

Independent Commission Against Corruption v NG SUI WA Dick Christopher

2014 INT 16

IN THE INTERMEDIATE COURT OF MAURITIUS

C N 1854/10

INDEPENDENT COMMISSION AGAINST CORRUPTION

v/s

NG SUI WA DICK CHRISTOPHE

RULING

In the present matter where the accused stands charged with the offence of 'Public official using his office for gratification', the defence has moved that the proceedings be permanently stayed as the continuance of such proceedings would amount to an abuse of process of the Court and would be in breach of the rights of the accused to a fair trial guaranteed under Article 10 of the Constitution inasmuch as:

(1) The investigation involved designated police officers, posted at the ICAC for the purposes of arrest and detention, who have acted in breach of Articles 71 and 91 of the Constitution, inasmuch as

(a) the Police Force is under the command of the Commissioner as per Article 71 of the Constitution, whereas the police officers who acted against the accused were instructed by and operated under the responsibility of the Director of the ICAC as per section 47(1) of the POCA; and

(b) the designated police officers, posted at the ICAC under section 24(5) (b) of the POCA, investigated and gathered evidence against the accused, for a body corporate which is not a disciplined force, in breach of section 91, 111 and 118 of the Constitution, which amounts to a direct interference with the powers of the Disciplined Forces Service Commission;

(2) the accused has been denied a hearing, whether public or private, in breach of the statutory provisions of section 47 of the Prevention of Corruption Act 2002("POCA");

(3) written statements have been recorded from the accused in breach of section 50(1) (d) of the POCA;

(4) There has been harsh and unconscionable delay in instituting the proceedings against the accused.

The prosecution has objected to the above motion. In support of its arguments, the prosecution has called Chief Investigator of the Corruption Investigation Division of the ICAC, Jean Claude Daniel Chung Yen to produce an affidavit which the latter has sworn explaining the chronology of events which has led to the present prosecution against the accused. It came out that a complaint was received at the ICAC in April 2006 concerning various issues following which the ICAC started an enquiry in respect of the Ministry of Health and Quality of Life, the Registrar of Companies and the Mauritius Revenue Authority. The enquiry pertaining to the allegations against the accused started in March 2008. Subsequently several statements were recorded from witnesses and documents were secured from the Trust Fund For Special Medical Care (TFSMC) – Cardiac Centre. On the 18th June 2008 the accused gave his statement under caution in presence of his Counsel.

The case was then sent to the Commission for decision and then to its legal division which sent back the file to the investigation department to clarify several issues. In November 2009 a statement was recorded from a French cardiologist and the case was then referred back to the legal division and upon recommendation of the Commission, the case file was sent to the DPP's office in April 2010. Following certain queries from the DPP's office, further enquiry was effected. On the 22nd November 2010 the DPP advised prosecution against the accused. The latter was then arrested on the 30th November 2010 and was released on bail on the same day. The present information against the accused was lodged on the 01st December 2010.

Under cross examination, CI Chung Yen explained that any investigation at the ICAC is under the directions of the Director of Investigations who himself operates under the Director General of the ICAC. The statements of witnesses in relation to the present case were recorded by senior investigators in presence of police officers posted at the ICAC. The accused was invited for an interview whereby certain questions were put to him and he was asked for his explanations. Same was reduced in writing by Senior Investigator Miss Sooben as recording officer in presence of the accused's counsel. It was an interview conducted under section 47 (1) of the Prevention Of Corruption Act (POCA) and it formed part of the investigative process.

CI Chung Yen confirmed that a statement was recorded from one Ramlochun on the 17th November 2010 for certification of the minutes of the proceedings of the Trust Fund for the Cardiac Centre as he was the secretary of the Board . The said Ramlochun is posted at the Morality section which forms part of the DPP's office . In November 2009 a statement was recorded from one Mr. Claude Vaislic. It came out that the accused was not confronted with the statements recorded from the two above witnesses.

