Independent Commission Against Corruption v M. S. Peerbakus

2020 INT 126

THE INTERMEDIATE COURT OF MAURITIUS

CN86/15

Independent Commission Against Corruption

v

Mohamed Salim Peerbakus

JUDGMENT

1) The Accused is charged with the following offences:
   - Bribery by Public Official, in breach of section 4(1)(a)(2) of the Prevention of Corruption Act (hereinafter referred to as "the POCA") under Count One;
   - Bribery by Public Official, in breach of sections 4(1)(a)(2) and 83 of the POCA under Count Two; and
   - Public Official Taking Gratification, in breach of sections 11(a) and 83 of the POCA under Count Three.

   He pleaded not guilty to all three counts and was assisted by Mr N. Ramburn, S. C.

2) Ms P. Bissoonauthsing and Mr T. Naga, counsel, appeared for the prosecution.

3) The trial started on 5 May 2015 and has lasted five years and three months and the court has delivered three rulings in the period 12 December 2016 to 30 January 2020. The prosecution has on 6 November 2016, by way of Notice of Motion to the Supreme Court, sought to invoke the supervisory jurisdiction of the Supreme Court under section 82(1) of the Constitution to set aside Ruling II of 20 July 2017 on the ground that this court was not administering justice: on 16 May 2018 the Supreme Court set aside the application upon the motion of Ms Bissoonauthsing to withdraw same.

The case for the prosecution

4) It is the case for the Prosecution that:

5) Under Count One, in or about the month of February 2011, at La Sourdine, L'Escalier, in the District of Savanne, the accused, did whilst being a public official wilfully, unlawfully and criminally solicit from another person, for himself, a gratification for abstaining from doing an act in the execution of his duties.

The particulars are that in or about the month and at the place aforesaid, the accused solicited the sum of Rs20,000 from one Nazir Mahomed Furreedun, against whom a Warrant To Levy was issued, so as not to proceed with the auction sale of the latter's seized goods and to allow the said Nazir Mahomed Furreedun, to purchase his own seized goods;

6) Under Count Two, on or about 29 October 2011, at Highlands, in the District of Upper Plaines Wilhems, the accused did whilst being a public official wilfully, unlawfully and criminally obtain from another person, for himself, a gratification for abstaining from doing an act in the execution of his duties.

The particulars are that on or about the date and at the place aforesaid, the accused obtained the sum of Rs5000 from the said Nazir Mahomed Furreedun, so as not to offer on auction sale his refrigerator, wardrobe, TV set, washing machine and DVD player; and

7) Under Count Three, on or between 9 April and 9 August 2011, at La Sourdine, L'Escalier, in the District of Savanne, the accused did whilst being a public official wilfully, unlawfully and criminally receive a gratification, for himself, for doing an act which he induced any person to believe he was empowered to do in the exercise of his duties, although as a fact such act did not form part of his duties.

   The particulars are that on or between the date and at the place aforesaid the accused induced Nasir Mohamed Furreedun to believe he was empowered to call at latter's residence on a monthly basis to collect Rs1500 being the monthly court fees, his personal and petrol allowances and consequently received a total sum of Rs7500.

The case for the defence

8) Whilst admitting knowing the Furreedun family, and having served papers on the said family in his official capacity as Court Usher, the accused denied the charges under all three counts in his five unchallenged out-of-court statements (Docs. C, C1, C2, C3 and C4).

9) No evidence was adduced by the defence.

Analysis

10) We are in the peculiar situation where we have to determine the present matter based on the testimony of the wife, daughter and son of late Mr Nazir M. Furreedun, whilst it was only the version of the latter that was put to the accused when recording his defence statements. In the case of *Mrs P. Marday v The State* [2000 SCJ 225] the Supreme Court says the following:

"In a criminal case it is normal to assume that the version that is put to an accused party when recording his or her defence is the very complaint that was made by the victim."

11) We are fully alive though that the version of late Mr Nazir M. Furreedun that was put to the accused in respect of Counts One and Three mention the presence of his wife and/or children when the accused allegedly solicited or was remitted sums of money.

Bribery by Public Official – Count One[1]

12) The Supreme Court has in the case of *R. Hanumunthadu v The State & Anor* [2010 SCJ 288] specified the elements of the offence under section 4(1)(a) of the POCA, as follows:

"In our view in order to establish its case on a charge under section 4(1) of the POCA, what the prosecution had to establish, was that the appellant being a public official did solicit from the complainant a gratification for doing an act in the execution of his functions. It had to establish that the solicitation of the gratification was in relation to an act which falls within the execution of the officer's functions and that processing and certification of claims averred in the information formed part of the duties of the appellant."

