JOYMUNGUL A K v THE STATE & ANOR

2014 SCJ 143

Record No. 7911

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Ambar Kumar Joymungul

Appellant

v.

1. The State
2. Independent Commission Against Corruption

Respondents

JUDGMENT

The appellant was convicted before the Intermediate Court for an offence of bribery by public official committed in breach of **Sections 4(1)(a), 4(2) and 83 of the Prevention of Corruption Act** ("The Act"). He was sentenced to undergo 12 months' imprisonment and to pay 500 rupees costs.

He is appealing on the following grounds:

1. The sentence is wrong in principle and is manifestly harsh and excessive.

2. The learned Magistrate erred when he ruled that the statement taken from the Appellant on 7th August 2003 was "admissible in whole".

3. The learned Magistrate erred when he ruled that the statement taken from the accused by Mr Golam on 23rd September 2003 was admissible in its edited version.

4. The learned Magistrate erred when finding that the Appellant could be found guilty of the offence with which he stood charged.

We propose to deal with Grounds 2, 3 and 4 before considering Ground 1 which only questions the sentence imposed by the learned Magistrate.

The appellant was charged for the offence of bribery by public official in an information which read as follows:

> "*That on or about the 17th day of February 2003 at Dragon House, Port Louis in the district of Port Louis, one AMBAR KUMAR JOYMUNGUL, also known as Joy and Rajiv, of age, Customs and Excise Officer, … … … whilst being a public official, willfully and unlawfully solicit from another person for another person, a gratification, for abstaining from doing an act in the execution of his duties*."

It was particularised in the information that the Appellant solicited from Mrs Engutsamy a sum of 200,000 rupees for Mr Belle Etoile an Assistant Comptroller of Customs to abstain from establishing a customs offence report against the company of which Mrs Engutsamy was a director.

Mrs Engutsamy was a director of a company which was in the business of manufacturing gold and silver wares. Customs Officers had inspected her factory whilst she was absent. She was asked to attend the customs office at Dragon House on 7 February 2003 which she did in order to produce her documents which she had been requested to produce in relation to her business. She met the appellant, a customs officer, as well as another customs officer Mr Bhurtun who stated to her that she did not have all the required import documents. Appellant added that since she had failed to submit her bill of entry she was liable to pay a penalty of 1 million rupees. Mrs Engutsamy was shocked and asked that all her documents be checked again. On 11 February 2003, the appellant and Mr Bhurtun called at her office in order to check her documents and she was told by Mr Bhurtun that her company had a heavy penalty to pay. A few days later she received a phone call from a person who introduced himself as the appellant and who asked her for a sum of Rs 200,000 to be paid in cash in order '*to close the file*'. Witness Engutsamy further stated that the appellant informed her that he was acting on behalf of Mr Belle Etoile, who was his hierarchical head, and that the 200,000 rupees was meant for Mr Belle Etoile. Mrs Engutsamy reported the matter to the Customs and she was requested by the then Comptroller of Customs to file a complaint with the Independent Commission Against Corruption ("The Commission").

The evidence of the prosecution established in the course of trial that there had been no offence committed by Mrs Engutsamy's company. The prosecution also produced, as part of its case, 2 statements given by the appellant on 7 August 2003 **[**"The first statement" **Doc. D]** and 25 September 2003 **[**"The second statement" **Doc. D1]** respectively. The

learned Magistrate acted essentially upon the confessions made by the appellant in those 2 statements in order to convict the appellant.

Grounds 2 and 3 challenge the decision of the learned Magistrate to act upon those 2 statements in order to convict the appellant. Following an objection as to their production, the learned Magistrate had ruled that both statements were admissible.

Ground 2 challenges the admissibility of Doc. D which is the first statement taken from the appellant on 7th August 2003. Learned Counsel for the appellant submitted that the learned Magistrate was wrong to have ruled, following an objection as to its admissibility, that the statement was admissible in whole since there were serious defects and shortcomings which had vitiated the whole procedure in the course of its recording and which rendered the statement inadmissible. It was submitted that the Commission derives its powers to examine a person only by virtue of the express provisions embodied in Section 50 of the Act. Yet the recording of the statement had failed to comply with the requirements and procedure specifically prescribed under Section 50 of the Act.

