

IN THE INTERMEDIATE COURT OF MAURITIUS

Cause No.349/2013

In the matter of:-

Independent Commission Against Corruption

v

Mohammad Shafi Nunhuck

RULING

The accused is charged with the offence of 'Bribery by public official' in breach of sections 4(1)(a)(2) and 83 of the Prevention of Corruption Act (the Act).

He pleaded not guilty to the charge and is assisted by Mr Y. A. R. Mohamed, S. C.

Mr Ponen, counsel, appeared for the prosecution.

Defence counsel has moved that the proceedings be stayed because of the essential departure from the prescribed rules regarding identification exercise, a grievous departure which has caused a miscarriage of justice.

For the defence it was submitted that the proper procedure for identification has to be followed, even in the cases of direct confrontation, and in the present case the whole process was wrongly conducted - *Appadoo & Ors v The Queen* [1965 MR 161]. The person who participated in the investigation organised the confrontation, and with only one person present: this renders the process null and void and fatal to the case.

The submissions of counsel for the prosecution are in a gist that the ultimate test in a case of abuse of process is one of fairness. It is true that PS Sookaram (W4) said he was present when the accused was arrested and that he conducted the direct confrontation, but identification is not disputed and the accused did not have any complaint about the exercise. The ICAC has not acted in such a way to justify staying proceedings, and the motion should be set aside.

In reply Learned counsel for the defence said that the defence is only complaining about the procedure adopted by the ICAC, which was irregular, but does not mean that it was deliberate.

A ground for staying a prosecution "founded in the general and inherent power of the court to protect its process from abuse", has its origins in *Connelly v. DPP* [1964] A.C. 1254, HL, and *DPP v. Humphrys (Bruce Edward)* [1977] A. C 1, HL, that is, "(i) where it will be impossible to give the defendant a fair trial, and (ii) where a stay is necessary to protect the integrity of the criminal justice system: *R. v. Maxwell (Paul)* [2011] 1 W. L. R. 1837, SC, and *Warren v. Attorney General of Jersey* [2011] 3 W.L.R. 464, PC (indicating that these two categories are distinct and should be considered separately)." - *Archbold Digital Edition 2012, para. 4-75*

(see also *R v Horseferry Road Magistrates' Court ex-p Bennett* [1994] 1 A.C 42, *The State v R. Velvindron* [2003 SCJ 319], *The State v Wasson* [2008 SCJ])

In *Appadoo & Ors (supra)* the Court cited extracts from the report of the Interdepartmental Committee on the Court of Criminal Appeal (Comnd - August 1965) and the Home Office circular dated 1 January 1925, and went on to give guidelines on the manner in which an 'identification parade' should be held.

What was held in the present case was a 'confrontation': in the accused's defence statement dated 1 June 2009 there is mention that he was informed of the various methods of 'identification' and chose 'direct confrontation', the accused's signature appearing after such mention. There is also mention that 'Hossein' formally identified him in the presence of an ICAC officer. It is to be noted that the accused said he did not have any complaint about the 'identification exercise' and he specified that 'Hossein' just pointed his finger at him and said "*Sa même sa missié la sa*".

In the UK 'confrontation' is governed by the PACE Act 1984, Code D, Annex D, whereas there is nothing in our law on the 'modes of identification'.

In *Williams v R (PCA 11/96 - Jamaica)* from *R v Hassock (1977) 15 J.L.R. 135* as cited in *N. M. Khaidoo v The State [2011 SCJ 38]* it was said:

"Although it is always difficult to formulate universal rules in these circumstances, where the facts may vary so infinitely, a prudent rule of thumb would seem to be: where the suspect was well known to the witness before, there may be confrontation. That is, the witness may be asked to confirm that the suspect is the proper person to be held. If the witness did not know the suspect before, then the safe course to adopt would be to hold an identification parade, with the proper safeguards, unless of course there are exceptional circumstances."

In *Williams* itself, their Lordships went on to say at paragraph 4:-

"Their Lordships wish to endorse what was said about the proper practice in that case. They agree that confrontation, if it is to be resorted to at all, should be confined to rare and exceptional circumstances. The essence of the objection is the elementary one, that it is improper for the police to tutor the witnesses. Once a suspect is in their custody he should be kept apart from eye witnesses to the incident. Nothing should be done at that stage which might assist the eye witnesses in their identification of him as the perpetrator. That is why, unless there are exceptional circumstances, he should be shown to them only by means of an identification parade."

In the light of the above, it is clear that a 'confrontation' should be the exception, not the rule. In the present case, the prosecution has not explained the reason why a 'confrontation' was resorted to, merely making an entry in the accused's statement that he was informed of the methods of 'identification', that he opted for such mode of 'identification' and had no complaint about it.

I am also of the view that PC Sookaram ought not to have been involved in the 'identification exercise' of the accused, as he was present at the time of his arrest.

It is to be noted that as it may, the issue per the motion of the defence, is whether the actions of PC Sookaram in initiating the proceedings before this Court, constitute an abuse of the process of the Court, and are prejudicial to the accused, in that he would not benefit from a fair trial.

I find that they do not. The accused will not be prejudiced by the fact that a 'confrontation' was carried and that 'Hossein' (Emamdhully) identified him in the presence of PC Sookaram. Emamdhully has not yet deposed and the defence will have full latitude to cross-examine him on such 'identification exercise' following the arrest of the accused. It is to be noted that the accused admitted that he stopped Emamdhully who was driving a lorry on 30 May 2009 and then met him on the material day and that whilst he was talking to the latter on the material day, he was asked to accompany officers to the ICAC office, so that the risk of erroneous identification is greatly diminished.

I have been referred to the case of *Appadoo & Ors (supra)* in support of the arguments for the defence: in the said case, two of the grounds of appeal challenge the procedure adopted for the identification of the appellants. About 200 persons were made to walk by a stationary car in which were two police officers, who then identified some as participants of the riot, after which three other police officers identified persons. The Court condemned the serious irregularity of the 'identification exercise' and allowed the appeal. I find that the said case can be distinguished from the present case in that there was no such serious irregularity here and that the accused in the present case had been made aware of his rights concerning identification.

For the reasons given above, I decline to stay the proceedings against the accused and I set aside the motion of the defence.



W. V. Rangan
Magistrate
Intermediate Court (Criminal Division)

This 25 September 2014