13) The prosecution has referred this court to the cases of *S. Gowry v Independent Commission Against Corruption & Anor* [2016 SCJ 499] and *Hamtohul Balakrishna v ICAC* [2008 INT 46] on the elements of the offence. We wish to point out that the charge in the case of Gowry was under section 4(1)*(b)* (2) of the POCA, whereas the charges against the accused under Counts One and

[1] (1) Any public official who solicits, accepts or obtains from another person, for himself or for any other person, a gratification for -
(a) doing or abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties;
…
shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.
(2) Notwithstanding section 83, where in any proceedings against any person for an offence, it is proved that the public official solicited, accepted or obtained a gratification, it shall be presumed, until the contrary is proved, that the gratification was solicited, accepted or obtained for any of the purposes set out in subsection (1)(a) to (e).

Two are under section 4(1)*(a)*(2) of the said Act. The elements are not the same so the case is not strictly relevant. The case of *Hamtohul* is an Intermediate Court case and is at best of persuasive value.

14) We place on record that Mr Hamtohul, who had given notice to appeal against his conviction on the day of judgment, passed away before the appeal was heard. His widow sought the leave of the Supreme Court to proceed with the appeal, but the court said "when that person dies, the appeal proceedings must abate." and that the widow could not proceed with the appeal and dismissed same.

15) In the case before us, the prosecution bears the burden of proving beyond reasonable doubt the following elements:

(a) the accused was a public official;
(b) he solicited from another person a gratification for himself;
(c) he abstained from doing an act in the execution of his duties.

(a) Is the accused a public official?

16) 'Public official' is defined at section 2 of the POCA as follows:

> "public official"
> (a) means a Minister, a member of the National Assembly, a public officer, a local government officer, an employee or member of a local authority, a member of a Commission set up under the Constitution, an employee or member of a statutory corporation, or an employee or director of any Government company; and
> (b) includes a Judge, an arbitrator, an assessor or a member of a jury;

17) Section 1A of the Court Ushers Act provides that 'court usher' "means an usher of a court who is a public officer and whose appointment is notified in the Gazette under section 2;", which falls within the meaning of 'public official' at section 2 of the POCA.

18) It is admitted by the accused that he is a court usher and that he was appointed court usher in 1995 and became a senior court usher in 2007 (see also Doc. B wherein the Master and Registrar replying to the ICAC states that the accused is a Senior Court Usher). Therefore, it is established that the accused is a public official within the meaning of section 2 of the POCA.

(b) Did the accused solicit from Mr Nazir Mahomed Furreedun a sum of Rs20,000 for himself at La Sourdine, L'Escalier, in the month of February 2011?

19) 'Gratification' is defined at section 2 of the POCA. It reads as follows:

> (a) means a gift, reward, discount, premium or other advantage, other than lawful remuneration; and
>
> (b) includes -
>
> (i) a loan, fee or commission consisting of money or of any valuable security or of other property or interest in property of any description;
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> (ii) the offer of an office, employment or other contract;
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> (iii) the payment, release or discharge of a loan, obligation or other liability; and
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> (iv) the payment of inadequate consideration for goods or services;
>
> (c) the offer or promise, whether conditional or unconditional, of a gratification;

20) We find that money - the Rs20,000 - falls within the definition of gratification, namely an advantage other than lawful remuneration.

21) The version of the Furreeduns is to the effect that the accused served the Memorandum of Seizure on a Saturday in February 2011 and not on 23 February 2011 (which is a Wednesday) and the version of Mr and Mrs Furreedun that was put to the accused is that he solicited the Rs20,000 on

that Saturday, the date of which has remained unknown. Mr Nazir M. Furreedun was called and started deposing on 26 March 2019 and passed away on 8 November 2019 without having been examined in chief beyond what is on record and without having been cross-examined. In the circumstances, the court cannot consider his evidence or attach any weight to same. Therefore, the case for the prosecution rests essentially on the evidence of immediate members of the Furreedun family and on circumstantial evidence from other prosecution witnesses.

22) It is not disputed that the accused had gone to the Furreeduns' house at La Sourdine, L'Escalier, in February 2011 for the purpose of serving the Memorandum of Seizure and that he had gone there several times before for the purpose of serving documents on several members of the Furreedun family for other proceedings. We note that the entry made by the accused on the Warrant to Levy document - Doc. B4 - to the effect that he executed the warrant on 23 February 2011 and the Entry dated 24 February 2011 made in the Warrant to Levy Register - Doc. D - in respect of the Memorandum of Seizure have remained unrebutted. We bear in mind the evidence of Messrs M. H. Pirbacosse and Z. A. Eddoo (Witnesses nos. 11 and 16) that the accused followed the procedure.

23) We bear in mind what the Supreme Court said in *M. Vythilingum v The State* [2017 SCJ 379], namely:

> "Giving evidence in Court is not a memory test and failure to recollect with precision all the circumstances and details of an incident is understandable. What is important is for the Court to be satisfied that a witness is speaking the truth in substance."

24) The pronouncement of the Supreme Court in the case of *Ramcharran v/s The Queen and Hoober v/s The Queen and Bhoyroo v/s Others* [1977 MR 226] is also relevant, as follows:

> "It is a fallacy that evidence should be treated as a monolithic structure which must be either accepted or rejected en bloc. On the contrary, it is the function of a trained

magistrate to weigh and to criticize testimony so as to distinguish what may safely be accepted from what is tainted or doubtful."