Firstly, the letter **[Doc. A]** summoning the appellant to appear before the Commission for examination was pursuant to both Sections 50 (1(a) and 50(1)(d) of the Act. The letter was confusing since both sections are mutually exclusive and it was submitted that there was thus from the outset of the enquiry a flaw in the procedure by the Commission.

Secondly, the first statement was recorded pursuant to section 50(1)(d) of the Act which requires that it should be made on oath or affirmation. Although the appellant made a solemn affirmation to tell the truth before Mr Bissessur, the acting Commissioner, the latter was not present during the recording of the whole of the statement. It was submitted that it cannot be said that the whole of the statement was given under solemn affirmation as required by Section 50(1)(d) of the Act.

Thirdly, the appellant had not been informed of his constitutional rights and duly cautioned at the time he made his solemn affirmation and before the recording of his statement. It was submitted that by virtue of Section 50(3) of the Act which guarantees the constitutional right against self-incrimination, the appellant should have been informed before the recording of his statement of his rights and more particularly of the protection against self-incrimination afforded under Section 50(3). It is pointed out that the recording of the statement started at 19 20 hours and it was only much later at 22 20 hours that the appellant was cautioned and informed of his constitutional rights.

Learned Counsel submitted that for all the above reasons the Commission had failed to comply with Section 50 of the Act in the course of the examination of the appellant and the

recording of his statements. The learned Magistrate was consequently wrong to have admitted and relied upon the statements in order to convict the appellant.

Learned Counsel added that the statements which had been wrongly admitted constituted the only evidence upon which the Learned Magistrate could have acted to convict the appellant. This, because Mrs Engutsamy never saw face-to-face the person who introduced himself as the appellant and who solicited the bribe only in the course of a telephone conversation.

The Law

In order to understand the purport of Grounds 2 and 3, it is apposite to refer to the following relevant provisions of Section 50 of the Act:

"***50. Powers of Commission to examine person***

(1) Where the Commission decides to proceed with further investigations under section 46 or 47, the Director-General may-

(a) order any person to attend before him for the purpose of being examined orally in relation to any matter;

(b) order any person to produce before him any book, document, record or article;

(c) order that information which is stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, be communicated in a form in which it can be taken away and which is visible and legible;

(d) by written notice, order a person to furnish a statement in writing made on oath or affirmation, setting out all information which may be required under the notice.

(2) A person on whom an order under subsection (1) has been served shall –

(a) comply with the order;

(b) attend before the Director-General in accordance with the terms of the order;

(c) continue to attend on such other days as the Director-General may direct until the examination is completed; and

(d) subject to subsection (3), answer questions and furnish all information, documents, records or statements, including certified copies thereof, as ordered by the Director-General.

(2A) ….

(3) A person may refuse to answer a question put to him or refuse to furnish information, documents, records or statements where the answer to the question or the production of the document or class of documents might tend to incriminate him."

Learned Counsel also referred to the Judge's Rules. We shall only reproduce those Rules which are of particular relevance to the present matter.

The Rules

"*Rule I – When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.*

Rule II – As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

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."

Before proceeding to analyse the evidence in relation to the issues raised under the second ground of appeal, we wish to observe that the case had initially started and was partly heard before another Magistrate. The proceedings however had to be discontinued due to the inability of the Magistrate to continue with the hearing of the case. Proceedings started anew before Magistrate Mootoo who tried and finally determined the case. We need to point out that any evidence, or part of the proceedings, which was heard before any other magistrate cannot be imported into the present appeal which can only be determined on the basis of the evidence and proceedings which took place before Magistrate Mootoo. We say so because at some stage of the hearing of the appeal reference was made to proceedings which took place previously before the Magistrate before whom the proceedings were discontinued.

Following a complaint for an act of corruption which was lodged by Mrs Engutsamy, the Commission decided to proceed with further investigations and on 7 August 2003 addressed a letter **[Doc. A]** to the appellant ordering the appellant:

(a) to attend before the Commission for the purpose of being examined in relation to an act of corruption by virtue of Section 50(1)(a) of the Act.

(b) To produce books, documents, records or articles in connection with that matter by virtue of section 50(1)(b); and

(c) To furnish a statement in writing made under solemn affirmation by virtue of section 50(1)(d) of the Act.

