Shibani Finance Co Ltd v 1. ICAC 2. The State of Mauritius - Judgment delivered on 08.11.12

This is an appeal against a judgment of the learned Magistrate of the Intermediate Court finding the appellant company, guilty for having on 05 July 2003 accepted a payment in cash in foreign currency whose equivalent was in excess of Rs 350,000 in breach of section 5(1) of the FIAMLA and sentencing it to pay a fine of Rs 125,000.

The judgment of the learned Magistrate was being challenged on the following three grounds:

(1) That the learned Magistrate was wrong not to find that the appellant had exercised all care and attention before proceedings with the cash transaction.

(2) That the appellant had a licence from the Bank of Mauritius to deal in foreign currencies and therefore was a financial institution within the meaning of financial institution under the Banking Act and which had in place a compliance procedure.

(3) That it can reasonably be said that the appellant through its officers willfully accepted payment when it is clear from the evidence that Mrs Gonneea could not remember whether it was the Chief Executive Officer or the Compliance Officer who authorized the transaction.

The Court noted that it was clear that the appellant was a “financial institution” as defined under the Act. Learned counsel for the appellant argued that the effect of the regulations of 2003 was that the appellant, as a cash dealer, had become a “prescribed person” within the meaning of paragraph (e) of the definition of “exempt transaction”.

However, the Court disagreed with that submission and ruled that customer due diligence measures provided in the regulations did not and could not make a transaction between a cash dealer and a customer an exempt transaction. The court went on to say that the purport of those regulations was to establish a number of procedures which had to be followed by banks, financial institutions and cash dealers

with a view to identifying customers before entering into a business relationship or transaction with them. The appellant, as a cash dealer, had to comply with these regulations.

With regard to ground 3, the court clarified that when a body corporate is charged with a criminal offence, the prosecution was not required to establish with precision the identity of the person who was the directing mind and will of that body corporate. It was sufficient if it was proved that somebody who was concerned in the management of the body corporate was involved. The court found that there was sufficient evidence on record to have allowed the learned Magistrate to come to the conclusion that the person who authorized Mrs Gonneea to go ahead with the transaction had the necessary authority to represent and decide for the appellant.

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

ICAC v K.Ramdoyal SCR 102969-5A/195/09 – Ruling delivered on 22.10.12

On 6th April 2011, the attorney of Respondent No. 1 caused to serve on the Applicant, a notice of taxation together with a draft bill of costs made and incurred at the request of the Respondent to resist an application to set aside summons, which application was set aside on 9th of May 2010 with costs.

By way of letter dated 8th April 2011, the ICAC objected to the taxation of costs for the following reasons:

1. because the Court of Civil Appeal has delivered a judgment on 21st February 2011 whereby the appeal has been set aside, but with no order as to costs, and
2. because in the judgment delivered by the Court of Appeal, no specific mention has been made to the effect that the Appellant (ICAC) has to pay costs of the lower court.

The appellant also stated that costs, if any, may be allowed proportionately to the respondents but not to one respondent only.

Counsel for Respondent No. 1 expressed the view that the silence of the Court of Civil Appeal on the issue of the payment of cost before the lower Court cannot be interpreted as disallowing the costs made by the lower Court and he prayed for the payment of the said costs. Counsel for the Appellant expressed the view that where costs of lower Court has to be met by a party, specific order to that effect has to be made by the Court of Civil Appeal.

The Court concluded that the decision of the learned Judge setting aside the application should be maintained. From the reading of the judgment of the Court of Civil Appeal, it could be deduced that since there was no order as to costs, this could only mean no cost at the level of the Court of Civil Appeal. However, since judgment of the lower court was maintained, the order in relation to costs had to be maintained too.

The court decided to set aside the objection by the Appellant as well as the proposed mode of payment of costs.