25) After a careful consideration of the evidence of Ms B. Idiana Furreedun, Mrs B. Nariman Furreedun and Mr M. I. N. Yassine Furreedun (Witnesses nos.20, 6 and 7) we find that, even making allowance for the fact that much time has elapsed since 2011 and the death of Mr Nazir M. Furreedun, those witnesses were below par. Ms Idiana Furreedun merely said that she remembers having mentioned the last two Saturdays of February 2011 in her statement, but was not made to confirm the presence of the accused for the purpose of serving seizure documents on a Saturday in February 2011.

26) It is also obvious that there is no clear and direct evidence from Ms Idiana Furreedun that in February 2011 the accused solicited from Mr Nazir M. Furreedun the sum Rs20,000 for himself: she is extremely vague all throughout her testimony in court and the only time she mentioned the sum of Rs20,000 in examination-in-chief was to say that the sum the accused asked her father must have been more and then later, that it must have been about that amount. It became more evident in cross-examination that she did not know much about the matter and that she derived any knowledge of the seizure from hearing her parents talk at home, which is understandable inasmuch as she was a high school student in 2011 and she herself stated that she was more focused on her studies. This renders her evidence hearsay. Her version in re-examination that a court usher asked for and obtained Rs20,000 and her ignorance of the recipient and claimant of the said sum make her evidence far from conclusive and is insufficient and therefore cannot be acted upon.

27) We can no more rely on the evidence of Mrs Nariman Furreedun inasmuch as her testimony is equally very vague, fraught with inconsistencies and appears to be mere conjecture. After having claimed in examination-in-chief at first that the accused informed them that they could purchase their seized items if they had Rs20,000 for the 'leasing', but later said that she was not aware who suggested the sum of Rs20,000 and that there was an agreement for Rs20,000 without specifying between whom. However, in cross-examination she deposed to the effect that she was not present

when the accused came for the seizure on the Saturday and only guesses that the issue of money, more specifically Rs20,000, might have cropped up then. She finally admitted that the accused had not asked Rs20,000 for himself, but had informed them that they had to pay such sum to the leasing company to save their movables. Her credibility is further undermined by the fact that she claimed having from upstairs seen Mr Nazir M. Furreedun give money to the accused "through the floor" (sic) whereas Mr Yassine Furreedun gives the lie to such version as he said that it was impossible to see downstairs from the living room; she did not specify what sum of money was given to the accused and when this happened; and she denied that she did not tell the ICAC she saw money being remitted to the accused.

28) Mr Yassine Furreedun admitted having given a statement to the ICAC on 21 March 2012, but failed to positively identify the signature thereon as his, since his testimony is to the effect that he was not sure it was his signature on the statement because he did not see it as being similar as his, the signature was almost like his, and on counsel for the prosecution asking him if he wanted to look again at his signature, replied that he did not know what to say to her and that he was not sure he could remember what he said to the ICAC. In the circumstances, he could not be referred to the contents of the said statement to refresh his memory or be confronted with a previous inconsistent statement. Apart from the fact that the accused went to their place at La Sourdine, L'Escalier, several times inclusive of 29 October 2011 and their talking on the phone on 31 October 2011, which we note by the way, as revealed and admitted during his cross-examination, was a call *from* him to the accused contrary to what he said in one of his statements to the ICAC, the rest of his evidence is unreliable since he unequivocally said that he was not privy to the conversation between Mr Nazir M. Furreedun and the accused or to any arrangement between them and he did not talk to the accused himself. His mention of the sum of Rs20,000 being needed to get their seized items back is in reference to what Mr Nazir M. Furreedun told him and is therefore hearsay. As with the other immediate members of the Furreedun family, his evidence falls short of establishing that the accused solicited the sum of Rs20,000 for himself in the month of February 2011.

29) We wish to add that Mr A. Ankiah, Senior Telecom Engineer, Mauritius Telecom (Witness no.10) produced the itemised bills of phone number 770 6168 of "Mohamuddin Yaseen Furreedun" and although Mr Yassine Furreedun admitted that he was using that mobile phone number at the time, the prosecution did not enlighten the court on the discrepancy in the name of the registered owner of the phone number.

30) In the light of the above, we find that the evidence led by the prosecution is not sufficient to establish the charge against the accused under Count One.

(c) Did the accused not proceed with the auction sale of Mr Nazir M. Furreedun's seized goods to allow the latter to purchase his own seized goods?

31) As the prosecution has failed to prove that in the month of February 2011 the accused solicited from Mr Nazir M. Furreedun the sum of Rs20,000 for himself, there would be no need for the court to consider whether he abstained to do an act in the execution of his duties, namely from proceeding with the auction sale of Mr Nazir M. Furreedun's seized goods to allow the latter to purchase them. Still for the sake of completeness we shall do so.

