

THE INTERMEDIATE COURT OF MAURITIUS
Criminal Division

Cause No. 200/2017

In the matter of:

The Independent Commission Against Corruption

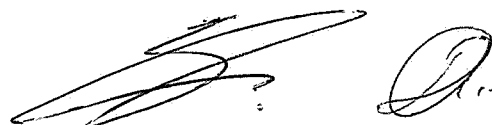
v.

Jayeshwur Raj DAYAL

RULING

The Defence is objecting to the production of 4 CDs purporting to contain certain video footage and the personal data of the Accused in the form of his voice. These materials have been obtained from the Defimedia Group in the course of the investigation of the ICAC for the purpose of comparison with the voice on an audio footage found on a mobile phone produced to the ICAC by Witness No. 20, Mr Saheed Nawab Soobhany.

At the time of the investigation, when the recorded materials were obtained, the framework for the protection of personal data was provided for by the Data Protection Act 2004. By the operation of either of section 46 or 52 of the said Act, it would have been patently both legal and permissible for the ICAC to have obtained the recorded materials it did for the purpose it intended. It would also have been perfectly in order for the said recorded materials to be produced in a Court of Law had the matter still been governed by the Data Protection Act 2004.



The Data Protection Act 2004 has, however, been repealed by the new ameliorated Data Protection Act 2017 with effect as from the 15th of January 2018. At the time the Prosecution sought to produce the documents in question, which unquestionably amounts to an act of data processing, the matter was governed by section 44(1) of the new Act.

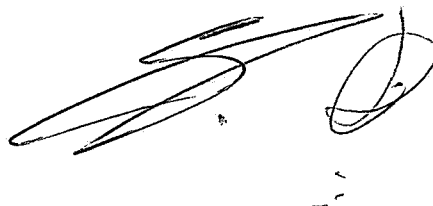
Section 44(1) (b) reads as follows:

44. Exceptions and restrictions

- (1) No exception to this Act shall be allowed except where it constitutes a necessary and proportionate measure in a democratic society for –
 - (b) the prevention, investigation, detection or prosecution of an offence, including the execution of a penalty;

The effect of the new section is to make any exception to the provisions of the Act possible only where it constitutes a necessary and proportionate measure in a democratic society.

Given the context to be a criminal trial for an offence of corruption by a public official; noting that the fact that the Accused had, at the stage of the enquiry, declined to provide a specimen of his voice; finding that the ICAC had acted legally and within the parameters of the Data Protection Act 2004 in obtaining the recorded materials; and, holding in view the relevance of such materials to the facts in issue, the Court has no difficulty in holding that the production of the documents obtained by the ICAC from the media agencies is both a necessary and proportionate measure in a democratic society.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a small dash.

On the necessity for safeguards, the 12th edition of Cross And Tapper On Evidence, alluding to the case of ***R v. Brady (18 May 2004, unreported)*** CA (in which there were such serious doubts as to whether the relevant film was what it purported to be, that a conviction, even following a confession, was quashed), suggests, at page 704, that some process of authentication of the materials relied upon is desirable.

In ***R v Robson and Another [1972] 1 WLR 651***, a case concerned with the admissibility of audio tapes, Shaw J, at 653, ruled that *'the judge is required to do no more than to satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court'*.

That test was applied in ***Choi Kit-kau v R [1980] HKLR 433***, a case concerned with the admissibility of tape recordings, where, at 438, Roberts CJ said: *Shaw J was of the view that it was necessary for the court to be satisfied, on the balance of probabilities, that the recording was authentic, by evidence of the history of the recording up to its production in court. The best method of proving that a tape recording produced in court is authentic is to show that it has been, since the time it was recorded, continuously in the custody of persons who assert that it was not tampered with. This is a course which should be followed if the authenticity of a tape is challenged and is desirable even if it is not.*

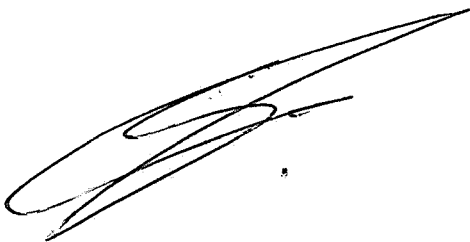
Paragraph 4-360 of the 2018 edition of Archbold reads as follows:

While the best way of establishing the authenticity of a recording is through evidence of its provenance and history, this is not the only way; authenticity can be proved circumstantially and the test is whether there is sufficient material for the tribunal of fact to conclude that the recorded sounds reproduce a conversation that occurred and which would be admissible if proved by oral testimony: H.K.S.A.R v. Yeung Ka Ho, unreported, September 26, 2013, Hong Kong Court of Final Appeal ([2013] HKCFA 82).

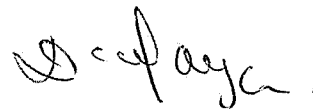


In the present case, although it would have been fitting for the nature of the materials sought to be produced as well as its provenance and history (or, as the Defence terms it, 'the chain of custody') be properly accounted for especially with regards to how and when they have been recorded and in what form, whether they are originals or not, whether they have been modified, converted or edited in any way and finally, the manner in which they have been retrieved before being handed over to Witness No.4 in the form of the 4 CDs, the fact remains that the Defence admits that the 4 CDs do contain the voice of the Accused. This, in the view of the Court, is sufficient to confer upon the CDs a prima facie attribute of authenticity.

The Court, in view of the above, rules admissible the 4 CDs sought to be produced by Witness No.4 leaving the issue of the weight to be attached thereto to be later assessed and determined.



S Y. Boodhoo
Magistrate



D. Gayan
Magistrate

9th of August 2019