

ICAC v Anthony & 02 Others

2023 INT 8

CN645/11

THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Independent Commission Against Corruption

v/s

- 1. Hedley Desire Laval Anthony**
- 2. Sheilendra Peerthum**
- 3. Ibnaysahood Bundheea**

RULING (NO. 1) (ADMISSIBILITY OF OUT-OF-COURT STATEMENT PURSUANT TO S. 188C OF THE COURTS ACT)

Accused No. 1 (hereinafter referred to as A1) stands charged under each of Counts 1, 2, 3, and 4, with Public Official Using His Office For Gratification, contrary to ss. 7(1) and 83 of the Prevention Of Corruption Act (hereinafter referred to as POCA).

And Accused No. 3 (hereinafter referred to as A3) under each of Counts 10, 11, 12, and 13, stands charged with Money Laundering, contrary to ss. 3(1)(b)(6)(8) of the Financial Intelligence And Anti-Money Laundering Act (hereinafter referred to as FIAMLA).

Counts 5, 6, 7, 8, and 9 against Accused No. 2 were discontinued by virtue of a Discontinuance Of Proceedings dated 15-12-2020 duly signed by the Director of Public Prosecution.

A1 and A3 were respectively assisted by Learned Defence Counsel.

Learned Counsel for the ICAC conducted the case for the Prosecution.

The Proceedings were held partly in English and partly in Creole for the purposes of the present Arguments.

In the course of the Trial, the Prosecution moved to produce the out-of-Court statements of Mr Sobhanand Jeetun (hereinafter referred to as W14), pursuant to **s. 188C(1)(2)(a) of the Courts Act**, given that W14 had passed away.

Learned Counsel for A1 and A3 at first moved for the matter to be fixed for Arguments, and then Learned Counsel for A3, who was also replacing Learned Counsel for A1 for the purposes of the present Arguments, stated on the day of the Arguments that the Defence was no longer objecting to the Motion of the Prosecution to produce W14's out-of-Court statements dated 25-09-09 and 09-11-09.

The Prosecution called Senior Investigator Deepchand (hereinafter referred to as W1) for the purposes of the present Arguments to try and satisfy the criteria set out under **s. 188C(1) of the Courts Act**.

Case For The Prosecution

W1 deponed to the effect that he was the main Enquiring Officer (hereinafter referred to as EO) in the present matter, and as such he recorded various statements from Accused Parties and Witnesses, and that he recorded two statements from W14 on 25-09-09 and 09-11-09, in relation to the project in four phases at Pavillon, Cap Malheureux, which is the subject matter of the present Proceedings.

W1 added that W14 gave these two statements voluntarily, and signed same voluntarily, and went on to state that during the recording of the said statements, he checked the National Identity Card (hereinafter referred to as NIC), i.e. J2008631404571, and inserted same on both said statements.

W1 was not cross-examined by Learned Defence Counsel for A1 and A3.

Learned Counsel for the Prosecution submitted to the effect that as per **s. 188C of the Courts Act**, the Prosecution had to satisfy the Court of the conditions set out under **subsections (1)(a)(b)(2)(a) of the Courts Act**.

Learned Counsel for the Prosecution went on to submit that the Identity of the maker had been established, that the Death Certificate (Doc. DC) of W14 had been filed already, and that it had been established that the said statements related to the subject-matter of the present Information.

Learned Counsel for the Prosecution therefore moved for Leave to adduce the said two statements of W14.

Case For The Defence

Learned Defence Counsel for A3 offered Submissions on behalf of A3 and A1, and reiterated that the Defence was no longer objecting to the Motion of the Prosecution, and went on to submit that the said Motion was bound to succeed under **s. 188C(1)(2)(a) of the Courts Act**, as given that the Death Certificate (Doc. DC) of W14 was on Record, **s. 188C(2)(a)** found its application to the present matter.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has given due consideration to the Submissions of both Learned Counsel.

It was clearly stated in Court that the Defence for A1 and A3 was no longer objecting to the Motion of the Prosecution to adduce in evidence two out-of-Court statements dated 25-09-09 and 09-11-09 of W14.

The Court is however duty-bound to assess whether all the criteria set out in **s. 188C of the Courts Act** have been satisfied in order to justify the Court in exercising its discretion to grant Leave to the Prosecution for the said two statements of W14 to be adduced as evidence.

S. 188C of the Courts Act provides as follows:

188C. Admissibility of out of Court statement in piracy and financial crime cases where maker is unavailable

(1) In any criminal proceedings under the Piracy and Maritime Violence Act or for a financial crime offence as defined in sections 41A(5) and 80D(5), a statement made out of Court shall be admissible as evidence, with leave of the Court, of any matter stated when –

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;

(b) the person who made the statement is identified to the Court's satisfaction; and

(c) one of the 5 conditions specified in subsection (2) is satisfied.

(2) The conditions referred to in subsection (1)(c) are that the person who made the statement –

(a) is dead [...].

(3) Where a statement is admitted in evidence under subsection (1) any evidence which, if that person had been called as a witness, could have been admissible for the purpose of impeaching or supporting his credibility, shall be admissible for that purpose.

