ICAC V MOHAMMUD JALILL FOONDUN

2014 Intermediate Court

Cause No 359/2010

ICAC

V

MOHAMMUD JALILL FOONDUN

Charge:- Bribery by Public Official. In breach of Section 4 (1) (a) (2) of the Prevention and Corruption Act.

Ruling

On the 5th of September 2013, the prosecution called Mr Vikash Sharma Daby, witness No 3, who started to testify in the present case. He was examined in chief and then cross examination started before the case was adjourned and continuation fixed for 18.11.2013. The court observes that there were memory failures and previous inconsistent statements in the testimony of the witness.

On 18.11.13, Mr Vikash Sharma Daby was called and tendered for cross examination to be continued. In the course of cross examination, it came to light that, following his request between the 05.09.13 to 18.11.13, the witness has been remitted a copy of his statements and he has refreshed his memory. The defence is now moving that proceedings should be stayed because of miscarriage of justice as the ICAC has committed a breach of the law. The defence objected to the motion and arguments were offered by both parties.

Counsel submitted that there are procedures to refresh the memory of a witness and that giving copy of his statements to a witness who has already started to depose, particularly during an adjournment of proceedings and without the leave of the Court is a clear breach and accused can no longer have a fair trial. Counsel quoted section 173(1) of the Courts Act and the case of **Louis Cherubin Lamarque v The State (SCR 6393 2011)** which deal with the procedures for previous inconsistent statement during cross examination. Counsel also referred to the case of **Mahmood Bhuglah v The State (1995)** which explains the principles when witness may refer to a document during the course of his giving of evidence. Counsel further quoted **Evidence: text and materials; 2nd edition by Steve Uglow** at pages 441 and 442.

Counsel for the defence objected to the motion and quoted the case of **Nasser Joomeer v The State 2013 SCJ 413** to say that the witness is not undergoing any test of memory. The court highlights that no specific reference was made to any part of the case and that a copy was submitted in court and sufficed to say that a number of irrelevant copies were annexed to the same case submitted by learned counsel. Counsel contented herself to say that the witness is not undergoing a test of memory and added that the court was aware that the witness was not remembering and handed over the case in court. She then relied on *"a Hong Kong case"* and said that rules for refreshing of memory can only apply in court and then added that if there is an adjournment, then there is *"another Hong Kong case"*. She undertook to forward the case and no specific reference was made. Counsel also stated that there should be equality of arms as defence witnesses are communicated with copy of their statements and quoted para 8-23 of Archbold 2010. Finally on the 30th of December 2013 a copy of one judgment from the Court of Appeal of Hong Kong was left at the registry of this court without any covering letter of other explanation which would assist the court or would enlighten the court on which part of the case counsel for the prosecution was relying. Be that as it may, it would appear that the relevant part of the case would concern a witness who refreshed his memory during adjournments using his statements which were communicated to him before trial. This case is different to the present one where statements were communicated during trial and particularly when witness has started to depose and was under cross examination.

The main crux of the submission of counsel for the prosecution is on the issue of giving a witness a copy of his statement before he starts to testify and said that it would be an artificial distinction to make a difference between that situation and one where the witness has already started to depose.

At the start I should point out that there is no statutory provision which govern the refreshing of the memory of the witness. In the absence of any statutory provision, the court should refer to sections 56 and 162 of the Courts Act which reads as follows-

56. Law of England to decide procedure

Where any question arises as to any procedure, or conduct in or respecting any matter, in the trial by jury, not herein provided for, the law of England shall be followed and rule the point or question at issue.

162. English law of evidence to be followed

Except where it is otherwise provided by special laws now in force in Mauritius or hereafter to be enacted, the English law of evidence for the time being shall prevail and be applied in all courts of Mauritius.

Having said so, I now find it useful to turn myself to the English Common law. First of all I should look at the principle and practice governing the refreshing of memory of a witness whilst he is testifying in court. It is trite law that a magistrate has the discretion to allow a witness who is giving evidence in court to refresh his memory from a statement made at the material time of the event in issue, provided that the magistrate is satisfied that-

1. The witness signifies that he cannot recall the details of the event because of the long time elapsed since the event;

2. The witness made a statement relating to the event at a time contemporaneous with the event or near the time of occurrence;

3. The document used to refresh his memory must have been made or verified by the witness; and

4. The document used for refreshing the memory of the witness must have been communicated to the other party if so required.

On the issue of giving a witness his statement before he starts to depose, there is the case of **Regina v Da Silva Court of Appeal (1990) 1 WLR 31** In the case under reference, a witness was given a copy of his statement before he started to testify and thereafter same was taken from him before he deposed. The principle for such a practice is lengthily dealt with in this case.

However, what is being contested is that witness has already started to depose, he has been examined in chief and cross examination has started and in the middle of cross examination, during an adjournment the witness was given a copy of his statement by ICAC and he has been able to refresh his memory without the leave of the court.

I am unable to agree with counsel for the prosecution that it would be making an artificial distinction between providing a copy of a statement before a witness starts to depose and after he has started to testify, each situation is governed by its own principle. I find it useful to refer to

Blackstone's Criminal Practice 2010 para F6.17 at page 2369 where the principle of Refreshing memory out of court after going into the witness box is analysed. This principle is

also perused at **para 1176. Refreshing memory. of Halsbury's Laws of England, Volume 11(2), fourth edition**, page 986. What comes out as the principle is clearly enunciated viz-

A witness who has begun to give evidence may be permitted to refresh his memory from a statement made near the time of the events in question, even if it is not a contemporaneous statement, provided that the judge is satisfied -

(1) that the witness indicates that he cannot now recall the details of the events because of the lapse of time since they took place;

(2) that the witness made a statement much nearer the time of the events and that the contents of the statement represent his recollection at the time he made it;

(3) that he has not read the statement before coming into the witness box; and

(4) that he wishes to have an opportunity to read the statement before he continues to give evidence.

This principle was also upheld in the case of **Regina v Da Silva (supra)** and it is therefore clear that the leave of the court must be obtained before handing over a copy of a statement to a witness who has started to depose. In the present case, ICAC has decided otherwise and I consider this to be a breach of the cardinal principle of refreshing memory.

The issue to be determined now is whether this breach would warrant a stay of proceedings of this case. As rightfully suggested in the case of **R v Richard John Sutton Court of Appeal (1992) 94 Cr,App.R.70** which upheld the proposition laid down in **R v Richardson Court of Appeal (1971) 2 QB 484** "*...the court should not deprive itself of its best chance of hearing the truth.*" I hold that it will be for this court to assess the evidence which will henceforth be given by witness Daby and to give to it the appropriate weight. I am fully alive that it is the weighted oral testimony to be given by the witness in the actual context which will constitute evidence in the case as opposed to the document which has been used to refresh his memory.

Ruling delivered by

V. Appadoo

Magistrate, Intermediate Court (Criminal Division).

13.01.2014.