The accused deposed under oath and confirmed that he was interviewed by the officers of the ICAC and police officers in presence of his legal adviser on the 18th June 2008. It was an informal hearing during which the legal adviser of the ICAC was not present. The accused explained that the TFSMC was set up for heart surgery and was supposed to collect funds partly from the government and partly from foreign missions. He stated that it was in February 2008 that he read in the press that the ICAC was investigating matters relating to him in respect

of facts which occurred in 2002 & 2003. Such a delay in instituting prosecution against him has been prejudicial to him inasmuch as some of the witnesses namely doctors whom he had visited in 2002 – 2003 cannot be traced out as he did not know where they are now. Furthermore having left the Cardiac Centre in 2005 he has now no access to the said Centre and therefore no documents are available to buttress his defence. He did not also have a chance to rebut the allegations of one Dr. Vaislic as he has not been confronted with the latter's statement. He has also been affected in his professional and private life .

In cross examination the accused conceded that the statement which he gave on the 18th June 2008 was given under caution and under the Judges Rules. It was in presence of his Counsel. He further conceded that he did not try to contact the ICAC when he heard that there was an investigation which was going on. In the statement which he gave to the ICAC, he made mention of Dr. Vaislic .and produced an e mail which he received from the latter. He confirmed that he was bailed out on the same date as he was arrested. There is as up to date a prohibition order against him and he has to apply for a variation order on each time he has to travel.

We have carefully analysed the arguments and submissions of both Counsel in respect of the defence motion for a permanent stay of proceedings on the ground of abuse of process based on the four aforementioned grounds. We propose to deal with ground 4 first and then proceed to grounds 2 & 3 lumped together and finally to ground 1.

❖ **Ground 4 - Delay in prosecuting**

Section 10 (1) of the Constitution provides

“(1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

In the case in hand it is not disputed that eight years have elapsed since the commission of the alleged offence in 2002 and the lodging of the present information against the accused in 2010.

The question to be asked is whether this lapse of eight years is, as contended by the defence an inordinate delay so as to be constitutive of a breach of the Constitutional rights of the accused to a fair trial within a reasonable time and thus amounts to an abuse of the process of the Court warranting the sanction of a permanent stay of proceedings.

On this issue of delay, we find it apposite to refer to the case of **Tapper v Director of Public Prosecutions [2012] UKPC 26** which cited with approval the following extracts from the Privy Council case of **Boolell v The State [2006] UKPC 46** as they clearly state the principles as they ought to apply in Mauritius:

“27. This statement of principle was followed by the Privy Council in Boolell v The State [2006]] UKPC 46, Lord Carswell, giving the opinion of the Board, derived from it the following propositions, as correctly representing the law of Mauritius:

“(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.

“(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all.”

After a perusal of the affidavit produced by the prosecution relating the chronology of the events culminating into the lodging of the present information against the accused (vide Doc.A), this Court is of the view that such a delay has been reasonably and satisfactorily explained by the prosecution as per the reasons set out in the affidavit sworn by Chief Investigator Chung Yen. We do not therefore consider the delay of eight years as being an inordinate delay which would cause prejudice to the accused in the preparation of his defence and which would deprive the latter of a fair trial.

As regards the issue raised by the defence to the effect that the accused was not confronted with the versions of the witnesses Ramlochun and one Dr Vaislic, the Court notes that as per the evidence on record the former witness, being at the material time the secretary of the TFSMC, only certified the minutes of the proceedings secured during the course of the enquiry whilst Dr Vaislic’s statement was recorded after the accused made mention of his name in his statement to the ICAC. At this stage the Court has not been enlightened as to the contents of the alleged allegations made by Dr. Vaislic against the accused and whether the said allegations had any bearing on the alleged charge against the accused. Thus at this stage it will be premature for this Court to determine whether any prejudice had been caused to the accused for not being confronted with the said statement. Indeed it is to be noted that the name of Dr Vaislic does not even appear on the list of the prosecution’s witnesses. As regards the documents which the accused contended are no longer accessible to him as he has left the TFSMC since 2005, as rightly submitted by Counsel for the prosecution, the accused may, if he so wished, summon the relevant officers of the Trust Fund to disclose those specific documents which he intended to rely upon for his case.