Sheilendra Peerthum v 1. ICAC 2. The Commissioner of Police 2012 SCJ 371- Judgment delivered on 02.10.12

In the motion paper and statement of case, the relief sought by the applicant is “Leave to apply for a judicial review of the decision and decision making process of Respondent No. 1 by persistently causing applicant’s arrests and investigating the matter on a piece meal basis over a long period of time.

The second respondent raised a Preliminary Objection to the effect that since the applicant was averring that his constitutional rights have been breached he should have proceeded by way of Plaint with Summons under section 17 of the Constitution by complying with the Supreme Court (Constitutional Relief) Rules 2000, instead of asking for leave to apply for judicial review.

Counsel for the first respondent urged that, on the face of the affidavit, leave should not be granted to the applicant. She relied on the decision in Ha Yeung Chin Ying T.S. v Independent Commission against Corruption & Anor [2003 SCJ 273], pointing out that there was nothing in the affidavit to show that the decision of the ICAC to resort to the services of Police Officers, which was being contested, was irregular.

The case of Ha Yeung (supra) highlights the importance for the ICAC to work in conjunction with the police for the conduct of its investigation as imposed on it by the PoCA. It is evident that a very limited power of arrest is given to the Commissioner of ICAC, which can be exercised only in the specific circumstances which are provided by section 53 (1) of the PoCA.

The court found that the applicant failed to disclose an arguable case in respect of the breach of any of the Constitutional provisions.

Court held that the applicant has failed to show on the averments of the affidavit that he has an arguable case for any of the prayers sought, and that the objection raised to the application is well founded. Consequently, there was no need for the court to deal specifically with the preliminary objection.

Application was dismissed with costs.

ICAC v SEENEEVASSEN 2012 SCJ 328 – Judgment delivered on 06.09.2012

The respondent, a police officer, was prosecuted before the Intermediate Court on information containing four counts of corruption offences under the PoCA 2002, namely section 7(1), and 83, section 4(1)(b) and (2) and section 4(1)(a) and (2) of the Act respectively. Count 3 was dropped as there was no evidence in support. As for the other three counts, the learned Magistrate, found that the charges had not been proved and dismissed them. The present appeal challenges the decision of the learned Magistrate to dismiss those three counts.

The facts of the case are briefly as follows. Two warrants of arrest were issued against one Mrs Marie Angela Christine Azemoth, née Louise. Both warrants concerned non-payment of debts and the committal orders were issued pursuant to section 30 of the District and Intermediate Courts (Civil Jurisdiction) Act. In fact the two warrants were received at Abercrombie Police Station on 27 April 2004 and 25 May 2005 respectively. The respondent was in charge of the warrant squad at that police station at the relevant time.

The evidence reveals that Mrs Marie Angela Christine Azemoth was in Belgium at the time those two warrants were sought to be executed. The main witness for the prosecution was Mrs Marie Fleurange Louise, the mother of Mrs Marie Angela Christine Azemoth. In or about February or April 2004, Respondent came to her place and informed her there was a warrant of arrest against her daughter for unpaid fine and told her that this would cost Rs 3,000. She gave him Rs 2,600. He took the Rs 2,600 to allegedly pay the warrant against her daughter. In 2005, accused came anew to her place in the month of May and told her that there was another warrant and this will cost €500.

At the hearing of this appeal, learned counsel for the appellant indicated that he was not challenging any of the findings of fact of the learned Magistrate. He was, however, disputing the application of the law to those facts. It was the contention of learned counsel for the appellant that on those facts it was wrong for the learned Magistrate to come to the conclusion that the sums obtained or solicited did not amount to a gratification. He referred to the decision of this Court in Suneechara v The State [2007 SCJ 131] and submitted that the word “gratification” cannot be applied to any advantage obtained or solicited without looking at the proper context in which the advantage had been obtained or solicited. In his view, the fact that the respondent had obtained Rs 2600 and that he had solicited €500 and Rs 400 shows that the respondent made an abuse of his public office for a private gain, and accordingly the money

obtained or solicited was tainted and thus qualified as “gratification” for the purposes of the Act.