32) There is undisputed evidence on record that the accused followed the procedure for the holding of the sale on 29 October 2011 upon receiving the letter from the Head Clerk of the Intermediate Court (Civil Division) dated 25 August 2011 - see Docs. B6, B7 and B8 - and that he was in charge of, and fixed, the sale to 29 October 2011 near the market place at L'Escalier. There is also evidence on record that the seized items were taken out of the Furreedun's house at L'Escalier: the accused admitted as much in his defence statements dated 25 April 2011 - see Doc. C. Mr Yassine Furreedun said that his father and his friends removed the seized items from their house, but the accused said in his defence statement dated 9 May 2013 - see Doc. C2 - that he had contacted his friend and cousins to help him to do so and to load the seized items into a truck: although there is nothing in the Code de procédure civile or the Court Ushers Act precluding an usher from asking his friends or family to help him in such a situation, it is on record as per the testimony of Mr A. J. R. Robert S.A. (Witness no.13) that the usher contacts the party seeking to execute a Warrant to Levy for transport facilities. Mr Robert S.A. none the less agreed that at times ushers make their

own arrangements. Whilst we entertain some doubt about the propriety of the accused asking his friend and cousins to help him with the seized items of the Furreedun family, we cannot conclude therefrom that he had asked Mr Nazir M. Furreedun for a gratification in February 2011.

33) We note that the name of the debtor in the Notice of Sale CN1279/2010 in the Government Gazette of 5 September 2011 - Doc. B8 - is *"Mohamed Nazir Furredun"* whereas the name mentioned in the Information in Count One is *"Nazir Mahomed Furreedun"*.

34) We take into account the discrepancy in the version of the accused in his defence statement of 25 April 2013 - see Doc. C - and the evidence of Mr Nazir Woomed (Witness no.15) and Mr Jimmitry A. Woomed (Witness no.14) on the access to the Furreeduns' house. According to Mr Nazir Woomed, Mr Nazir M. Furreedun had the key to the house in October 2011 and according to the accused he had access to the house on 29 October 2011 and could remove the seized items from it. Whilst bearing in mind the numerous contradictions in the testimony of Mr Jimmitry Woomed, we find that his testimony to the effect that he had phoned the accused after 10h30 and around 11h10-11h16 and the accused had told him that he had no access to the house and that it was closed and unattended, remains undisputed. This is exactly what he reported to Mr Robert S.A.: the e-mail that the latter produced - see Doc. S - confirms such version. On the other hand, the accused said in his statement of 9 May 2013 - Doc. C2 - that he had told Mr Jimmitry Woomed that he could not proceed with the sale as the property did not belong to the debtor anymore, but to Mr Nazir Woomed, and he could not enter the premises without the new owner's consent. Whilst the failure to access the house may have been true when the accused first repaired there, bearing in mind that he said he reached the Furreeduns' house at La Sourdine, L'Escalier, around 7h45, saw the house closed and unattended, made enquiries in the vicinity, was on his way to L'Escalier Police Station when he met with Mr Nazir M. Furreedun and was still near the market place around 11h00, it remains that he did not inform Mr Jimmitry Woomed of his meeting and subsequent access to the house when they talked on the phone either around 11h00 or 11h16. The failure of the accused to report such occurrence to Mr Jimmitry Woomed reveals the inconsistency of his version of the events of 29 October 2011.

35) We further find that there is no clear evidence about what happened to the seized items inasmuch as Mr Yassine Furreedun said that "they" did not manage to take them and the accused merely said in his defence statement dated 25 April 2013 - Doc. C - that he did not proceed with the sale upon the former showing him a document from the Supreme Court to the effect that the Furreeduns' house had been sold.

36) The issue that arises now is whether the accused unlawfully used the pretext that the Furreeduns' house had been sold to a third party not to proceed with the auction sale of the seized goods to allow Mr Nazir M. Furreedun to purchase same. It is not disputed by the defence that the sale was not done. This is apparent from Docs. B6 and P where the accused made entries to the effect that the sale could not be effected on 29 October 2011 because Mr Nazir M. Furreedun's house had been seized and sold at the Master's Court. We take into account that Messrs Pirbacosse and Eddoo both said that they would need the consent of the new owner of a property to enter a property and would not proceed with a sale, although we are aware that Mr Eddoo could not say what an usher would do if he got access to a property which had been sold to a third party. In any event, we find that the prosecution has not adduced any evidence that the accused was required by law to proceed with the auction sale notwithstanding the fact that the Furreeduns' house had been sold to a third party.

37) In the case of *V. Kulara v D. S. Sunassee i.p.o S. Sunassee* [2001 SCJ 140] the respondent had entered an interpleader to oppose the sale by auction of a vehicle seized against the execution debtor on the ground that he was the rightful owner thereof, as he had purchased it from the execution debtor, his father. The trial court, whilst stating that the sale appeared doubtful, found for the respondent and ordered the usher not to proceed with the sale. On appeal, the Supreme Court held that the sale between the Sunassees had been a sham and authorised the usher to proceed with the sale by levy. In the present case, the accused had gone through the procedure to fix the sale and was in the process of removing the seized items from the house when he was shown the document to the effect that the house had been sold at the Supreme Court. Since the accused was shown a document emanating from the Supreme Court to the effect that the

Furreedun house had been sold at the Master's Court, there was no reason for him to consider that such sale was a sham, which circumstance would have potentially entitled him to proceed with the auction sale.

