K. Sicharam v ICAC 2011 SCJ 375
Judgment delivered on 07 November 2011

The Appellant was found guilty by the Intermediate Court of the offence of Influencing a public official in breach of section 9 of the Prevention of Corruption Act (PoCA) 2002. He was sentenced to undergo 3 months imprisonment. He appealed against conviction and sentence by the Intermediate Court.

The Respondent, that is, the Independent Commission Against Corruption, took a preliminary objection to the hearing of the appeal by the Supreme Court on the ground that the Director of Public Prosecutions, either by himself or through the state, had not been made a party to the proceedings.

The Respondent submitted that, by virtue of section 47 and 82 of the PoCA 2002, the prosecution of the Appellant before the Intermediate Court was instituted and prosecuted by the Respondent with the consent of the DPP. As such, the DPP, through himself or through the State, ought to have been made a party to the appeal.

The Supreme Court held: -
"In an appeal against conviction following a prosecution by a party other than the Director of Public Prosecutions, the appellant has to join the Director of Public Prosecutions either by himself or through the State as a party to the appeal. However, in the case of an appeal against an acquittal following a prosecution by a person other than the Director of Public Prosecutions, the latter ought not to be joined as a respondent to the appeal, but notice of appeal may be given to him at any time before the hearing of the appeal. The requirement of joinder or notification is important if the Director of Public Prosecutions is to be in a position to meaningfully exercise his powers under section 72 of the Constitution."

The Supreme Court further held that, given that the DPP, or the State, had not been joint in the appeal, this could now not be done as such joinder would not be owithin the

mandatory time frame provided under section 92 of the District and Intermediate Court (Criminal Jurisdiction) Act.

The preliminary objection of the Respondent was therefore upheld and appeal dismissed with costs.

ICAC v I.D. Somauroo & Ors 2011 SCJ 299
Judgment delivered on 7 September 2011

The Appellant made an initial application ex parte to a Judge in Chambers and obtained an order for the disclosure of transactions which the respondents might have had with the various banks and other financial institutions.

In a subsequent application before another Judge in Chambers ("the learned Judge") the respondents applied for and obtained an order prohibiting the appellant to inquire and investigate in their transactions, movables and immovables, bank accounts, shares and interests, insurance policies, deposits, financial instruments, derivatives and transfers prior to the Prevention of Corruption Act coming into effect and setting up the appellant. The Appellant's contention, which was to the effect that it was entitled to obtain evidence dating prior to its setting up in relation to money laundering offences which are offences of a continuous nature, was rejected by the Learned Judge.

The present matter is an appeal against the decision of the Learned Judge prohibiting the Appellant to inquire and investigate in Respondents' transactions, movables and immovables, bank accounts, shares and interests, insurance policies, deposits, financial instruments, derivatives and transfers prior to the Prevention of Corruption Act coming into effect and setting up the appellant.

In its appeal, the Appellant raised two issues: -

1. Whether the Learned Judge failed to apply the "serious question to be tried" and "balance of convenience" tests which in Counsel's contention were the necessary tests for the granting of an injunction; And

1. Whether the Learned Judge erred in holding that the Appellant could not investigate a money laundering offence by seeking an order from the Judge in Chambers for disclosure of transactions prior to the establishment of the Appellant.

In relation to the first issue, the Supreme Court held that there are two types of Injunctions: - (i) Interlocutory Injunctions and (ii) Final Injunctions. The issue of a serious question to be tried and the balance of convenience arise when the Learned Judge in Chambers is called to order an Interlocutory Injunction which is of a temporary nature and pending the determination of an eventual main case. However, the Learned Judge in Chambers may be called upon to consider a prayer for a final injunction in exceptional circumstances, for example when due to the time factor, an eventual main case cannot be contemplated or where the question to be decided is a simple legal question where the Judge in Chambers is in a good position to reach a final decision as a judge in Chambers. In these cases, the Learned Judge sitting in Chambers does not have to consider whether the Applicant has a serious issue to be tried eventually in Court, and if so, whether the balance of convenience lay in their favour. In the present matter, the Learned Judge was called to decide a simple question of law and she was perfectly entitled that question and, in light of her decision, to consider the prayer for a final decision. The first issue raised by the Appellant therefore failed.

