

ICAC v Tupsy

2014 INT 223

Cause Number: 1617-2010

In the Intermediate Court of Mauritius
(Criminal Division)

In the matter of:

Independent Commission Against Corruption

v

Davindra TUPSY

Judgment

The Accused stands charged with ‘Public official using his office for gratification’ in breach of section 7(1) and 83 of the Prevention of Corruption Act (POCA), to which he pleaded Not Guilty and was assisted by Counsel.

The Prosecution case was also conducted by Counsel.

The Supreme Court has recently had the opportunity in **Joomeer v The State 2013 SCJ 413** to state that in such offences as the present one, the elements of the offence which the Prosecution has to prove are the following:

What the prosecution needs to prove under section 7(2) of the Act is that the defendant:

- (a) was a public official;***
- (b) made use of his office or position;***
- (c) so acted for a gratification for himself or another.***

It is also interesting to note that the Supreme Court has also explained in **Joomeer (Supra)** that there is no need to prove the obtaining of any gratification under section 7(2) of the Act and that:

The opprobrium lies in the abuse or misuse of the office or the position as a public officer for a gratification. Whether the gratification is received or accepted is

not part of the elements of the offence even if the reception or the acceptance adds further evidential weight to prove that the abuse of office was “for gratification.”

I have also considered the particulars of the offence under the present information as to the material circumstances of the alleged offence and which reads as follows:

In the months and place as aforesaid, the said Davindra Tupsy, whilst being an Agricultural clerk posted at the Veterinary Services Division, obtain for himself sum of Rs. 10,000 from one Mrs. Lutchmee Appadoo to have latter’s cow declared dead and to arrange for the State to compensate her with another cow.

Now, as regards the first element of the offence namely ‘public official’, it cannot be disputed that the Accused was in fact such an officer in the light of his own admission to same in his statement (Document B refers) and the statement of service produced by Ms Heerah (Document A refers) as well as the confirmation from Mr. Beedassy, the Superintendent at Veterinary Services Division to this effect.

As regards the other elements of the offence, the Prosecution relies heavily on its main witness, Mrs. Lutchmee Appadoo.

The latter stated during examination in chief that she is an animal breeder and that she went to Redit to enquire whether her cow was still registered under her name as she had given the cow to a lady for a year but the latter had not returned the cow yet. She then met the Accused who registered the complaint and took her phone number. She added that the Accused called her to inform her that she should give him 10,000 rupees to do some paper works so that the government would financially compensate for her alleged dead cow.

The Prosecution then moved to put an inconsistent part of her statement dated 08-07-2009 to her to the effect that she had stated therein that the Accused allegedly stated to her that he could get her a cow from the government if she would give him 10,000 rupees and that he would declare her cow dead. Whilst she agreed she stated so in her statement, she nevertheless maintained in Court that the Accused had told her that he would make her get money for the dead cow. Thus, already there is glaring and persistent inconsistency with her

previous statement acknowledged by the complainant as to whether the Accused would allegedly get her another cow or money in compensation for a dead cow.

Several questions from the Prosecution then followed so as to clarify the said inconsistency. However, this only proved to create more confusion to the extent of causing contradiction as well from her previous statement during her examination in chief. In fact, she then stated that she did not know whether the Accused would have made her get another cow or money in return. Thus, there is not only uncertainty from such a reply but also confusion as well as obvious contradiction. This state of confusion as well as contradiction unfortunately prevailed throughout her testimony so that she could not say whether the Accused took the 10,000 rupees to make her get another cow or money as compensation for the alleged dead cow.