The Appellant Court finds that the respondent did not obtain any “gratification” as the money was remitted to him as an agent – and not as a police officer – to pay for a debt. With regard to the second and fourth counts, which charged the respondent with soliciting a gratification “for doing an act which is facilitated by his duties” and “for having done an act in the execution of his duties”, the evidence shows that the “act” contemplated could only be the payment of the debt.

Appeal was dismissed.

BURHOO K. K. v. THE INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR - 2012 SCJ 211 – Judgment delivered on 13.06.2012

The appellant was prosecuted before the Intermediate Court on a charge of public official using his position for gratification in breach of Section 7(1) and 83 of the Prevention of Corruption Act (POCA). He pleaded not guilty but was found guilty and sentenced to undergo six months imprisonment.

He appealed against his conviction initially on fourteen grounds out of which, only thirteen were pressed.

Facts of the case:

Appellant being a Police officer stopped the complainant who was not wearing his seat belt and was carrying a number of children in excess of the authorized number. The appellant informed the complainant that he had committed two contraventions and would be accordingly booked. The complainant begged the appellant to be let off and offered him a Rs 100 note. The appellant asked for Rs 200 instead, which he had to be paid by noon. The complainant agreed to meet the Appellant to hand over the Rs 200 to him, opposite the Intermediate Court. In the meantime complainant called at the

ICAC to report the matter. As agreed Complainant met the Appellant and gave him Rs 200. At the same time, some police officers approached the appellant, who swallowed the Rs 200 note and was arrested on spot.

Appellant denied that he had ever asked the complainant for a sum of Rs 200 or that the latter remitted such a note to him when they met opposite the Intermediate Court.

Out of the 13 grounds which were pressed before the Appellate Court, 12 grounds related to the factual issues which failed. The Appellate Court concluded that the Trial Magistrate's analysis and assessment of the evidences, witnesses and so on were not erroneous or perverse.

Only one ground was raised a point in law and which reads as follows:
"The learned magistrate was wrong to find that s.4 and s.7 of POCA could be interchanged by the prosecution and by her."

Before the trial court, the defense had argued that the prosecution had wrongly charged the appellant under Section 7(1) of the POCA, when the circumstances of this case fall squarely under Section 4(1) of the Act.

The Appellate Court seconds the trial Magistrate when she held that "what is averred here can equally fall under Section 4(1) as under Section 7(1) of the POCA. However this does not make the information defective for uncertainty and is not fatal to the case for the prosecution". The fact that the appellant could, in the circumstances of the present case, have been equally charged under Section 4 of the Act, does not mean that the charge laid against him under Section 7, was defective.

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

Ashok DHURBARRYLALL v/s 1. Mohamed Reza Kurmally, 2. Roshi Bhadain, 3. The Independent Commission Against Corruption, 4. The Commissioner of

Police, 5. The State of Mauritius - 2012 SCJ 209 - Interlocutory Judgment delivered on 08 June 2012.

The plaintiff lodged a plaint on the 17th December 2004 claiming the sum of Rs 10,500,000 from the 5 defendants.

Facts

The plaintiff averred that on the 17 December 2002 following a phone call from Inspector Tengnah "based" at ICAC, he was picked up by ICAC officers and taken to the backyard of the NPF Building where he was photographed and videoed by the MBC cameraman and other media photographers. He was thereafter taken to the ICAC office where Sergeant Mooroogessen informed him of his arrest on a charge of conspiracy to smuggle cigarettes. He was detained in police cell until the 23 December 2002. Thus his arrest and detention were unreasonable, abusive, arbitrary and unlawful and was based on fabricated evidence. The acts and doings of defendant No. 1, 2, 3, 4 and 5 constitute "fautes" causing him prejudice for which he is claiming damages.

As for Defendant No. 1 is concerned the plaintiff has averred that the latter has made a false and malicious declaration against him and other customs officers for bribery in connection with the cigarette smuggling case.