(4) In assessing the weight, if any, to be attached to a statement admitted in evidence under subsection (1), the Court shall have regard to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

In order for W14's said two out-of-Court statements to be admitted in evidence, it is incumbent on the Prosecution to establish the following:

- 1) the present matter relates to a financial crime offence;
- 2) the oral evidence given in the Proceedings by W14 who made the said two statements would be admissible as evidence of that matter;
- 3) W14, who made the said two statements, has been identified to the Court’s satisfaction;
and
- 4) That W14 has passed away.

In the present matter, items 1), 2), and 4) above were not disputed by the Defence.

In relation to item 1), pursuant to **s. 80D(5) of the Courts Act**, a “financial crime offence” means “an offence committed under an enactment specified in the Sixth Schedule” of the **Courts Act**.

And in the present matter, the offences in relation to A1 relate to **s. 7 of the POCA**, which section falls specifically under **PART II of the POCA**, and in relation to A3, the offences relate to **FIAMLA**.

Both said enactments are specified in the **Sixth Schedule of the Courts Act**, and the said offences in the present matter therefore fall within the definition of “financial crime offence” for the purposes of the **Courts Act**.

Now, the Court is alive to the fact that the present alleged offences occurred prior to the coming into force of the said amendments brought to the **Courts Act** by the **Finance (Miscellaneous Provisions) Act 2021** [\[Act No. 15 of 2021\]](#) and the **Courts (Amendment) Act**.

The first amending Act brought amendments to **the Courts Act**, which are, in the Court’s considered view, procedural and evidential in nature, the said amendments relating inter alia to the production of out-of-Court statements of Witnesses who are unavailable for reasons specifically set out in **s. 188C of the Courts Act**.

The second amending Act provided inter alia for the creation of the Financial Crimes Division of the Intermediate Court, and set out the transitional provisions as to the venue for hearing and determining financial crime offence cases.

As authoritatively set out in **De Maroussem v Director General, Mauritius Revenue Authority** [\[2010 PRV 81\]](#), “[t]he coming into force of a taxing statute involves questions of substance (what

transactions are to be taxed, and at what rates?) and questions of procedure (what are the procedures and time limits for assessing tax?)[.] The presumption against a statute having retrospective operation applies to the former but not in general to the latter (subject always to the language of the particular statute)".

The Court is alive to the fact that the said Authority related specifically to Tax Statutes, whereas the present matter relates to Financial Crimes, but the Court is of the considered view that the general principle remains that amendments to the Law which are procedural in nature generally have retrospective effect.

In **Muktar Ali v R** [\[1988 SCJ 188\]](#), the Appellate Court concluded that the learned trial Judge was right in holding "that the Criminal Procedure (Amendment) Act 1986 being a procedural law, [it] could have retrospective effect, in that it enabled the Director of Public Prosecutions as from the 25th September 1987 to file before a Judge an information regarding any offence referred to in the Schedule to that Act, even if it had been committed before that date." (emphasis added)

Applying the above principles set out in **De Maroussem (supra)** and **Muktar Ali (supra)** to the present matter, in the absence of any express provision/s to the contrary, and given these above mentioned amendments to the **Courts Act** were, in the Court's considered view, for the reasons highlighted above, procedural and evidential in nature, the Court is of the considered view that the said provisions are to be given retrospective effect, and that hence, it is open to the Prosecution to make the present Motion in Court, although the offences in the present matter occurred prior to the abovementioned amendments to the **Courts Act**.

In relation to item 2), W1 deponed to the effect that W14's said two out-of-Court statements related to the project in four phases at Pavillon, Cap Malheureux, and as per the present Information:

- 1) Counts 1, 2, 3, and 4 in relation to A1, relate respectively to the first, second, third, and fourth phases of works allegedly done at Cap Malheureux; and
- 2) Counts 10, 11, 12, and 13 in relation to A3, relate respectively to the first, second, third, and fourth phases of works allegedly done at Cap Malheureux.

The Court is therefore of the considered view that the oral evidence of W14, who gave the said two statements, would have been admissible as evidence of that matter.

In relation to item 3), W1 explained that he checked the NIC of W14, at the time of recording his said two statements, and that he inserted same on the said two out-of-Court statements.

And W14 was not cross-examined on behalf of A1 and A3.

Also, the name of W14 as per the List of Witnesses on the present Information is identical to the name mentioned in the (Doc. DC).

And the NIC given by W1 in Court is identical to the NIC mentioned on (Doc. DC).

Further, Identity of W14 was never put in issue by the Defence.

In light of all the above, the Court is satisfied that W14 has been duly identified and is the very person who gave the said two out-of-Court statements.

In relation to item 4), as mentioned above, the name mentioned on the List of Witnesses of the present Information is identical to the name mentioned in the (Doc. DC), and the NIC given by W1 in Court in relation to W14 is identical to the NIC mentioned on (Doc. DC), and it has therefore been established that W14 has passed away.

And this was not put in issue by the Defence.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, the Courts is satisfied that all the criteria set out in **s. 188C(1)(a)(b)(c)(2)(a) of the Courts Act** have duly been satisfied, and the Court therefore exercises its discretion to grant Leave to the Prosecution to adduce, as evidence, the said two out-of-Court statements dated 25-09-09 and 09-11-09 given by W14 only.

The present Arguments were in relation to the admissibility of the said two statements only.

[Delivered by: D. Gayan, Ag. President]

CN645/11 – Intermediate Court (Criminal Side)

[Intermediate Court (Financial Crimes Division)]

[Date: 17 January 2023]