Now, it is clear from the above particulars under the present information that the Prosecution had averred that the Accused obtained from the complainant the sum of 10,000 rupees to declare her cow dead and to arrange for the State to compensate her with another cow. It is also settled law that the Prosecution is bound to aver in the information what it intends to prove and whatever is averred has to be proved. This principle was again recently affirmed in **The State v Treebhoowon & ors 2012 SCJ 214.**

I also find it relevant to cite the following extract from **Mungree V The State 2013 SCJ 468** which has been referred to by the Counsel for the Prosecution in her written submission as an obvious sign of her fairness:

We have no difficulty in agreeing with the stand of Miss Bisnauthsing and Mr. Mootoo, who appeared, respectively before the present Bench for respondent No. 2 and respondents Nos. 1 and 3, that the decision at (i) above was correct. However, the decision at (ii) above in Coureur was arrived at without consideration of the provisions of section 10 of the Constitution relating to the rights of the accused to be informed in detail of the charge lying against him and be given full opportunity to prepare his defence. Both Miss Bisnauthsing and Mr. Mootoo had to concede - and rightly so – that they could not refute the argument that there was a possibility that an accused party charged with an offence particularised in a certain manner could be misled if in fact the alleged offence, according to the evidence, should have been particularised in a different manner, as in the present

case. They also rightly conceded that they could not refute the argument that the accused in the present case has been convicted, as charged, of an offence which, as particularised, was not shown by the evidence to have been committed by him. Indeed, the offence of which the accused in the present case was convicted was that he had solicited a gratification for officers of a District Council, and the evidence fell short of proving that.

In the circumstances, the learned Magistrate could not, in our view, convict the accused “as charged”, nor could she convict the accused of the offence with different particulars without having the information amended and giving to the accused the opportunity of pleading anew, cross-examining further relevant witnesses and adducing evidence in relation to the differently particularised charge.

I find that the above extract is directly relevant and applicable to the present case in the sense that the Accused finds himself, after the evidence from the Prosecution exposed in Court, misled in his defence by the material circumstances of the offence as averred under the particulars provided in the present information. It also goes without saying that in the light of evidence on record which is in material contradiction with the particulars provided under the present information, the Accused cannot be found guilty as charged.

I further find it would be impossible to amend the information so as to make it accord with the evidence on record since the evidence is in state of uncertainty and confusion as to whether the Accused obtained the 10,000 rupees so as to arrange to compensate the complainant by another cow or financially. This is also a reason probably why the Prosecution did not deem it fit to make any motion to amend the information.

Moreover, I find that the version which was put to the Accused in his statement (Document B refers) is the following:

“... et qui la mo fine dire madame Luxmi Appadooqui si li donne moi Rs. 10000 mo pou capave faire li gagne vache avec Gouvernement pou declarer qui madame la so vache fine mort et moi mo pou donne li aine l'autre vache pou sa...”

When the ratio in Marday v the State 2000 SCJ 225 to the effect that it is normal to assume that the version that was put to a defendant is the very complaint that was made by the victim

to the police, I find that the version the complainant gave in Court is so materially different from that given by her to the investigating body during enquiry so that ***“such a patent disparity, which remained unexplained by the prosecution, indeed greatly affected her credibility, making it unsafe for the trial court to convict”***. Thus, it is clear that the contradiction and inconsistency noted in this case is so gross and material that it greatly affects the overall credibility of the complainant.

I therefore find that the Prosecution has not been able to prove its case as charged under the present information against the Accused beyond reasonable doubt.

I also find it relevant to question the fact whether there is any offence under POCA in the present case. In fact, it is arguable whether the Accused used his office to allegedly obtain gratification in the form of sum of the 10,000 rupees or whether he swindled the complainant of her property namely 10,000 rupees by employing fraudulent pretences to establish the belief in the existence of an imaginary power. Such a question becomes reasonable in the light of the evidence from the complainant that she did not give any “goose” to the Accused but merely gave him 10,000 rupees as a government officer to do some paper works. She even added she gave the money to the Government through the Accused so that she could be compensated in money for the death of her cow and that it never crossed her mind that she was giving “goose”. I also consider here the evidence on record from Mr. Beedassy that such a government scheme to compensate any breeder in case of loss or death of cow had ceased in about 1999. Thus, it can be argued that the Accused might have duped an innocent naïve rural side old age woman of her property.

In the light of all the above considerations, I dismiss the present charge against the Accused.

Neerooa M.I.A (Mr.)
Magistrate, Intermediate Court.
This 23 July 2014.