

Ruling-ICAC v P.Jugnauth

2014 INT 257

IN THE INTERMEDIATE COURT OF MAURITIUS

(Criminal Division)

In the matter of :-C.No. 265/2014

Independent Commission Against Corruption [“ICAC”] v

Pravind Kumar JUGNAUTH

R U L I N G (No. 2) - On Arguments following Motion by the Defence to the effect that (i) the information does not reveal any offence known to law & (ii) the Prosecution is time barred

Accused is charged on information dated and lodged on **14 March 2014** for having on **23 December 2010 ...” whilst being then a *public official*, whose relative had a personal interest in a decision which a public body had to take took part in the proceedings of that public body relating to such decision ...”** in breach of section 13(2) &(3) of the Prevention of Corruption Act [hereinafter referred to as “ POCA”] as amended by section 4(b) of Act No.1/2006.

For ease of reference section 13(2) POCA is reproduced below :

13. Conflict of interests

(1) ...

(2) Where a **public official** or a relative or associate of his has a personal interest in a decision which a public body **is to take**, that public official shall **not vote or take part in any proceedings** of that public body relating to such decision.

The Particulars of the information expatiate that ... “... *in his capacity as Vice Prime Minister and Minister of Finance and Economic Development, Accused approved the re allocation of funds amounting to Rs.144,701,300.- to pay Med Point – in which company Accused’s sister, Mrs Malhotra held 86,983 shares out of 368,683.*”

Accused has entered a **plea in bar** and is assisted by counsel, Mr R.Chetty SC and Mr.R.Bhadain.

On 14 April 2014, Mr Bhadain prayed –

- (i) *that the information be dismissed as it does not reveal any offence known to law - hence Accused could not plead to it* [hereinafter referred to as ‘**Limb 1**’] and

(ii) *stated that the Prosecution was time barred and the proceedings null and void pursuant to section 4 Public Officers Protection Act [“POPA”] hereinafter referred to as ‘Limb 2’]*

?The Motions were objected to by the Prosecuting Authority and Arguments subsequently heard.

?Mr Roopchand appears for the ICAC and Mr Mootoo appears on behalf of the DPP’s Office, with leave of the Court, for the purpose of the above Arguments.

?The Court does not deem it necessary to reproduce *in extenso* the Arguments of Counsel and the case law cited, which are on record. However for ease of cross-reference, the gist of the Arguments are reproduced below.

- **A. RESUME OF THE DEFENCE’S ARGUMENTS UNDER LIMB 1**

(a) “... IS TO TAKE ...” v “... HAD TO TAKE ...”

?It is the contention of the defence that the “ *decision*” is a material part of the information and Accused cannot plead to an information which does not reflect the *exact wording of the law* as per section 125 District & Intermediate Courts (Criminal) Act [“DIC”] and is lacking in a description of the actual circumstances - which as per information refers to a “*re allocation of funds*”.

?The variance between the words “*is to take*” as per section 13(2) POCA carries with it a connotation of “*a decision contemplated to be taken in the future*” as opposed to the words “*had to take*” which reflect the notion of “*having to do something*”. The effect of such a departure is such that the offence as per information does not reflect the words or the offence created by the enactment and is therefore an absurdity.

(b) ***Lack of Particulars of The Actual Decision Process***

?It was further submitted that since a “*public official*” taking part in the actual “*decision making process*” is the offence sought to be impugned by section 13 POCA, the perfunctory reference to the “*approval of the re allocation of funds*” could not possibly mean “The Actual Decision” or “The Proceedings in relation to such Decision” -?

?B.?RESUME OF THE DEFENCE’S ARGUMENTS UNDER LIMB 2

The issues raised by the Defence during the course of the Arguments, amongst others, were -

- (a) Is the ICAC to be assimilated as “*the State*” or as per POPA “... *a person, other than the State*”?
- (b) The present Prosecution is not a prosecution by the State - which is only when the DPP signs an information to be lodged before the Supreme Court in an Assizes case. The Prosecution has been brought by the ICAC under **section 82 POCA** with the **consent of the DPP** which stipulates that no prosecution under the POCA “...*shall be instituted except by, or with the consent of the DPP...*” and the matter has been duly referred to the Intermediate Court in virtue of *section 112 Courts Act*. ?
- (c) Accordingly, the ICAC is “ ... *a person, other than the State ...* ” as per section 4 POPA, reproduced overleaf for ease of reference and since the offence allegedly occurred in 2010 and the case was lodged in 2014, **the matter is time barred and could not be proceeded with.**
- (d) Accused was at the time a “Minister” and therefore *a person engaged in a public duty*. ?Since the case for the defence is based on section 4(1)(b) POPA, a “Minister” being a person engaged in *the performance of a public duty* was afforded protection under the POPA.
- (e) The aspects of “public service” and “public office” were also emphasized upon as well as the Independence of the ICAC, the perception of such independence and its accountability - which said accountability was, according to the Defence, to be to the people of Mauritius and to the Judiciary as opposed to the State.

