

FCD CN: 98/2020
CN: 47/2019

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

Swaley JOWAHEER

RULING

The accused has been prosecuted for the offence of Traffic D'Influence in breach of section 10(5) of the Prevention of Corruption Act. He pleaded not guilty to the Information and was represented by Mr G. Glover SC together with Mr L. Balancy. Prosecution was represented by Mr T. Naga of ICAC.

During the course of trial, witness no.1, the enquiring officer was under examination-in-chief. She stated under oath that the ICAC carried out an investigation following an anonymous complaint. Objection was raised by the defence to the effect that the content of the said complaint cannot be adduced as evidence since same was not confronted to the accused at enquiry stage. The defence submitted that the mere fact that the words 'facts and circumstances' were written and explained to the accused during the recording of his defence statement, is not evidence that the detailed complaint was confronted to him. Hence the accused had no opportunity to give his version in light of the complaint. He may be compelled to do so in court under oath, thereby breaching his constitutional right to silence.

The contention of the prosecution is that the words 'facts and circumstances' are not a generic phrase which forms part of the usual caution given to suspects during enquiry. If it is written facts and circumstances were explained to the accused, it means the whole detailed complaint was put to the accused.

The prosecution did not submit that there is evidence available, other than the accused's defence statement, to show that the latter was confronted with a full and detailed complaint levelled against him. At this stage of proceedings, it is therefore clear that the prosecution is relying solely on the phrase 'facts and circumstances explained' in the defence statements to contend that the accused has been confronted and made aware of the precise and exhaustive complaint against him.

There has been no argument on the applicable laws on the matter. In fact the prosecution is not suggesting that failure to confront the full complaint to the accused during enquiry does not necessarily amount to a breach of his constitutional rights and thus impede the fairness of trial. The proposition from the prosecution is only that the full complaint has been confronted to the accused, albeit orally and not comprehensively recorded in his defence statement.

The principles of law regarding the issue of non-confrontation have been ruled upon by the Supreme Court in numerous cases, vide **The State v Peter Wayne Roberts CS 16/15; Jhootoo v The State 2013 SCJ 373; The State v Rajcoomar Seegolam & Anor CS 4/17; Grandcourt v The State 2018 SCJ 56; DPP v Lagesse & Ors 2018 SCJ 257; The State v Marie Francois Bernard Maigrot CS 6/12.**

However, it is apposite to cite the dictum in **Seetahul v State 2015 SCJ 328** where the following was held: *It suffices that the version of the complainant was put to him so that he was made aware of the case against him and the evidence on which it is based so as to enable him to prepare his defence.*

In the present matter, it is understood that the complaint in question was anonymous and thus there would be no witness or complainant as such. Nevertheless, as per Seetahul (supra), the complaint must be put to the suspect so that he is made aware of the case he has to answer and to rebut each and every piece of evidence if he wishes to do so. An analysis of all five defence statements (Docs A to A4) reveals the use of the phrase 'facts and circumstances of the case were explained' as part of the caution given to the suspect, now the accused party. The content of all the defence statements primarily dealt with the part of the enquiry which concerned the mobile phone of the accused.

The assertion made by the prosecution that the accused has been orally informed of the complaint has been decided in my ruling dated 25.05.22. I reiterate my finding in that, in the absence of a specific rule governing the method of confrontation to suspects, an oral confrontation cannot amount to a valid one. There would be no written record of what piece of evidence has been shown and explained to the accused. Such would defeat the very essence of recording defence statements from suspects. A

mere caution would suffice and the suspect would be given free rein to give his version according to what may or may not have been said to him orally. The major defect in such a proposition lies in the inability for a suspect to admit certain facts of a complaint and deny the rest. Since he has not been given the chance to respond to each and every fact of the complaint, the accused or suspect would have to do so from his own memory once the complaint has allegedly been read to him. Furthermore, a reading of the responses given by the accused in his defence statements gives no indication that he was replying to any complaint whatsoever. His responses were mostly restricted to the recorded facts put to him regarding the examination of his mobile phone.

For these reasons, I find that any evidence pertaining to the content or facts of the anonymous complaint not confronted to the accused at enquiry stage, and not properly recorded, is inadmissible.

A handwritten signature in black ink, appearing to be 'P K Rangasamy', written over a horizontal line.

P K Rangasamy
Magistrate of the Intermediate Court
23.02.22