In relation to the second issue raised by the Appellant, the Supreme Court held that, as per the provisions of the Prevention of Corruption Act 2002, there is no reason prohibiting the appellant to enquire, albeit upon reasonable suspicion, into facts which occurred prior to the POCA but relevant to suspected offences under the prevailing law after the coming into force of the POCA which the appellant is empowered to investigate, notably money laundering offences under the Financial Intelligence and Anti Money Laundering Act (FIAMLA) which came into force in June 2002.

The Court went on to hold that: -

“In our view, the principle of non-retroactivity of criminal law, which was invoked by the present respondents (then applicants), is in no way infringed by the investigation of facts prior to the enactment creating a specific offence so long as those facts tend to establish the commission of the offence not prior to the enactment but subsequent to the enactment.”

The appeal was accordingly allowed and the judgment of the Learned Judge in Chambers quashed.

R.K.Parayag v ICAC & Anor 2011 SCJ 309
Judgment delivered on 13 September 2011

The appellant was prosecuted before the Intermediate Court on the first count of an information containing two counts, for the offence of bribery by public official in breach of section 4(1)(e) and (2) of the Prevention of Corruption Act 2002 (POCA). He pleaded not guilty to the charge and was assisted by Counsel.

It was averred in the particulars under Count I that the Appellant was alleged to have on the 3rd August 2002, at Royal Road, Grand Bay, whilst being an assistant Secretary at the Ministry of Land and Shipping, obtained from Mr Mootoosamy Veerappa Pillay, director of Dovsomm Limited, the sum of Rs 15,000 for other persons, for assisting the said Mootoosamy Veerappa Pillay to obtain three PSV Contract Cars NYP licences from the National Transport Authority (NTA).

The undisputed facts of the case as established before the trial Court are as follows:-

(1) The appellant was an Assistant Secretary posted at the Ministry of Public Infrastructure, Land, Transport and Shipping (the Ministry) and thus a public official in the year 2002;

(2)He was duly designated by the Permanent Secretary of the Ministry, which was the parent Ministry for the NTA, to represent the Ministry on the Licensing Committee of the NTA;

(3)One of the functions of the NTA was to grant public service vehicle licences and, in order to discharge this function, the NTA had set up a Licensing Committee consisting of three members of the NTA Board;

(4) The Licensing Committee met at the NTA with regard to the granting of licences for public service vehicles such as taxis, contract cars, contract buses etc

(5) The complainant, Mr. Mootoosamy Veerappa-Pillay (witness No. 5) started a company Dovsomm Ltd in 2000 and he made an application to the NTA to obtain a licence to operate three contract cars. After the appropriate procedures were carried out at the NTA, their application was referred to the Licensing Committee which met on 29.7.02 to consider the application. The complainant and his brother, witness No. 6, were convened before the Committee chaired by the Road Transport Commissioner. The appellant was the representative of the Ministry on that Committee. The Committee recommended the granting of the application.

The evidence adduced before the trial Court by the complainant was to the effect that some days after he had been convened before the Licensing Committee, a man, whom he identified as being Accused No. 2 (charged with the offence of aiding and abetting the author of a crime, to wit: the appellant under Count 2 of the Information) came to his place on a motor cycle looking for him. He asked him if he had made an application and informed him that his application had been rejected. He also told him that a man had said that something could be done for him and he had to go to Port Louis near the Government House to meet that man. He went to Government House where he met both the appellant and accused No. 2.

Both of them took him inside the compound of Government House. The appellant proposed to him to give Rs 5,000 for each of three persons who held the file for the licence, that is, Rs 15,000, stating that he would be granted the licence only upon his giving the money. The appellant also told him that he personally did not need anything but three persons were involved and something had to be done quickly as the application was pending.