38) Even if the accused got access to the property, we find that there is no evidence to establish that he acted unlawfully and criminally when he did not proceed with the auction sale.

39) The contention of SI Monneron (Witness no.1) was that the accused knew as from February 2011 that he would be in charge of the sale of the seized items as the "district fell under the regions of his responsibility" (sic), in other words that La Sourdine, L'Escalier was in the district assigned to him. We note however that witness Monneron immediately after assented to the proposition of Learned counsel for the defence that no usher who carries out a seizure knows that the sale will be allocated to him. Messrs L. R. Luckhoo (Witness no.18) and Eddoo support the version of the accused that an usher cannot know at the time he effects a seizure that he will be the one to do the sale. Mr Eddoo also added that a sale might not even materialise for various reasons.

Bribery by Public Official – Count Two[2]

40) We have earlier referred to the case of *R. Hanumunthadu* on the elements of the offence under section 4(1)(a) of the POCA: the case is of relevance under Count Two also. The prosecution bears the burden of proving the following elements:

(a) the accused was a public official;

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[2] S.4 (1) Any public official who solicits, accepts or obtains from another person, for himself or for any other person, a gratification for -
(a) doing or abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties;
…
shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.
(2) Notwithstanding section 83, where in any proceedings against any person for an offence, it is proved that the public official solicited, accepted or obtained a gratification, it shall be presumed, until the contrary is proved, that the gratification was solicited, accepted or obtained for any of the purposes set out in subsection (1)(a) to (e).
S.83 In the course of a trial of an accused for a corruption offence, it shall be presumed that at the time a gratification was received, the recipient knew that such gratification was made for a corrupt purpose.

(b) he obtained from another person a gratification for himself;

(c) he abstained from doing an act in the execution of his duties.

(a) Is the accused a public official?

41) We refer to our findings under Count One on this element of the offence. We find it established that the accused is a public official within the meaning of section 2 of the POCA.

(b) Did the accused wilfully, unlawfully and criminally obtain from Mr Nazir Mahomed Furreedun a sum of Rs5000 for himself on or about 29 October 2011 at Highlands, Plaines Wilhems?

42) We have earlier already considered the definition of 'Gratification' under the POCA: we find that money - here the Rs5000 - falls within the definition of gratification, namely an advantage other than lawful remuneration.

43) For the reasons expatiated earlier, the evidence of Mr Nazir M. Furreedun is excluded. The case for the prosecution in respect of Count Two therefore rests primarily on the evidence of the immediate and extended family of Mr Nazir M. Furreedun and on circumstantial evidence from other prosecution witnesses. Whilst Mrs B. Nazira Meeajane (Witness no.5) said that her brother, Mr Nazir M. Furreedun, asked her for a loan of Rs5000 she did not give any details of the date of the request or the place where this request was made, she could not remember if she had said in her statement to the ICAC that her brother told her he had given the money to a court usher, she was not told the name of the court usher and was unsure if her brother had even phoned her to ask for the loan. Furthermore, it came out during her deposition in court that she replied in the

affirmative to the questions of her ICAC interviewers, thereby casting serious doubt on the reliability of her version to the ICAC and as a consequence, on her evidence in court.

44) Ms Idiana Furreedun does not mention the sum of Rs5000. Mrs Nariman Furreedun said that her husband paid Rs5000 and this only on the day the usher came to inform them that he would seize their items and later she said that the Rs5000 was not remitted in her presence: she does not mention any date or location. Mr Yassine Furreedun could not remember exactly having told the ICAC that they had to give the accused a sum of Rs5000 and could not identify his initial on the statement dated 9 January 2013. Therefore, the court is still in the dark whether the alleged remittance was made in February 2011 or October 2011 or even if it took place. In the circumstances, we find that their evidence is neither here nor there and cannot be acted upon.

45) It is to be noted that Count Two of the Information charges the accused with *obtaining* the sum of Rs5000 from Mr Nazir M. Furreedun and that in the version of Mr Nazir M. Furreedun that was put to the accused when his statement was recorded on 30 April 2013 - Doc. C1 – there is no mention of anyone witnessing the remittance of money on 29 October 2011 at Highlands.