Defendants Nos. 2, 3, 4 and 5 have all raised pleas in limine litis, namely, with regard to the requirement of a notice prior to the action, that the action itself is time-barred and finally the plaint does not disclose a cause of action against them.

Court referred to Section 24(5)(b) of the PoCA which provides that the ICAC may for the purpose of the Act, "make use of the services of a police officer... designated for that purpose by the Commissioner of Police....". And was of the view by extending their services to the ICAC the police officers who may be statutorily detached to work at the ICAC become the préposés of the ICAC. They remain police officers by virtue of their

appointment in the Police Force and fall under the general operational control of the Commissioner of Police and are therefore also préposés of defendants Nos. 4 and 5.

The court also considered articles 91, 93 and 94 from Repertoire Dalloz Responsabilité du fait d'autrui – chapitre 1er – Section 2.

Another issue was whether the plaint has been entered within the two years' delay provided for under section 4(1) of the POPA (Police Officers Protection ACT).

In computing the time for the purpose of the application of section 4(1) of the POPA, the relevant enactment is section 38(1)(d) of the Interpretation and General Clauses Act (the IGCA), it was clear that the plaint has been entered just one day outside the statutory delay. However, the Court has to apply the law as it finds it at any given time as it appears on our statute book - Mungroo & ors. v. The State of Mauritius & ors [2007 SCJ 326].
Court held that service in terms of section 4(2)(a) of the POPA has not been effected on defendants Nos. 2, 3, 4 and 5.

It has also been argued that the only complaint contained in the notice is that defendant No. 2 and police officers based at ICAC unreasonably, abusively, arbitrarily and unlawfully arrested the plaintiff on the 17 December 2002 and detained him until the 23 December 2002 and that they so acted in the conduct of their enquiry.

The Court finds that the plaintiff has failed to enter his case within the statutory delay against defendants Nos. 2, 3, 4 and 5. There was been no valid notice on defendants Nos. 2, 3, 4 and 5. The case was dismissed against those defendants but to proceed against defendant No. 1 after its "mise-en-état" following the present interlocutory judgment.

The Plaintiff has appealed against the decision of the court which has been fixed for merits on1st July 2013.

K.S.Sicharam v The State of Mauritius SCR 106012 – (5A/284/11) Judgment delivered on 06.03.12

The Applicant was praying for leave from the Supreme Court to appeal to the Judicial Committee of the Privy Council against the decision of the Supreme Court in the case of Sicharam v ICAC 2011 SCJ 375 dismissing his appeal against the judgment of the Intermediate Court.

At the hearing of the present application, the Respondent raised a Preliminary Objection to the effect that it was only at this stage that the State of Mauritius has been put into cause. Initially, the Respondent in the appeal case was only the ICAC, and that it was only for the application for leave to appeal to the Privy Council that the ICAC has been substituted by the State of Mauritius for the first time without the proper procedure being followed by the Applicant, that is, for him to seek leave to put into cause the State of Mauritius at leave stage.

The Applicant submitted that no notice of Preliminary Objection has been served on the Applicant within the statutory delay. He further moved to amend the motion paper so as to put into cause the ICAC.

The Supreme Court held that it has a duty to ensure that the provisions of the constitution are respected and this in so far as the Judicial Committee of the Privy Council is concerned. The Preliminary Objection of the Respondent was upheld and the application dismissed with costs.

ICAC v M.R.A.F.E. Peermamode 2012 SCJ 104 Judgment delivered on 13.03.12

This was an appeal to the Supreme Court against the decision of the Learned Magistrate of the Intermediate Court dismissing the Information against the Respondent on the ground that the information could not stand inasmuch as they did

not disclose any offence known to law at the relevant dates, namely on 1 and 23 March 2006.