The witness thereupon told the appellant that he could not decide on his own for the company and he took the appellant's phone number to contact him later. After leaving Government House, he immediately proceeded to ICAC premises where he related the matter to the officers and he was asked to give a statement. On the following day, he contacted the appellant by phone and a meeting was fixed for the latter to collect the money. The meeting was initially fixed at his house but he met them on the road and signalled to them to park their vehicle on the other side of the road on a parking space near a store. The appellant got down from the car and came to meet him. He remitted an envelope containing the money to him and the latter took same and went into the car whereupon ICAC officers arrested him. The witness had already taken down the serial numbers of the bank notes before he remitted same to the appellant.

Evidence was also adduced from officers working at the ICAC to the effect that they witnessed the remittance of the money and that immediately after the remittance, they disclosed their identity to the Appellant and secured the money which was remitted to latter by the Complainant. The Appellant further declined to give any statement, to identify any exhibit and sign on anything.

The Appellant was found guilty as charged and sentenced to undergo six months imprisonment. He appealed against conviction under 7 grounds of appeal.

Under Grounds 1 and 4 of the grounds of appeal, the Appellant prayed that the conviction by the Learned Magistrate be quashed inasmuch as there has been entrapment by the ICAC officers.

After considering judgments of the House of Lords, the Supreme Court held that: -

“We do not agree with the submission of appellant’s Counsel that the complainant did not want to give any money but was prompted to do so by the ICAC officers. It is clear from the evidence of the complainant that, when accused No. 2 told him his application had been rejected and asked him to come and meet someone at Government House, he immediately understood that they were looking for something that was not proper and he had already decided to go to meet them in order to find out what it was about and, if there was anything abnormal, he would then go to ICAC. His meeting with the appellant at Government House convinced him that bribes were sought from him and this is why he reported the matter to ICAC.”

The Supreme Court further held that it was satisfied that the commission of the offence by the appellant has not been brought about by the ‘state’s own agents’. The appellant already had the intent to commit the crime and the ICAC officers had no role to play in the formation of his intent.

The Supreme Court therefore held that it was satisfied that there was no entrapment, as rightly concluded by the Learned Magistrate. Ground 1 therefore has no merit and is set aside.

The issue raised under ground 4 was in relation to the fact that Learned Magistrate did not draw the proper inference from the fact that the money allegedly secured from the Appellant was never produced before the trial court.

The Supreme Court endorsed the submissions of Learned Counsel for the ICAC to the fact that the production of the money was not material as witnesses were called to give evidence about the remittance of the envelope containing the money and the securing of the said envelope from the appellant. Ground 4 was accordingly set aside.

Grounds 2, 3 and 7 of the Grounds of Appeal questioned the appreciation of the evidence by the Learned Trial Magistrate.

The Supreme Court held that, after perusing the record, it was satisfied that there was no major contradiction in the testimony of the prosecution witnesses such as to adversely affect their credibility. Contradictions, if any, are minor and of no consequence and do not affect the veracity of the witnesses. The Supreme Court held that it was satisfied that the Learned Magistrate made a correct appreciation of the evidence placed before her and her findings of fact cannot be disturbed

Grounds 2, 3 and 7 were accordingly set aside.

Ground 5 was to the effect that the Appellant was not charged with an appropriate offence and/or he was charged with an impossible offence.

The Supreme Court held: -

“We endorse the submission of respondent’s Counsel that it was immaterial in the present case that the appellant, not being a Board member of the NTA, was not in a position to do any official act in favour of the complainant and that what matters is that the appellant took a gratification for another person for a specific purpose, namely for favouring the complainant to obtain his PSV licence.”

On the issue that the appellant had been charged with the wrong offence, the Supreme Court held that it was for the prosecution in its discretion to decide under which charge to prosecute an accused party.

Ground 5 was accordingly set aside.