46) The accused said in his statement of 30 April 2013 - Doc. C1 – that when he told Mr Nazir M. Furreedun he would be at a wedding dinner of a remote relative of his, commonly known as Bhai, who resided at Belle Vue Chemin Grenier, at Sir Abdool Razack Mohamed Hall, at Phoenix, on 29 October 2011, the latter invited him to meet his sister at Highlands. We note by the way that SI Monneron mentioned "Abdool Raman Osman Hall" when he deposed in examination-in-chief, so that there is the possibility that he enquired at the wrong venue. However, when the accused was asked who he met at the dinner, at first, he said that it was difficult for him to recollect who he met during the dinner and then recanted his version and said that he did not attend the dinner because his son was sick in the car and he had stopped at Camp Fouquereaux to get him a drink of soda water and then went back home. Mr M. Nasser Aullyram (Witness no.17) testified to the effect that he is not related to the Peerbakus family of Chemin Grenier, does not know the accused, and did not invite him to his wedding reception on 29 October 2011 at Razack Mohamed Hall. He

conceded in cross-examination that it may be his wife's family sent the accused an invitation, but as the accused said that the relative getting married was the bridegroom and was called "Bhai", therefore necessarily a man, it stands to reason that he could not have been invited by the bride's family. Mr Aullyram's testimony was convincing, whereas the accused's explanations about the wedding, his attendance at same and his presence or not at Highlands at the material time was not, for being contradictory.

47) There is undisputed evidence from Mrs I. Chinan (Witness no.19) of Emtel that on 29 October 2011 at Bonne Terre there was a call from mobile phone number 979 7491, registered in the name of Mrs Nazira Meeajane, to the accused's mobile phone number 793 7653 at 15h47 and return calls from the accused to mobile phone number 979 7491 at 17h10, 17h41, 18h55 and 19h02. It is on record from Mrs Nariman Furreedun that the number she had given to the ICAC as being her husband's is in fact that of her sister-in-law, Mrs Nazira Meeajane, who had given it to her husband to use. There is also undisputed evidence from Mr Ankiah that on 28 and 29 October 2011 Mr and Mrs Nazir M. Furreedun and Mr Yassine Furreedun called the accused. We bear in mind though that both Mr Ankiah and Mrs Chinan deposed to the effect that locations may or may not be indicative of the exact location of the caller.

48) According to the accused's version - see defence statement of 30 April 2011 Doc. C1 - he denied having met Mr Nazir M. Furreedun at Highlands "on that day" (sic) meaning 29 October 2011, but then he goes on to say that he "called at Highlands… bit late & as it was raining" (sic) and his son was sick, suggested to Mr Nazir M. Furreedun to bring his sister to the Intermediate Court on the following Monday. We have gone through the Mauritius Telecom Itemised Bills for 29 October 2011 and we note that such records indicate that the accused was in the south of the island from 6h40 up to 18h48, and that he received numerous phone calls throughout the day, thereby leaving no possibility that he had been at St Aubin or Quatre Bornes on that day – see Docs. E, E1 to E4. There were two outgoing mobile phone calls at 18h55 and 19h02 from the accused's phone number to mobile phone number 979 7491, the registered owner of which is Mr Nazir M. Furreedun, indicating that the accused was in the region of Midlands and Camp Fouquereaux at

the relevant time. The Emtel Itemised Bills also place Mr Nazir M. Furreedun at Highlands from 17h41 to 20h36 on the material date.

49) Still, although it is established by the prosecution that the accused was in Highlands in the evening of 29 October 2011, that there were several phone communications between members of the Furreedun family and the accused on 28 and 29 October 2011 and the itemised bills contradict his version that he went to St Aubin and Quatre Bornes after leaving L'Escalier, we find that this is not sufficient for the court to reasonably infer that the accused obtained Rs5000 from Mr Nazir M. Furreedun at Highlands on 29 October 2011.

(c) Did the accused not offer for auction sale Mr Nazir M. Furreedun's refrigerator, wardrobe, TV set, washing machine and DVD player?

50) As the prosecution has failed to establish the second element of the offence under Count two, the court would not have to consider whether the accused abstained to do an act in the execution of his duties, that is, so as not to offer for auction sale the refrigerator, wardrobe, TV set, washing machine and DVD player of Mr Nazir M. Furreedun. We shall do so for the sake of completeness.

51) Although the Notice of Sale mentions ten seized items to be sold at auction, the Information only mentions five items, the description of which does not tally with the Notice of Sale and there is therefore no evidence to establish that the items listed in Count Two are the very items listed in the Notice of Sale. There is evidence from SI Monneron that the refrigerator, wardrobe, TV set and washing machine had remained at Closel and L'Escalier, but as the accused did not proceed with the sale, it stands to reason that the said items would still be there.

52) We note that the accused's own version in his statement dated 25 April 2013 - Doc. C, folio 119617 - is that he realised that the refrigerator, TV and washing machine were missing and had been replaced by older models. In spite of having informed Mr Nazir M. Furreedun of the offence

of purloining seizure, he concluded that there was no such offence and there is no evidence that he gave a declaration to that effect.

53) We further note what whilst the accused said in his defence statement of 25 April 2013 - Doc. C – that when his friends and he were removing the seized items from the house on 29 October 2011, Mr Yassine Furreedun came and argued with his father and then showed him (accused) a document form the Supreme Court to the effect that the house had been sold since 9 June 2011, Mr Yassine Furreedun categorically denies that he talked to the accused at the time. Even though Mr Yassine Furreedun answers in cross-examination that he accompanied his father everywhere because of the latter's ill-health and was always by his side, he none the less consistently said that he was at some distance from his father and the accused on 29 October 2011 when they were all at the house at La Sourdine, L'Escalier. At the end of the day, we have no idea of the exact occurrences on that day.