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4. ?Limitations of actions

- (1) *Every civil or criminal action, suit or proceeding, by a person, other than the State, for any fact, act or omission, against a –*
 - (a) **public officer** in the execution of his duty;
 - (b) *person engaged or employed in the performance of any **public duty**, or*
 - (c) ...

*?shall, **under pain of nullity**, be instituted within 2 years, from the date of the fact, act or omission which have given rise to the action, suit, or other proceeding.*

- **C. ? RESUME OF THE ICAC’S ARGUMENTS UNDER LIMB 1**

?Mr Roopchand submitted that there is no reason why the Accused could not enter his plea.

It was argued that by cumulatively considering the Request for the re allocation of funds to the time of formal approval of re allocation of those funds, same would be considered as “*taking part in the proceedings*”. And that if the Defence’s Arguments were to be retained, the law would punish the person who participated in any proceedings *before* the actual decision is taken as opposed to the person who *actually takes* the decision.

It was further submitted that the information is not deficient in any manner. Reference was made to the case of *Yuk Tching Hin Chan v The State* [2010 SCJ 347] in support of the fact that provided the elements of the offence are indicated in the charge in compliance with section 125(1) DIC, there is **no** requirement that the charge should be drafted *verbatim* in the words of the enactment.

- **D. RESUME OF THE ICAC’S ARGUMENTS UNDER LIMB 2**

The ICAC having been given lawful status by an Act of Parliament more especially section 19(1) POCA (thus becoming a “statutory corporation” as per section 2 Interpretation & General Clauses Act and as opposed to a private incorporation) and notwithstanding section 19(2) POCA which describes the ICAC as a *body corporate* and without saying that the ICAC was a private entity, it was submitted that -

- (a) *ICAC is an emanation of the State*, controlled by the State in as much as it exercises public functions by detecting and investigating corruption cases and had special powers beyond those which result from the normal relations between individuals,
- (b) all the more so since the characteristics of the ICAC contain intrinsic public elements, and the Prosecution could not therefore be considered as time-barred.

It was finally submitted that ICAC was lodging and conducting cases before the Intermediate Court on behalf of the DPP who after having given his authoritative attention to those cases *delegated* his powers to the ICAC. Reliance was sought from *Edath-Tally v Glover* [1994 SCJ 409 at second paragraph of pg 17].

- **RESUME OF DPP’S OFFICE ARGUMENTS UNDER LIMBS 1 & 2**

Mr Mootoo submitted on behalf of the DPP’s Office that the **tense** of the verb is immaterial as the sequence of events with a view of establishing criminal liability has been averred.

- (a) “**Public official**” as per *POCA* v “**public officer**” and “**public duty**” as per *POPA*

Emphasis was made that the term “**public official**” is used in section 13 POCA 2002 (the Interpretation section of which defines same as including “a “*Minister*” and “a *public officer*”) as opposed to section 4 POPA 1957 which refers to “*public officer*” and “*public duty*”.

Indeed, Accused being a “**public official**” *took part in proceedings* which give rise to a conflict of interest and in view of the properly drafted information, cannot therefore say that he is not aware of the charge he has to plead to.

Furthermore, the fact that the Reference of the DPP accompanies the present information before the Intermediate Court means that *the present matter has the characteristics of a prosecution by the State* and the matter cannot therefore be considered as time barred as per section 4 POPA.

CONCLUSIONS OF THE COURT

After consideration of the Submissions of counsel, the Conclusions of the Court as regards the Arguments heard are as follow :-

❖ LIMB 1

?The Court would be in agreement with a combination of the Submissions of Messrs Roopchand and Mootoo. Indeed, the Court does not find the information lacking either in terms of “*material elements*” and/or “*particulars*”.

?And, the Court is in agreement with Mr Mootoo’s Argument that the “tense” used and the use of the words “*had to take*” as per information as opposed to using the exact words “*is to take*” as per the enactment is immaterial in the teeth of the description of the sequence of events.

?Such choice of words/”tense” cannot be a contentious issue, does not create a departure from the words or offence created by the enactment, is not an absurdity and does not render the offence as one “*unknown to law*” and/or to which Accused cannot plead.

? The Court finds it apposite to refer to extract at page 4 of ***Yuk Tching Hin Chan [supra]*** with emphasis on the highlighted part ... “ ... *it should be noted that section 125(1) [DIC] provides that “ ... the description in the information of any offence in the words of the enactment creating such offence, with the material circumstances of the offence charged, shall be sufficient ... ”. This hardly means that the charge should be mandatorily drafted in the words of the enactment verbatim, so long as the elements constituting the offence were indicated... ”.*

?The Court furthermore does not find that there is any dearth in the Particulars supplied as per the unambiguous and non equivocal information which sufficiently conveys to the Accused the charge to be met.?