The Learned Magistrate's reasoning was to the effect that the provisions of the Prevention of Corruption Act (PoCA) 2002 did not apply to Mauritius. In her judgment, she held that Section 3 of the PoCA 2002, as originally enacted, did not provide for the application of the PoCA in Mauritius. The said section read as follows: -

"3. Application of Act
A person shall commit an offence under this Act where –

(a) the act or omission constituting the offence occurs elsewhere than in Mauritius; or

(b) the act constituting the offence is done by that person, or for him, by another person."

She further referred to the Prevention of Corruption Amendment Act 2006 which amended section 3 of the PoCA by deleting the words <elsewhere than in Mauritius> and replacing them by the words <in Mauritius or outside Mauritius> " and to section 16 of the amending Act which provided that the amendment to section 3 of the PoCA 2002 shall be deemed to have come into operation on 1 April 2002".

The Learned Magistrate referred to the provision of the Constitution and to other Supreme Court judgments to hold that the PoCA 2002 did not apply at the time of the alleged offence and that the amendments to section 3 of the PoCA could not be applied retrospectively.

The Supreme Court held that the Learned Magistrate erred when she decided the case solely on the basis of the principle of non-retroactivity of criminal offences, as prohibited by section 10(4) of the Constitution, following an incorrect assumption that there was no actionable criminal offence in respect of acts and omissions committed in Mauritius until the 2006 amendment.

The Supreme Court further held that: -

“In our view, it is clear that the legislative intent in the 2002 Act was that all the corruption offences provided for in the Act would apply in respect of acts committed in Mauritius or “elsewhere than in Mauritius”. We say so for the following reasons which have been rightly evoked in the skeleton arguments and submissions of Counsel for both appellants and also in the written and oral arguments offered by Counsel representing the Attorney General subsequent to the State of Mauritius having been joined as a co-respondent in view of the importance of the constitutional issues raised.

First, the history of the 2002 Act, the explanatory memorandum to the Bill preceding the Act and the contents of the Parliamentary Debates in 2002 in relation to the Bill, leave absolutely no doubt that the main object of the Bill was to curb corruption offences in Mauritius.

Second, the contents of the Act – in particular the offences created at sections 4(e), 6(1), 8, 9, 10, 11, 12, 13, 14 and 15 - make it preposterous to contend that the legislation was only meant to apply to acts and omissions committed “elsewhere than in Mauritius”. This view is reinforced by the scheme of the legislation which makes extensive provisions as to the setting up of new institutions to combat corruption in Mauritius and for their exercise of powers which could only be intended with regard to combating corruption offences committed in Mauritius.

Third, a literal interpretation could result in ambiguity and this is where it becomes imperative to adopt the meaning which is in line with the legislative intent. Indeed, on a literal and isolated reading of section 3(a) of the 2002 Act, one possible interpretation is that a person would commit an offence under the Act only in respect of acts or omissions occurring elsewhere than in Mauritius. However, upon a reading of section 3 in context and bearing in mind section 45 of the Constitution and section 4 of the Interpretation and General Clauses Act (IGCA), that possible literal interpretation must be discarded as it would lead to an absurdity. Indeed, section 45 of the Constitution provides that it is the function of Parliament to make laws for the peace, order and

good government of Mauritius and section 4(1) of the IGCA provides that every enactment shall apply to Mauritius. Section 3 of the 2002 Act is, in our view, so worded that it can be read as conveying the intention of the legislator to simply provide, more specifically, that the offences provided under the act would also be actionable in respect of acts or omissions committed elsewhere than in Mauritius. Section 3 was in fact intended to cast the net wider so that corruption offences with international ramifications are not left unpunished.

The 2006 Act, in our view, merely removed the possibility of any incongruous interpretation which could arise from a literal reading of section 3(a) of the 2002 Act as drafted."

The Supreme Court held that the learned Magistrate was wrong to dismiss the two charges contained in the information. The decision to dismiss the information was quashed and the case remitted to the Intermediate Court for the trial to proceed on that information.