We accordingly set aside ground 4 of the defence’s motion for a permanent stay of proceedings.

❖ Grounds 2 & 3 - Alleged breaches of sections 47 and section 50 (1) (d) of the POCA.

It was submitted by the defence that the ICAC has failed to follow the procedure laid down in the POCA relating to the manner in which a suspect or any other person is to be heard. Reference was made to **section 47 (3) of the POCA** which reads as follows:

“In carrying out an investigation under this section, the Commission may conduct such hearings as it considers appropriate and, for that purpose –

(a) the hearing shall be conducted by the Director General or such officer as the Director General thinks fit;

(b) the Chief Legal Adviser, or a member of the Legal Division deputed by the Chief Legal Adviser, shall be in attendance and shall provide legal advice to the Commission;

(c) the hearing may be conducted in public or in private as the Director-General may, in his discretion, determine;

In the case in hand it is not disputed that the Commission did not carry out a hearing under section 47(3) of the POCA as confirmed by CI Chung Yen. This begs the question as to whether failure on the part of the ICAC to carry out such a hearing as prescribed under section 47(3) of the POCA amounts to a procedural impropriety so as to constitute an abuse of process depriving the accused of the protection provided by the POCA.

From a close reading of section 47(3) of the POCA, this Court is of the view that the Commission is not bound to hold such a hearing as it is clearly stated that “*the Commission may conduct such hearings as it considers appropriate.....*”(emphasis added),

At this juncture we find it pertinent to refer to the case of **Dowarkasing M v The Independent Commission Against Corruption [2013] SCJ 138 A** submitted by the defence where the following extracts are of relevance:

“Under section 47, the respondent may decide to invite a person to collaborate in its further investigation without any compulsive element underlying the invitation. A person who does not turn up for a hearing in response to the invitation does not commit any offence.....”

In light of the above, it is clear that there is no obligation on the part of the Commission to conduct a hearing. However it is the defence contention that if the ICAC chose not to do a hearing then there is no alternative provided in law. Such an interpretation is in this Court’s opinion tantamount to an indirect manner of saying that the ICAC is bound to hold a hearing, which therefore defeats the purpose of the word “may”. We are not prepared to follow the defence point of view. Section 47 (3) of the POCA as it is so worded does not prevent the Commission from resorting to another method in the course of its investigation under section 47 of the POCA.

The accused confirmed that an interview was carried out in presence of his Counsel and as per the evidence of CI Chung Yen, the accused was interviewed after being cautioned in compliance with the Judges rules.

True it is that the interview was recorded by Senior Investigator Sooben in presence of Chief Investigator Chung Yen who were both at the material time posted at the ICAC and were therefore officers of the ICAC under section 24(1) of the POCA. However, this procedure adopted at the enquiry level instead of a hearing under section 47(3) of the POCA is not irregular or illegal. Whilst it is true that the Judges Rules are administrative directions to the police, the Judges Rules have also to be complied with by any other investigative body. Indeed **Rule VI of the Judges Rules** reads as follows:

“Rule VI: Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.”

It is highly relevant here to note that one of the statutory functions of the ICAC pursuant to section 20 (1) (d) of the POCA is to detect and investigate any act of corruption, so that it goes without saying that the ICAC officers have a duty of investigating offences. Thus, they are also qualified to comply with the Judges Rules as per Rule VI mentioned above.