Ground 6 was to the effect that the Learned Magistrate was wrong not to have ruled that the shifting of the burden of proof and the ‘presumption of guilt’ provided under the Prevention of Corruption Act are unconstitutional.

The Supreme Court referred to the Supreme Court judgment in the case of Oozageer Suneechara v The State 2007 SCJ 131 and held that section 4(2) of POCA does not

infringe the principle of fair trial and more specially that of presumption of innocence enshrined in section 10(2) of the Constitution'.

Ground 6 was accordingly dismissed.

The Supreme Court held that since all the grounds of appeal have failed, the appeal was dismissed with costs.

M.J. Meeajun v The State & Ors 2011 SCJ 141 Judgment delivered on 20 May 2011

Appellant was convicted under four counts of an information for breach of section 5(1) and 8 of the Financial Intelligence and Anti-Money Laundering Act for carrying out a transaction in cash above the prescribed limit, which at the material time was Rs.350,000. Appellant is sentenced to pay a fine of Rs100,000 under each count.

Under Ground 1 of the appeal, Appellant argued that the learned Magistrate failed to make a separate determination for each of the 4 counts.

The Court noted that the mischief of the offence lies in engaging in any transaction in cash whether in Mauritian or foreign currency above the statutory limit. As per the information, all the four charges were under section 5(1) of the Act had the same elements. A reading of the judgment shows that the learned magistrate noted in the very first paragraph of her judgment the individual transactions under each count and the fact that these were not disputed by the appellant in his out of court statements. She also referred to the respective receipt of each transaction before she made a finding of guilt of the appellant on the four counts. Accordingly, their Lordships did not find any merit under Ground 1.

Under Ground 2, the decision of the learned Magistrate is challenged on the ground that she misdirected herself both on the facts and in law inasmuch as (a) no payment as such was effected by the Appellant; (b) the particulars of each of the 4 counts refers

to “exchange” and not to “purchase;” (c) ex-facie the evidence on record it was the financial institutions which purchased the foreign currencies.

Learned counsel for Appellant referred to the words “cash dealer, ” “foreign exchange dealer” and “money changer” in the Banking Act to make the point that what the financial institution concerned does is “buying and selling foreign currency” so that when Shibani Finance Money Changer was “buying foreign currency” from the appellant while the appellant was only receiving payment and not making payment as such.

The Court found this to be an ingenuous argument which they did not accept. First, each legislation is to be read independently of the other, unless such reference is specified. So should each section, all the more when the law we are concerned with is a penal section. Second, the question to ask is who was the customer and who the shopper? It is not Shibani Finance Money Changer who went to the appellant to buy GBP. It is the appellant who went to Shibani Finance Money Changer to buy Mauritian rupees. If he, as customer, went to buy Mauritian rupees from Shibani Finance Money Changer as the shopper, it follows that it is the appellant who paid in GBP for same. He, therefore, made a payment in cash for the impugned transaction which exceeded the permissible statutory amount of Rs 350,000.

That should also dispose of the argument of learned counsel revolving around the word “exchange,” all the more so when that word is referred to in the particulars and is not an element of the offence. Section 5(1) does not speak of exchange as such but only of making and accepting payment in cash. Cash in section 2 means “money in notes or coins of Mauritius or in any other currency.” The Court found no merit in ground 2.

Under Ground 3, the decision of the learned Magistrate is challenged on the ground that she misdirected herself on the facts and in law inasmuch as, ex facie the record, on the evidence adduced by the witnesses called by the Prosecution, the transaction in respect of each of the 4 counts was an exempt transaction.

The legal exercise of applying section 2 of the Act (which defines an exempt transaction)to the facts of the case reveals that the transaction is not an exempt transaction.

Learned counsel submitted that the Appellant was an established customer of IOIB where the moneys were deposited after the change and that a couple of named witnesses considered that the transactions were exempt transactions. The Court found that IOIB only came into the scene after the events giving rise to the offences. Further, the question whether the transaction was exempt or not was not a question of facts as such but a question of law. The transactions had to comply with section 2 of the Act, which they did not, independently of the personal views of the witnesses who obviously had an interest to serve in making such a statement. Ground 3 was dismissed.