M.F.Isseljee v The ICAC & Anor 2012 SCJ 46

Judgment delivered on 02.02.2012

The Appellant pleaded guilty to two counts for having given a gratification to another person to use his influence to obtain a benefit from a public body.

He appealed against sentence. However, before the appeal heard, appellant moved for leave of the Court to file additional grounds of appeal outside statutory delay. The Application was fixed for Hearing on the same day as the Hearing of the Appeal.

At the Hearing before the Appellate Court, the Court set aside the application for leave to file additional grounds of appeal on the ground that the issues raised in the additional grounds of appeal were not novel points and the mere fact of invoking issues

as to jurisdiction or constitution did not mean that application would be favourably entertained by the court.

The Application for leave to file additional grounds of appeal outside delay was set aside.

In relation to the appeal against sentence, the Appellate Court noted that the Learned Magistrate took into account all mitigating factors and exercised her discretion under section 151 of the Criminal Procedure Act to sentence the Appellant to undergo only 9 months imprisonment. The Appellate Court further stated that the Learned Magistrate was under no obligation to consider community service order.

The Appeal was accordingly set aside with costs.

R.K.Parayag v Independent Commission Against Corruption & Anor 2012 SCJ

Judgment delivered on 21.02.12

This was an application for leave to appeal to the Privy Council against the decision of the Supreme Court dismissing the appeal against the judgment of the Intermediate Court which found the Applicant guilty of the offence of bribery by public official in breach of section 4(1)(e) and 2 of the Prevention of Corruption Act 2002 and sentencing the Applicant to undergo six months imprisonment.

The Application was based on two grounds: -

1. As of right against the decision of the Supreme Court on a question of interpretation of the Constitution; and
2. With leave of the Court on a question which is of great public importance so that it ought to be submitted to the Privy Council.

It was submitted on behalf of the Applicant under the first ground that the Supreme Court sitting on appeal erred in law whilst interpreting section 4(2) and 83 of the Prevention of Corruption Act 2002 as amended by Act No 5 of 2005, as against section 10(11) of the Constitution in respect of presumption of innocence. Counsel for the Respondent submitted that the issue under the first ground of the application does not deal with interpretation of the Constitution but with application of the Constitution.

The Court held that no case has been made out by the Applicant to allow an appeal as of right under section 81(1)(a) of the Constitution and there was no question of great general public importance that ought to be submitted to the Privy Council.

The application was set aside with costs.

BISSESSUR V THE STATE & ANOR 2012 SCJ 16
Judgment delivered on 16 January 2012

The present matter was an appeal against conviction of both Appellants by the Intermediate Court for the offence of Bribery of Public Official in breach of section 4 of the Prevention of Corruption Act 2002 sentencing them to undergo a term of imprisonment of 3 months and to pay costs of Rs 500/-.

The particulars of the charge which were found proved by the learned Magistrate were that both appellants were police officers who were on duty as public officials at Rose-Hill Police Station. The first appellant solicited for himself and for the second appellant a sum of 300 rupees as gratification for abstaining from reporting the complainant Poinen for the offence of driving without licence. The second appellant had accepted for himself and for the first appellant a sum of 200 rupees as gratification for abstaining from reporting Poinen for the offence of driving without licence. The said abstention was facilitated by virtue of their functions and duties as police officers.

The Respondent raised a Preliminary Objection to the effect that the appeal was not prosecuted within the statutory delay as provided for by the District and Intermediate Court (Criminal Jurisdiction) Act. It was not disputed that the present appeal was not prosecuted within the statutory delay.

The Court found that no valid reason for the delay justifying the exercise of its discretion to grant leave to proceed with the appeal. The court also considered the grounds of appeal and found that same did not give rise to any risk of substantial injustice or miscarriage of justice which would warrant the appellate court's intervention either proprio motu or by virtue of its supervisory jurisdiction under section 82 of the Constitution.

The appeal was accordingly set aside with costs.