On the same day, the appellant appeared before the Acting Commissioner. He made a solemn affirmation that he would tell the truth only the truth and the whole truth and also made the following declaration:

> "*I am fully aware that any untruthful answers given by myself during the interviews in connection with the investigation regarding act of corruption reported by the Director of Divali Production may be used in evidence in proceedings for perjury"* ***[Doc. B]***

On the same day, as from 19.20 hours, PS Roomaldawo started to record the first statement from the appellant in presence of his Counsel. Later at about 22.20 hours, in view of the fact that he had started to give evidence which could be of a self-incriminating nature, the appellant was cautioned and informed of his constitutional rights before he elected to proceed with his statement.

On 25 September 2003, appellant gave a second statement after he had been cautioned and made aware of his constitutional rights. The statement was recorded by S Golam who was an investigator of the Commission.

The Commission is empowered by virtue of Section 46(3) of the Act to proceed with further investigations following the report of an alleged corruption offence as it did in the present case following a preliminary investigation. Where the Commission decides to proceed with such further investigations, it is expressly empowered to obtain evidence from any person in the manner prescribed under Section 50 of the Act. By its wording, Section 50(1) confers a statutory discretion on the Director-General to exercise his powers to compel any person to give evidence orally in the manner prescribed under sub-section (1)(a). He may also issue an order for the production of documents and articles under sub-section (1)(b) or for the communication of information stored mechanically or electronically in a computer system under sub-section (1)(c).

What is of greater significance to the present case and the questions raised under Ground 2 is that he has a discretion to order a person to give evidence in 2 distinct ways.

He may order a person to give evidence orally before him under Subsection 1(a) or by way of a written notice to furnish a written statement made on oath or affirmation under Sub-section 1(d).

Although the letter summoning the appellant to attend the Commission for examination contains a reference to Section 50(1)(d), there is no evidence of any written notice issued with the conditions prescribed under Section 50(1)(d) for the giving of evidence on oath or solemn affirmation. A close reading of Section 50(1)(d) plainly reveals in that connection that it only applies to a situation where:

(1) There has been a written notice issued by the Director-General;

(2) Such a written notice sets out in writing the information which is required from the person on whom the written notice is served;

(3) As a result of the request for information contained in the written notice, it becomes incumbent on the person so requested "to furnish a statement in writing made on oath or affirmation.

There was never such a written notice, setting out the information which was required from the appellant, issued or served upon the appellant. In the absence of compliance with these statutory conditions, Section 50(1)(d) could not become applicable for the purpose of ordering appellant to give evidence on oath or affirmation.

There was, however, no impediment, and it was indeed open, to the Commission to proceed with further investigations in compliance with Section 50(1)(a) after it had communicated a request to the appellant couched in such broad and general terms as are contained in Doc. A. The Director-General was fully empowered under Section 50(1)(a) to order the appellant to attend the Commission in order to be examined orally, independently of, and without prejudice to the exercise of his powers to obtain information through the other channels to which he was lawfully entitled under Sections 50(1)(b),(c) or (d).

Unlike Section 50(1)(d), there is under Section 50(1)(a) no statutory prescription for evidence to be given on oath or affirmation. But the Director-General has a discretion to require an oath or affirmation, since it is expressly provided under Section 47(3)(f) that, in carrying out any further investigation under Section 47, the Director-General of the Commission "*<u>may</u> take a deposition on oath or solemn affirmation".*

In view of the above provisions of the law, there is no merit in the submissions made under ground 2 that there was no compliance with Section 50(1) in that the whole of the

statement was not given under oath. There was no such mandatory requirement for the taking of a deposition under Section 50(1)(a) coupled with section 47(3)(f) of the Act. It is also significant to note, however, Section 47(a) makes it a criminal offence for any person to make a statement which is false or misleading. As is evident from Doc. B, the purpose for administering the solemn affirmation to the appellant was to avoid that he comes forward to make any false or misleading statement in the course of his examination as a witness during the interviews in connection with the investigation regarding the act of corruption which had been reported by Mrs Engutsamy. It is expressly mentioned that the answers given by the appellant may be used as evidence in "proceedings for perjury". But there is no merit in the argument that the whole of the statement should have been given under oath or solemn affirmation failing which the whole of the statement becomes inadmissible.