Under Ground 4, the decision of the learned Magistrate is challenged on the ground that she failed in her legal duty to determine the issue of mens rea. His submission is that ex facie the evidence on record, the Appellant, then accused, could not reasonably be held to have a guilty mind.

Their Lordships bore in mind the propositions of law laid down by Lord Scarman in Gammon Hong Kong Ltd. v. Attorney-General of Hong Kong v. (1985) AC 1, applied in our law in the case of Rayapoulle v The State [1990 MR 286] and held that the charge under section 5(1) of the Act is a criminal offence requiring mens rea and not a technical offence irrespective of the existence of mens rea.

In the present case, the mens rea of Appellant was more than self-evident. The Appellant knew what he was doing. He knew he was carrying cash on him, not once, not twice, not thrice but four times. He knew they were foreign currency. He knew he wanted cash in Mauritian rupees. He knew after changing the GBP he needed to deposit same in his regular accounts at a bank. He was looking for the best deal to change the GBP cash into Mauritian rupees cash. He knew what he was giving and what he was

receiving in return. It cannot, therefore, be said that he lacked the criminal intent. Accordingly, the learned magistrate was right in her conclusions.

Under Ground 5, the decision of the learned Magistrate is challenged on the ground that she failed to carry a proper balancing exercise. Appellant's counsel submitted that had she done so, she would have found that the Prosecution has failed to establish beyond reasonable doubt the guilt of the Appellant on each of the 4 counts. He referred to those parts of the evidence where prosecution witnesses had accepted that the appellant was an established customer of the IOIB, that all the moneys from the above transactions had been deposited in the account at the IOIB and Mauritius Post Office Bank and that some witnesses had taken the view that the transactions were exempt.

However, their Lordships referred to Abongo v. The State [2009 SCJ 81] where the learned Judges stated that the Act was meant "essentially for the purpose of combating money laundering offences which had the potential of adversely affecting the social and economic setup, both at the national and international level to such an extent that they may constitute serious threats not only to the financial system but also to national security, the rule of law and the democratic roots of society." That the appellant, after carrying out the impugned transactions, placed the moneys in an established bank account, therefore, is more damning to him than redeeming of him. That is exactly what laundering is all about.

All the grounds of appeal having failed, the appeal was dismissed with costs.

N.K.Chady v Her Honour, Mrs R.Seetohul-Toolsee & Anor i.p.o ICAC 2011 SCJ 54

Judgment delivered on 24 February 2011

This was an application invoking the supervisory powers of the Supreme Court under section 82(1) of the Constitution to set aside the ruling delivered by the Respondents and further directing the Co-Respondent to communicate to the Defence all unused materials including the Preliminary Investigation Report (PIR).

The Respondents stated that they will abide by the decision of the Court whereas the Co-Respondent, that is, the ICAC, resisted the application.

The Applicant had averred in his affidavit that his constitutional rights to a fair trial

encompass the disclosure to all materials in the possession of the prosecution that are of assistance to him in the preparation and conduct of his case. The denial of the prosecution to communicate the PIR will seriously jeopardise those rights the moreso as he has no other mean to ascertain where the investigation had been conducted in compliance with the provisions of the PoCA 2002, the identity of the Complainant, the existence of other witnesses who might exculpate him, whether all documents, statements and materials obtained in course of the investigation, including those which might exculpate him had been communicated to the DPP and the nature and statement given by one Deven Anacooty.
The stand of the Co-Respondent is that the relief sought is premature and is in form of a disguised appeal. Furthermore, the ICAC averred in its affidavit that all documents has been communicated to the Applicant except for the PIR which is an internal communiqué between the Director of Investigation and the Commission. It has further averred that the confidential nature coupled with the protection of the identity of the informants outweighs the public interest for disclosure.
The Court considered the guiding principles which will prompt its intervention under section 82 of the Constitution, that is, the non-administration of justice by a lower court or an urgent need for the Supreme Court to intervene as no other means are available. The Court further considered other judgments of the Supreme Court which held that a party cannot appeal against an interlocutory ruling as a trial cannot be interrupted each time a party is dissatisfied with a ruling.
The Court held that there was no merit in the present application justifying its intervention under section 82 of the Constitution. The Court further held that it had not been persuaded by the Applicant and his Counsel that non-disclosure of the PIR will hamper the Defence resulting in great or grave prejudice and a denial of a fair hearing. Any required information or material could be gathered from the witnesses, the moreso as the trial had not yet started. Any possible defect in the trial proceedings or possible wrong conviction resulting therefrom can be remedied at the appellate stage.
The Court therefore held that the applicant has not satisfactorily shown that justice was in fact not being administered and there were no other avenues to remedy the situation.
The Application was therefore set aside, with costs.