Reference is made to *The State v Treebhowon & Mooneea* [2012 SCJ 214] where the Court referred to *Blackstone's Criminal Practice (1993)* at pages 1116-1117:-

"...The particulars of the offence should give such particulars as may be necessary for giving reasonable information as to the nature of the charge...the test is : do the particulars provided make **clear** to the defence the nature of the case they must meet...."

And the Court is of opinion that the Particulars, as per information and reproduced above at page 1 do give *reasonable information as to the nature of the charge and the case to be met by the Defence.*

For the sake of legal argument, the Court would simply say that the burden of proof lies on the Prosecution. Therefore, provided the information avers all the elements of the offence - which the Prosecution has the burden of proving to the required standard of proof - there cannot be any dispute as to whether section 125 DIC has been complied with.

The general rule held in *Beekhan v The Queen* [1976 MR 3] is that "what is averred must be proved" and "what must be proved should be averred". In the hypothetical situation that the Prosecution eventually fails to prove what has been averred, it would have failed to discharge its burden of proof and therefore in proving its case.

For all the reasons set forth above, the Court finds no merit in the Defence's Arguments as regards Limb 1, does not find same to be a valid reason/s as to why the Accused cannot put up a Plea and sets same aside.

❖ LIMB 2

The Court would once again be in agreement with a combination of the Arguments offered by Messrs Roopchand and Mootoo - that notwithstanding the independence of the ICAC which is styled as a *body corporate*, the latter cannot be, by virtue of its very purpose, other than an emanation of the State in as much as it brings forward prosecutions under the POCA and this coupled with the Reference of the DPP accompanying the present information endows the present case with characteristics of a Prosecution by the State.

Adopting a "back-to-basics" approach and without going into the Defence's convoluted maze, the Court is of opinion that the ICAC cannot be considered as a person, other than the State.

The Defence has extracted extensive references that would *tend in abstracto* to demonstrate that the ICAC is "a person, other than the State."

However, in view of the fact that since the ICAC cannot prosecute otherwise than

- (i) through the DPP via section 82(1) POCA and

- (ii) without losing sight of the DPP's constitutional powers under section 72(3) & (4) Constitution and this coupled with
- (iii) the requirements of a "Reference" as regards all prosecutions before the Intermediate Court as per section 112 Courts Act,

the Court finds that these factors endow the present ICAC prosecution with features of a "State prosecution" to such an extent that same are so intermingled that the ICAC, albeit a separate and distinct entity, cannot be considered as "*a person, other than the State.*"

Furthermore, in view of the manner that ICAC's Director General and Commission are appointed coupled with the public funding of the Commission, there cannot be any dispute that ICAC is an integrated part of the State.

Accused is a "*public official*" within the purview of section 13 POCA and since for all the reasons given above, the present Prosecution bears the salient characteristics of a State Prosecution, same *cannot* be considered as null and void or time barred for having been lodged in 2014 as regards an offence which allegedly occurred in 2010, Accused accordingly cannot claim protection under the POA on the grounds that the Prosecution has been initiated 4 years after the event by "*a person, other than the State...*".

It is apposite at this stage to cite an extract from ***D v National Society for the Prevention of Cruelty to Children [1978 AC 171] House of Lords - Lord Simon of Glaisdale:-***

"... The State cannot on any sensible political theory be restricted to the Crown and the departments of central government (which are indeed, part of the Crown in constitutional law). The State is the whole organization of the body politic for supreme civil rule and government - the whole political organization which is the basis of civil government. As such it certainly extends to local – and as I think, also statutory - bodies in so far as they are exercising autonomous rule ...".

And furthermore refer to the reasoning in ***Griffin v South West Water Services [hereinafter referred to as "S"] [1995 IRLR 15] Blackburne J*** - whether S, a privatized water company was to be considered as a "*State Authority*" depended on whether it fulfilled the criteria laid down by the ECJ in ***Foster v British Gas [C-188/89) [1991] CLY 1672a***. S was required *by legislation* to carry out a *public service* - the supply of water and sewerage undertaking. It possessed "*special powers conferred by legislation*"; and the legislative provisions and the conditions of S's licence indicated that S performed its *public service duties* under the "*control*" of the State ...".

The analogy to be made is clear. Established case law has extended the restrictive meaning of “State” to a “*statutory body exercising autonomous rule*” and even to “*a privatized company having special powers conferred by legislation and governed by legislation to carry out public service duties under the control of the State*” - situations which are very much akin to the ICAC set-up

For all the reasons set forth above, the Court accordingly finds that ***as regards Limb 2, the Prosecution cannot be considered as either time barred and/or null and void. The Arguments of the Defence are Set Aside. Case to proceed against Accused.***

Dated this 5th September 2014.?????

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N.Ramsoondar; □□□□□□□A.Neerooa
Magistrate, Intermediate Court (Crim) □□Magistrate, Intermediate Court (Crim) □