The next issue raised under ground 2 was that the statement was inadmissible on the ground that there had been a failure to comply with section 50(3) in that the appellant was not duly cautioned and informed of his constitutional rights, more particularly his right of protection against self-incrimination, before the recording of the statement.

Section 50(3) provides a statutory right of protection against self-incrimination to a person on whom an order has been served under Section 50(1) to give or produce evidence.

Independently of the statutory protection afforded under section 50(3), the privilege against self-incrimination is a deeply-rooted common law principle. There is no doubt that the right to remain silent and the right not to be compelled to incriminate oneself extend both to the investigation process and trial proceedings. The classic formulation of this privilege is that no one is bound to answer any question if the answer would have a tendency to expose him to any criminal charge **[**as per **Goddard L.J in Blunt v Park Lane Hotel 1942 2 K.B 253** at p 257**]**.

Although Section 50(3) provides statutory protection against self-incrimination to any person who has been ordered to give evidence under Section 50(1), there is no express legal duty to give a warning to the person before he starts to give evidence. In the course of criminal proceedings the Judge or Magistrate will normally warn the witness that he is not obliged to answer the question at the stage when the witness is confronted with a question, the answer of which would tend to expose the witness to a criminal charge.

Turning to the context of the present case, there is no rule which prescribes the requirement for a person who has only been summoned to give evidence under Section 50(1) of the Act to be cautioned or to be informed of his right against self-incrimination before he starts to give evidence. There can be no doubt however that the need for the protection of his right would arise whenever he is confronted with a question,

the answer of which would tend to incriminate him. But a person who is called upon to give evidence under Section 50(1) is not entitled to be cautioned or informed of his right against self-incrimination, before the recording of his deposition, in the same manner as is provided for under the Judges Rules in respect of the recording of a defence statement from a person against whom there is evidence of reasonable suspicion that he has committed an offence.

Turning to the statement in question given by the appellant, it is comprised of 2 distinct parts. The first part relates to the testimony of the appellant which he was called upon to give pursuant to Section 50(1) of the Act. In that part of his statement, the appellant relates with forceful details the inspection of the premises and the checking of documents of Mrs Engutsamy's company by himself and other customs officers and the part played by Mr Belle-Etoile and Mr Bhurtun in the course of the investigation. There is no situation which arises in order to invoke the protection against self-incrimination under Section 50(3) of the Act until the appellant himself starts to give evidence which could be of a self-incriminating nature. There is not the slightest indication that he started to give such evidence in answer to a question. But as soon as he started on his own to relate the circumstances which prompted him to make a phone call to Mrs Engutsamy to solicit a bribe for Mr Belle Etoile, he was immediately cautioned and informed of his constitutional rights, including his right to silence, by PS Roomaldawo as a result of which he made the following reply:

> "*Moi Ambar Kumar Joymungul mo fine bien comprend se qui ou missié Roomaldawo, enqueteur du ICAC fine dire moi qui mo gagne droit garde le silence pas dire narien si mo oulé, mais tous se qui mo pou dire pour écrire par ou et ça capave servi comme preuve en Cour et mo pou continue donne mo l'enquête en presence mo avocat Missié Jeewoolall*"

After he had been duly cautioned at the appropriate stage and informed of his constitutional rights and protection against self-incrimination before being further questioned, he voluntarily elected to proceed with the statement. He expressed in unequivocal terms that he had fully understood his right to remain silent and not to say anything if he so wished and that whatever he may say would be put into writing and may be used as evidence against him. It was then that he elected to proceed with his statement in presence of his counsel. This takes us to the second part of his statement given under warning. He went on to make in no uncertain terms a voluntary confession as to how he made a phone call to Mrs Engutsamy and solicited the payment of a sum of 200,000 rupees for Mr Belle Etoile to abstain from charging her company with a customs offence for which she might be liable to pay a huge penalty. After giving explicit details in support of his version he reiterated that he had spoken the whole truth in his statement in the presence of his counsel and added "*mo*

satisfait et mo pas ainant complaint pou faire". And the closing words of his statement read as follows:

> "*Ou missié Roomaldawo fine lire mo l'enquête qui compose de vingt-une pages et mo pas ainant narien pour ajouter, corriger ou rayer et mo fine cause tous la vérité et donne ça volontairement*".