As regards the defence's contention of an alleged breach of section 50 (1) (d) of the POCA, the Court is of the view that same is not relevant to the present issue. Indeed section 50 prescribed a series of orders which come into play where there has been a failure on the part of a person to respond to a request under section 47 of the POCA. As stated in the case of '**Dowarkasing M' (supra)**, "*Section 50.....covers a different situation which can be qualified as a post-section 47 situation. It is where a person fails to respond to a request under section 47 that section 50 gathers its importance*". Further the case of '**Dowarkasing'** is to be distinguished from the case in hand as in the former case there was no interview being carried out by the ICAC as the applicant in the said case did not respond positively to the ICAC's request.

In the light of the foregoing considerations, grounds 2 & 3 of the motion for abuse of process are set aside.

- ❖ **Ground 1 (a) - Alleged breach of Article 71 of the Constitution inasmuch as the Police Force is under the command of the Commissioner as per Article 71 of the Constitution, whereas the police officers who acted against the accused were instructed by and operated under the responsibility of the Director of the ICAC as per section 47(1) of the POCA.**

At the outset we wish to place on record that Counsel Mr. Bhadain who submitted on the above ground for abuse of process made it clear to the Court that the defence is not pressing on ground 1 (b) in view of the fact that the same issues will be canvassed in the case of **Peerthum v ICAC and the Commissioner of Police – [2012] SCJ 371** where leave has been granted to appeal to the Judicial Committee of the Privy Council.

In respect of limb 1(a), it was submitted that the police officers who are posted at the ICAC under section 24 (5) (b) and who are designated by the Commissioner of Police have participated in the investigative process as Chief Investigator Chung Yen was at the material time in charge of a team of investigators comprising of senior investigators, investigators and police officers.

Counsel for the defence made a comparison between section 3 (4) of the defunct Economic Crime and Anti-Money Laundering Act (ECAMLA) and section 24 (5) (b) of the POCA. **Section 3 of the ECAMLA** entitled "Director of the Economic Crime Office" stipulates in its sub section 4 that:

"(4) The Director may, for the purposes of conducting any investigation under this Act, use the services of any police officer or other public officer designated for that purpose by the Commissioner of Police or the Head of the Civil Service, as the case may be."

Section 24 of the POCA entitled "Officers of the Commission" provides in its subsection 5(b) that :

“(5) (b) for the purpose of this Act, make use of the services of a police officer or other police officer designated for that purpose by the Commissioner of Police or the Head of the Civil Service, as the case may be.”

It was submitted by the defence that the reason why the words “conducting any investigation” in section 3(4) of the ECAMLA were removed from the equivalent section 24 (5) (b) of the POCA were to be found in **paragraph 458 – 459 of the Select Committee Report on Fraud and Corruption** which was laid down on the Table of The Mauritius National Assembly on Tuesday 18 December 2001. Paragraphs 458 and 459 read as follows:

“458: Since the beginning of the nineties, Government has resolutely turned its back to the Police and sought support from outside independent bodies to investigate corruption.....”

“459: Our attempts, since 1991, to confer investigative powers to the Ombudsman, the Anti-Corruption Tribunal and, finally, the Economic Crime Office, have been steps have been in the right direction.....”

Paragraphs 462 and 463 of the above Report were also referred to.

It is the contention of defence Counsel that police officers at the ICAC under section 24 (5) (b) are there to do their police duties and to help Icac in terms of offering security and arresting suspects only. But in the case in hand there were police officers who formed part of the team of investigators headed by CI Chung Yen and this according to Counsel is a direct interference with the powers of the Commissioner of Police as set out in Article 71 of the Constitution.

This Court is of the view that the opening words of Section 24 (5) (b) make it very clear as to why the Commission may make use of the services of police officers namely *“for the purpose of this Act”* (referring to the POCA). And it is to the common knowledge that “the purpose” of the POCA is to combat fraud and corruption, whether petty or serious corruption cases and it cannot be said that those police officers seconded for duty to the ICAC can only effect arrest and provide security. In fact by using the words “for the purpose of this Act”, the POCA does not restrain the services of those police officers designated under section 24 (5) (b) only to “investigative powers” as under section 3 (4) of the ECAMLA. Section 24 (5) (b) of the POCA has a more extensive meaning than the defunct section 3 (4) of the ECAMLA. Those police officers designated by the Commissioner of Police under section 24 (5) (b) of the POCA whilst retaining their duties under the Police Act have additional powers under the POCA as their services were required “for the purpose of this Act”.