54) More fundamentally, there is no evidence on record to establish that the accused intentionally refrained from offering Mr Nazir M. Furreedun's refrigerator, wardrobe, TV set, washing machine and DVD player on auction sale.

55) In the light of the foregoing paragraphs, we find that the prosecution has not established that the accused obtained the sum of Rs5000 from Mr Nazir M. Furreedun on 29 October 2011 at Highlands to not offer for sale his refrigerator, wardrobe, TV set, washing machine and DVD player.

56) We take note that Ms Bissoonauthsing submitted that it is not part of the case for the prosecution that the sale did not take place because the accused took money. We are taken aback by such submission as it is averred in Count One of the Information that the accused solicited a gratification from Mr Nazir M. Furreedun *"so as not to proceed with the auction sale of the latter's seized goods…"*.

57) Be that as it may, our conclusions in respect of Counts One and Two of the Information are supported by the very motion made by counsel for the prosecution in the course of her submissions to have Counts One and Two dismissed on the ground that there is no evidence on which the court can convict.

Public Official Taking Gratification - Count Three[3]

58) We note that in Count Three the name mentioned in the particulars is *"Nasir Mohamed Furreedun"* (sic) and that this person's name does not appear on the list of witnesses. There is no way for the court to be certain that there is perfect identity between that person and Witness no.5/Nazir Mahomed Furreedun. Be that as it may, since Learned defence counsel did not raise any objection to Count Three as it stands, but merely made an observation on the issue at a late stage of his submissions qualifying it as a "technicality", the court will proceed to assess the evidence in relation to that count.

59) The case of *R. Hanumunthadu* that we cited earlier is relevant to the present charge also. The prosecution bears the burden of proving the following elements:

(a) the accused was a public official;
(b) he received a gratification for himself;
(c) he did an act which he induced a person to believe he was empowered to do in the exercise of his duties, although as a fact such act did not form part of his duties.

[3] S.11(a) Any public official who accepts or receives a gratification, for himself or for any other person -
(a) for doing or having done an act which he alleges, or induces any person to believe, he is empowered to do in the exercise of his functions or duties, although as a fact such act does not form part of his functions or duties;
shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding10 years.
S.83 In the course of a trial of an accused for a corruption offence, it shall be presumed that at the time a gratification was received, the recipient knew that such gratification was made for a corrupt purpose.

(a) Is the accused a public official?

60) We refer to our earlier findings on this element of the offence: it is established that the accused is a public official within the meaning of section 2 of the POCA.

(b) Did the accused induce Mr Nasir Mohamed Furreedun to believe that he was empowered to call at his place on a monthly basis to collect Rs1500 being the monthly court fees, his personal and petrol allowance, and consequently received a total sum of Rs7500 for himself between 9 April 2011 and 9 August 2011 at La Sourdine, L'Escalier?

61) As highlighted above, we found that money fell within the definition of gratification at section 2 of the POCA, namely an advantage other than lawful remuneration. The same conclusion applies here.

62) It is provided in the Legal Fees and Costs Rules 2000 (Courts Act, Fourth Schedule) that an attorney or a party shall pay fees into the Consolidated Fund and at sections 2 and 26(5)(a) of the Court Ushers Act that all court ushers appointed shall receive the salaries and allowances as may be provided in the Estimates and that an applicant shall deposit the costs of required services, inclusive of the cost of travelling of the usher for the District Clerk to entertain same.

63) In the light of the above, the accused would not have been empowered in the exercise of his duties to collect from Mr Nazir M. Furreedun monthly court fees and personal and petrol allowances. The issue that arises at this stage is whether he induced the latter to believe he was empowered to do so.

64) As we said earlier, since Mr Nazir M. Furreedun was partially examined-in-chief and not cross-examined at all, we cannot consider or attach any weight to his evidence. The case for the prosecution therefore rests on the evidence of the other members of the Furreedun family and

circumstantial evidence from other prosecution witnesses. Ms Idiana Furreedun mentioned a man coming to collect money in the afternoons and a sum of about Rs1000 to Rs2000, but does not specifically say that it was the accused who regularly came to collect money from her father, does not say that it was a sum of Rs1500 and does not mention any date, let alone the months of April to August 2011. Mr Yassine Furreedun was not privy to any conversation or agreement between his father and the accused and his information about the seizure and seized items amounts to hearsay. He does not mention any monthly payment of Rs1500 in the months of April to August 2011 throughout his testimony.