Appellant thus confirmed, after the statement had been read over to him, that the whole of the statement had been given voluntarily by him and reflects the truth. He added that he had no alteration, amendment or correction to make to his statement.

The appellant had to all intents and purposes given a voluntary statement which was recorded with all the safeguards necessary for the protection of his rights. Appellant was assisted by counsel throughout the recording of the whole statement. The statement had not been obtained from him by any form of oppression or inducement, or fear of prejudice or in consequence of anything said or done which was likely to render his confession unreliable or inadmissible. Furthermore, he confirmed in his second statement which was recorded under caution from him on 25 September 2003 that his first statement was true. He did so after the first statement had been read over to him.

In view of all that we have stated above, we consider that the ruling of the learned Magistrate to admit the first statement of the appellant cannot be impeached for any of the reasons invoked under ground 2. Ground 2 must accordingly fail.

Ground 3 challenges the admissibility of the edited version of a second statement recorded by witness Golam on 23 September 2003 on the ground that Mr Golam was not "a person in authority" who was entitled to record a statement in which the appellant made a confession as to the offence charged. The unchallenged evidence shows that the statement had been recorded after the appellant had been duly cautioned and explained his constitutional rights.

Witness Golam was an investigator of the Commission (ICAC) when he recorded the statement from the appellant on 23 September 2003. The Commission is a statutory body set up by law with wide powers under the Act to investigate an 'act of corruption'. It is beyond dispute that witness Golam, in his capacity as an investigator of the Commission, was "a person in authority" who was entitled, at the material time, to record the statement from the appellant in the course of an investigation of the Commission into a corruption offence.

It is also apposite to refer to Rule VI of the Judges Rules which expressly provide that:

> "*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 beyond dispute that the second statement was recorded at the Commission's office by investigator Golam in the course of the investigatory functions of the Commission under the Act in respect of an act of corruption. The appellant had been informed of his rights and had volunteered to give his statement to investigator Golam and was fully aware that the recording of the statement was in relation to an offence of corruption in which he was involved. The learned Magistrate cannot, in our view, be faulted for having ruled that Mr Golam was 'a person in authority' for the purpose of recording such a statement and that the edited version of the statement recorded from the appellant by witness Golam was admissible. There is no merit in Ground 3 which also fails.

Ground 4 as drafted is quite vague. It was however submitted by learned Counsel for the appellant that the prosecution had failed to prove the 'willful and unlawful intention' of the appellant to solicit a gratification which is one of the essential elements of the offence. He added that appellant had been only acting under the instructions of his superior officers who were Mr Belle Etoile and Mr Bhurtun. The evidence has shown the active and prolonged involvement of the appellant from the outset and the circumstances and context in which he solicited the sum of 200,000 rupees as bribe for Mr Belle Etoile in a manner which could leave no doubt as to the required guilty intent on his part for the commission of the offence with which he was charged. The learned Magistrate's finding that the appellant had the willful and unlawful intention to solicit for another person a gratification for abstaining from doing an act in the execution of his duties is fully borne out by the evidence and cannot be impeached. Ground 4 therefore fails.

We are left with Ground 1 which questions the sentence on the ground that it is manifestly harsh and excessive. The learned Magistrate gave due consideration to the clean record of the appellant. The offence involves an act of corruption perpetrated by the appellant in the course of his duties as a Customs Officer for the purpose of extracting a relatively substantial amount of money. The fact that he solicited the gratification for another person does not make his criminal act less reprehensible. Public officers endowed with law enforcement duties and powers like the appellant cannot be expected to be dealt with leniently when they make such an abusive use of their position in the course of their duties in order to obtain any form of unlawful gratification. The sentence is undoubtedly commensurate with the seriousness of the offence. It cannot by any standard be considered to be harsh or excessive but is richly deserved.

The appeal fails on all the grounds and is dismissed with costs.

A. Caunhye
Judge

N. Devat
Judge

07 May 2014

Judgment delivered by Hon. A. Caunhye

For Appellant	**:**	**Mr. Attorney P. Rangasamy** **Mr. G. Glover, SC**
For Respondent No. 1:		**State Attorney** **State Counsel**
For Respondent No. 2:		**Mr Attorney S. Sohawon** **Mr K. Goburdhun, of Counsel,** **together with Miss P. Bissoonauthsingh, of Counsel**