and food allowance to the agreed amount, thus the result why a grievance was filed with the Ministry of Employment that resulted in a settlement as per exhibit D2. It is indeed correct that the

first Accused subsequently paid the balance on these amounts that were retained. Nonetheless the offence was committed and that would not absolve the first Accused of being held liable for the offence of trafficking. The conduct of the first Accused fell nothing short but of exploitation. The fact that he was not paid his full salary and food allowance is tantamount to a misrepresentation as an incentive or promise of reward. To my mind, it was indeed the aim of the first Accused to exploit Mr. Golder. I believe that he formed the necessary *men rea* to commit the offence. This is compounded by the fact that the first Accused was, as per evidence of the prosecution, by the fact that the first Accused was aggressive towards the virtual complainant. That in itself means that Mr. Golder was subject to psychological pressure.

[22] In his testimony, Mr. Golder testified that the first Accused showed aggression towards him. There were threat that he would be sent back to his country if he did not comply. This is evidence of psychological pressure being exerted on Mr. Golder . He was concerned that should this threat happen and he loses his job he will encounter enormous problems in his country because he had borrowed in order to come to Seychelles to work. Representative of the Employment Department and ARID testified to this show of aggression against Mr. Golder during the negotiation procedure.

[23] Mr. Golder also complained that he was accommodated in an unhealthy and deplorable accommodation that looked more like a store. The photographs (exhibit P3) clearly depicts an old dilapidated shed where Mr. Golder was housed in. This is confirmed by letter of Jeanette Moumou addressed to Mr. Leon (exhibit P4).The first Accused's defence was that Mr. Golder was to be housed only for the night of his arrival as the first Accused was feeling tired but that he was to be moved to the approved accommodation at Glacis. However, Mr. Golder stayed there as he wanted to be with his brother and the latter was also employed by the first Accused and was being accommodated at the same accommodation at Pointe Conan. The first Accused had in fact rented a house at Glacis which had been approved as suitable accommodation for housing expatriate workers. However, it does not appear that there was any real effort or attempt by the first Accused to move Mr. Golder to Glacis. The law provides that it is not a defence to state that the person who is allegedly being trafficked consented to such act. Therefore, failure to move

Mr. Golder to the approved accommodation was an act of trafficking by the first Accused.

[24] Mr. Golder also complained and it is not denied that he was made to clean the yard at Pointe Conan and cook for the dogs that the first Accused had on the premises. He felt obliged to do it as he did not want any trouble. The first Accused does not challenge the fact that such was not a term of Mr. Golder's contract of employment. He was not obliged to do that. He maintains that he did it reluctantly. To engage a worker to perform work that falls outside his ambit of his contract of work, be it forcefully or passively through fear of repercussions is tantamount to exploitation, which is one form of trafficking.

[25] As a result of all this mistreatment being exerted on him, Mr. Golder, states that he was hospitalised and a medical report (exhibit P8) produced in evidence explains that Mr. Golder "*showed no evidence of formal mental disorder and his suicidal attempt could attributable to a situational crisis/adjustment disorder.*" Though, it appears that the only issues that were negatively impacting on Mr. Golder at that time was his treatment by his employer, the medical report does not fully connect the two together though it can be inferred that since he was subjected to psychological pressure that possibly occasioned situational crisis / adjustment disorder. I do not believe that it established sufficient causal link to the required standard of proof, between Mr. Golder's suicidal attempts at that time and the treatment by his employer for the court to place much weight on the medical report.

The Case against the Second Accused

[26] The second Accused was the person who organized the recruitment of Mr. Golder to work for the first Accused. It is not in dispute that he was instructed to make payments to Jahil on behalf of HD Jobs Agency by the second Accused. Jahil is an acquaintance of second Accused. In fact, Mr. Golder testified, which is not disputed that the second Accused informed him that he had a licence to recruit foreign workers. I find that the second Accused was at all times involved in the recruitment of Mr. Golder to work in Seychelles although he claims that he was employed by HD Jobs Agency and he was

following instructions. I have no doubt that the instructions to recruit Mr. Golder came from him. He had met Mr. Golder in Seychelles and had pursued the contact and engagement with Mr. Golder. It is clear that Mr. Rahman, the second Accused presented himself to Mr. Golder as being the owner of HD Jobs Agency albeit that as per exhibit P5, the Registration of Business Names document, is a notification of change of particulars, showed that the second Accused resigned as one of the person in whose name HD Jobs Agency was registered. Following from that the second Accused argument is that he was in employment with HD Jobs Agency, discharging duties on the agency's behalf when Mr. Golder was recruited to work for J and R Builders. Be that as it may, such a business cannot be rendered liable to any criminal act as HD Jobs Agency was merely a business name. However, employees within that business can be made criminally liable.

[27] However, before the charge can be established against the second Accused, the Court has to be satisfied beyond reasonable doubt that he was involved or had known or had knowledge or connived with the first Accused to that Mr. Golder would be subject to such acts as identified above which could be considered as an act of trafficking. I do not find that the second Accused had any knowledge nor connived with the first Accused to subject Mr. Golder to such treatment. There is no causal link between the two. The necessary mens rea as far as the second Accused is concerned vis-à-vis the commission the offence has not been established.

Decisions

[28] I, hereby find that the prosecution has proved its case against the first Accused beyond reasonable doubt but failed to establish the case against the second Accused.

[29] Therefore, the first Accused is found guilty and convicted as charged. The charge against the second Accused is dismissed.

Signed, dated and delivered at Ile du Port on 16th April 2021

Vidot J