ICAC v K.Ramdoyal & Anor 2011 SCJ 44
Judgment delivered on 21 February 2011

This was an appeal against the judgment of the Supreme Court rejecting the Application by the Appellant for the setting aside of two summons to witness issued on the ICAC by the Intermediate Court at the instance of the two respondents who are, respectively, plaintiff and defendant in a case before that Court.
The application before the Supreme Court was based on the duty of confidentiality imposed by section 81(2) of the Prevention of Corruption Act 2002 (PoCA 2002).
The Court's observation, to which Counsel on both sides agreed, was that section 81(2) of the PoCA 2002 does not debar a party to a case from summoning and securing the attendance as a witness of any of the Appellant's officers unless the summon amounts

to an abuse of the process of the Court, notably when the officer has no relevant evidence to give in the case concerned. It enables such an officer, when summoned in the witness box, to raise an objection, where appropriate, to the disclosure of any information falling within the ambit of section 81(2) of the PoCA 2002. The Court further observed that the wrong approach had been adopted by the learned judge of the Supreme Court by embarking into an unwarranted examination of the admissibility of the evidence which was sought to be elicited ex facie the two "summons". The Court also observed that the learned judge failed to make a distinction between the propriety of summoning a witness and the admissibility of any particular piece of evidence having regard to section 81(2) of the PoCA 2002.

The Court held that in an application before the Supreme Court to set aside a summon to witness, the Court should only be concerned with the propriety of the summons and not with questions relating to admissibility of any item of evidence which a witness may be called upon to give. Such questions can only be properly decided by the trial court within the context of the case before it.

The Court further held: -

"We wish to make it clear that these purported pronouncements (that is, the pronouncement by the learned judge on admissibility of evidence, including the interpretation of section 81(2) of the PoCA 2002), which clearly fell outside the ambit of the application before the learned judge, should not be regarded as authoritative."

Subject to the observations of the Court, the decision of the learned judge to set aside the application was maintained and the appeal set aside.

B. Hamtohul v ICAC & Anor 2011 SCJ 12
Judgment delivered on 28 January 2011

The Appellant, a former Police Sergent, was, on 20 February 2008, convicted by the Intermediate Court on three counts for offence of Public Official taking Gratification in breach of section 11 of the Prevention of Corruption Act 2002. He was sentenced to undergo nine (9) months imprisonment under each count. On the same day, he gave notice of appeal. His appeal was scheduled to be heard on the merits on 13 July 2009. However, he passed away on 20 June 2009. Learned Counsel for the appellant moved for and obtained a postponement. He thereafter indicated that the widow of the Appellant would wish to proceed with the appeal and asked for leave of the Court to do so.

The Court held that it was unable to accede to the request. The Court held that the right to appeal to the Supreme Court against a judgment of the Intermediate Court is conferred on the person charged and convicted. In the absence of an express provision in our legislation, the appeal proceedings must abate.

The Court therefore held that since there is no live appellant, the appeal cannot proceed and that in the present state of our law, the widow cannot pursue the appeal.

The Appeal was accordingly dismissed.