We find it apt to cite here an extract from the case of **Ha Yeung Chin Ting T.S v Independent Commission Against Corruption & Anor [2003] SCJ 273 :**

“It is clear from section 24 (5) (b) of the Act that Superintendent of Police Hurrychurn has been posted, together with his other junior colleagues, to the first respondent (referring to the ICAC) by the second respondent (i.e the Commissioner of Police) because first and foremost his services as a Police Officer were required for the purposes of the Act i.e to combat corruption and fraud within the meaning of the Act.”

In the case in hand there is evidence on record that the role of the police officers involved in the present case was in fact limited to the witnessing of the statements recorded from the witnesses called by the ICAC. Indeed it came out that the statement recorded by Miss Nunkoo was done in presence of PS Jokhoo who was not involved in the enquiry. Similarly the statement of Mrs. Beeharry (witness no.3) was recorded by Miss Sooben – Senior Investigator at ICAC witnessed by CPL Jungbahadoor whilst that of Mrs. Jhowry (witness no.4) was witnessed by CPL Joysuree. Witnessing of statements by police officers are perfectly in line with the duties of any police officer under the Police Act.

Now, true it is that the above police officers formed part of the investigative team under the supervision of CI Chung Yen as per the latter's own testimony. This is perfectly in line with section 24 (5) (b) of the POCA as the ICAC is an investigative body for corruption cases. If police officers designated under section 24 (5) (b) of the POCA are at the ICAC only to effect arrest and offer security services, this will definitely be contrary to section 24 (5) (b) as to the reason why they have been designated by the CP to be posted at the ICAC.

Based on all the above we therefore find that there has been no breach of Article 71 of the Constitution. Those designated police officers under section 24 (5) (b) of the POCA retain their substantive appointment in the Police force under the command of the Commissioner of Police as per Article 71 of the Constitution.

As stated in the case of '**Ha Yeung (supra)**' when referring to SP Hurrychurn who at the material time was an officer designated by the Commissioner of Police under section 24 (5) (b), the latter '*while enjoying certain privileges attached to the post and exercising additional powers under the Act, but his substantive appointment remains an office in the Police force. Consequently he remains a Police Officer within the meaning of the Police Act and retains all his functions under that Act including his powers, immunities, liabilities and responsibilities under the common law or under any other enactment.*'

The following extracts cited by Counsel for the prosecution from the case of '**Ha Yeung**' (supra) is also of relevance:

"The advantages of having Police Officers posted at the Serious Fraud office in England and Wales have been highlighted in the article by Mr John Wood, the Director of the Serious Fraud Office in England and Wales – vide (1989) Crim.L.R.175, quoted by learned Counsel for both respondents. At page 177 of that article, we read –

"Nevertheless, section 1(4) of the Criminal Justice Act 1987 gives the Director of the Serious Fraud Office the right to conduct an investigation in conjunction with the police, who will exercise any necessary powers such as those of arrest and detention under the Police and Criminal Evidence Act 1984....." (the underlining is ours)."

*"Thus the Serious Fraud Office came into being with a complement of 26 lawyers, 19 accountants and support staff **with police officers concerned in the investigation of cases handled by the Office to be located in the same building.....**" (emphasis added).*

Ground1 (a) of the defence's motion is accordingly set aside.

Conclusion

Based on all the above considerations, we accordingly set aside the defence motion for a permanent stay of proceedings on the ground of abuse of process. The present matter is to be fixed for trial and we trust on the diligence of all Counsel involved to give early dates for trial.

This 21st January 2014

K. BISSOONAUTH

Magistrate, Intermediate Court

M. I. A.NEEROOA

Magistrate, Intermediate Court.