65) Learned Senior Counsel submitted in relation to Mrs Nariman Furreedun that there was a desirability for corroboration of her evidence. In the case of *DPP v Kilbourne* [1973] A.C 792, as cited in *S. O. Kassim v R* [1988 SCJ 70], the Court of Appeal said the following:

> *"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise."*

66) Mrs Nariman Furreedun deposed to the effect that her husband made monthly payments, but was not certain about the sum, saying that it could be Rs1500 and that there were two agreements, one of which was for monthly payments to the accused. We note that she does not mention any date or the period of time over which the accused was allegedly at their place to collect the money. She also claimed that when she was upstairs she saw "through the floor" (sic) that her husband was remitting money to the accused, which in itself is peculiar, and which moreover is at loggerheads with the evidence of Mr Yassine Furreedun that one cannot see downstairs from upstairs/the living room. There is also the fact that she related to the ICAC that the accused phoned each month before he came to collect the money around the 8th of each month.

67) The possibility of calls having been made from other phone numbers cannot be excluded. Be that as it may, no doubt has been cast on the testimonies of SI Monneron and Mr Ankiah to the effect that there was no communication between the accused and Mr and Mrs Nazir M. Furreedun and Mr Yassine Furreedun in the period February to August 2011. Having perused the unchallenged itemised bills - Docs. E, E1 to E4 and F - we find that there is indeed no evidence of communication between the persons mentioned during the material period. All the foregoing, coupled with Mrs Nariman Furreedun's numerous instances of lapses of memory and inconsistencies between her testimony in court and her version to the ICAC render her evidence unreliable. In the circumstances the issue of corroboration does not even arise.

68) It is not denied by the accused that he repaired to Mr Nazir Mahomed Furreedun's place at La Sourdine, L'Escalier on several occasions prior to April 2011, but in the absence of any cogent evidence from the prosecution or evidence from which the court can reasonably infer that the accused induced Mr Nazir M. Furreedun/Nasir Mohamed Furreedun to believe that he was authorised to collect monthly court fees and personal and petrol allowances from him and collected Rs1500 each month from April to August 2011, the single fact that he was at Mr Nazir M. Furreedun's/Nasir Mohamed Furreedun at La Sourdine, L'Escalier on several occasions is not sufficient to establish the charge against him under Count Three.

69) Mr Ramburn S.C. submitted that the accused's version was not investigated and independent evidence not sought and that this impinges on the fairness of the investigation. In the case of *The Director of Public Prosecutions v T. P. J. M. Lagesse & Ors* [2018 SCJ 257] the Supreme Court explains clearly what the duty of prosecuting authorities is when recording a statement from a suspect, as follows:

> "The baseline is therefore that the accused must be made aware of the case against him. What effectively does that imply? Quite clearly this will depend on the particular

circumstances of each case, but evidently cannot mean the "charges as per the information lodged before the trial court" be put to him at the stage of enquiry.

Where there is a complaint, it would de facto imply that the suspect has to be confronted with that complaint; and if there were additional incriminating evidence gathered during the course of the enquiry those should be put to the suspect…

…

In fact there is no such thing as a duty to put the charge as per the eventual information to the suspect at enquiry stage. He is normally, as he should be, informed of the facts and circumstances against him, or reproached of him…"

70) Although there is no evidence before the court that the Furreeduns have any convictions on record, even if it is so, this does not automatically put in doubt their testimony. However, even though SI Monneron said that he did not find it important or necessary to investigate what the accused told him, he none the less admitted that whilst fairness demands that he verifies whatever the accused said, he did not do so. We note that he did not confront the accused with the photos taken at the two loci; he did not ascertain from the Supreme Court that the house, in which all the seized movables were, had been sold; he did not ask for itemised phone bills for the period prior to February 2011; when questioning the accused on 30 April 2013 he mentioned the time of his meeting Mr Nazir M. Furreedun on 29 October 2011 as being "at about 19h00" when the version that the latter gave to the ICAC was that it was "around 18h30"; still in the statement of 30 April 2013 he put to the accused that the "last time" the accused said that he came to meet Mr Nazir M. Furreedun at Highlands on 29 October 2011 when there is no such mention in the accused's statement dated 25 April 2013 and explained this by saying that it was a fair question because the accused was legally assisted; he mentioned the dates 9 and 10 April 2011 when questioning the accused whereas Mr Nazir M. Furreedun had also referred to 8 April 2011 and explained the discrepancy by attributing it to a slip of the pen. We note that SI Monneron systematically evaded

certain questions of Learned defence counsel. Moreover, he reluctantly admitted that the accused did what the law requested of him in relation to the procedure for the seizure and sale of the seized items, but we find that there is a major contradiction in his testimony as to whether the sale was carried out or not. The witness also admitted that the police had to obtain the consent of the new owner of the house, Mr Iqbal M. Joomun, before DPC Boodnah (Witness no.4) could take photos (Docs. A, A1 to A10), that Mr Nazir M. Furreedun does not give precise dates and that he did not put the whole question properly to the accused in relation to the dates in April 2011. In the light of all the foregoing, we cannot but conclude to some deficiencies in the enquiry.

Conclusion

71) For all the reasons given above we find that the prosecution has failed to prove the case against the accused beyond reasonable doubt under Counts One, Two and Three. We accordingly dismiss Counts One, Two and Three against the accused.

W. V. Rangan
President, Intermediate Court

D. Gayan
Magistrate, Intermediate Court

This 26 August 2020