

ICAC v RAMDONEE VISHUDEO

2020 INT 167

IN THE INTERMEDIATE COURT OF MAURITIUS
(CRIMINAL DIVISION)

Cause Number 785/2012

In the matter of:

THE INDEPENDENT COMMISSION AGAINST CORRUPTION

v

VISHNUDEO RAMDONEE

Ruling

1. The present matter relates to a corruption offence, namely '*Trafic D'influence*', in breach of Section 10 (5) of the Prevention of Corruption Act 2002.
 - 1.1. It is averred that, Mr. Vishnudeo Ramdonee (the accused) had, on or about 03 January 2012, whilst being the Legal Counsel and Chairperson of an Objection Committee at the MRA, solicited money in the sum of Rs.10 000 for himself, from one Navin Gojudhur (the complainant), in order to set aside an objection against the renewal of the latter's liquor licence.
2. The trial has started. The proceedings have reached the stage of the examination in chief of Mr. Jeebun, the then Team Leader in the Internal Affairs Division of the Mauritius Revenue Authority (MRA), who was supervising and investigating into the present alleged corruption case. Upon a question as to the identity of the person against whom, the complaint he was investigating into, was directed, Learned Senior Counsel for the defence, took objection to any evidence being led from the witness in relation to the internal affairs investigation, more especially in relation to an alleged identification of the accused by the complainant, on the ground that such an identification process did not follow the rules and breached the constitutional rights of the accused.

2.1. Arguments were heard on both sides. Hence the present ruling.

3. The main issue which this Court has to rule upon is, whether the evidence surrounding the circumstances in which the complainant, Mr. Navin Gojudhur, had pointed in the direction of the accused, whilst the latter was stepping out of the building of the MRA, is admissible? It is contended by the prosecution that it is because such evidence is essentially, relevant; the 'recognition' was voluntary and spontaneous; and there was nothing improper done by Mr. Jeebun during such exercise.

4. This Court has duly considered the submissions offered in the present matter and all the principles that have emerged from the authorities to which I have been referred. I do not propose to recite the submissions made on behalf of both parties but I shall address the essential and relevant points raised when determining the issues under consideration.

4.1. Reference was made to the *Turnbull* guidelines and to case law on the holding of an identification parade and other forms of identification.

5. There is no dispute as to the established principles governing evidence of visual identification. The dangers of over-reliance on such evidence has been made plain for more than a century and the miscarriages of justice which occurred in cases based upon identification evidence are well known. In that respect, the *Turnbull* guidelines/direction, which relate to the risks which attach to identification evidence in general and the caution to be exercised when considering disputed identification evidence, have been consistently applied in the UK and before our Courts. I therefore do not propose to set them out but shall apply the principles, which have emerged therefrom, where relevant, in determining the issue raised at this stage of the proceedings.

6. The question which arises in the present matter relates to the manner in which identification evidence should be gathered and presented in Court. We are in the realm of pre-trial visual identification and the Courts have, in general, sought to ensure that identification evidence is gathered in 'controlled circumstances'. To that end, an important factor in deciding whether to exclude such evidence is whether the

established safeguards have been observed, first in electing the option resorted to and second, when it was carried out.

7. I will set out the principles governing the admissibility of out of court identification very briefly.

7.1. It is a settled proposition of the law that evidence is admissible of a former identification of the accused by a witness out of court. It may be given either by that witness or by some other person present at the identification and may include the words declaratory of the identification.

7.2. An out of court identification is generally admissible as prior consistent statements and is not a substitute for the evidence which the witness ultimately fails to give in Court¹.

7.3. Evidence of previous identification may, however, be excluded, as a matter of discretion, if it carries such a risk of prejudice to the accused which outweighs its probative value.

7.4. Further to the discretion given to the Court, the test is '*a balancing exercise of the admissibility of the evidence and the prosecution's interests in having it admitted, on the one hand, and the overriding duty of the court to secure a fair trial for the accused, on the other hand.*'²

8. Without going into the merits of the evidence adduced so far, I propose to set out briefly the undisputed facts surrounding the present matter for purely introductory purposes to put the issue raised in context.

8.1. The accused, was employed as legal counsel at the MRA at the material time. An Objection Committee (the Committee), was set up, to hear and determine objections from the public regarding applications for liquor licences. The accused, had, on 01 December 2011, chaired the Committee, where an objection for the renewal of the liquor licence held by Mr. Navin Gojudhur, was on the agenda. Mrs. Wade, the then Section Head at the Operational Services Department at the MRA and Mr. Purmessur, the then Team Leader

¹ **Christie [1914] AC 545**

² As quoted in **The State v Koonjul & Anor [2007 SCJ 179]**

of the Excise Department of the MRA, also sat on the Committee on that day. The accused was seated in the middle of the abovenamed two members during the Committee.

- 8.2. On 06 January 2012, Mrs. Wade was called to attend to a serious case reported by Mr. Navin Gojudhur against one Mr. Bhowany. However, the description, which Mr. Gojudhur gave of Mr. Bhowany, did not match the latter's features. Mr. Gojudhur indicated that the said Mr. Bhowany was seated in the middle during the Committee upon being questioned about the same by Mrs. Wade. Whilst the latter was seeing Mr. Gojudhur off, they (Mrs. Wade and Mr. Gojudhur) accidentally came across Mr. Bhowany in the corridor. Upon being asked whether he was the very Mr. Bhowany, Mr. Gojudhur replied in the negative.
 - 8.3. The investigation which ensued was directed against the accused. It was supervised by Mr. Jeebun, whose instructions were, to confirm whether it was indeed the accused who came to the place of Mr. Gojudhur on 03 January 2012. After a statement had already been recorded from Mr. Gojudhur, on 16 January 2012, Mr. Jeebun, his junior, and Mr. Gojudhur, stood outside of the building of the MRA, waiting for the accused to come out of the building for lunch. Mr. Gojudhur stood at a distance away from them; at about 12 40 hrs, once he recognized the accused, Mr. Gojudhur came to them and pointed to the accused as being the person who had come to his place on 03 January 2012. The said exercise was made without the knowledge of the accused.
 - 8.4. Mr. Gojudhur is yet to be heard.
9. The key issue to be determined is how was the identity of the accused revealed when the case was reported by Mr. Gojudhur to the MRA. Whether it was the complainant who produced the suspect to the MRA or it was the MRA who produced the suspect to the complainant, assume all its importance. I say so because, the very *raison d'être* underlying the different identification exercises which are recommended and the necessary safeguards which have been put into place to avoid any unfairness to a suspect and a miscarriage of justice down the line, would find their application in deciding whether the impugned evidence of Mr. Jeebun ought to be excluded.

- 9.1. Mr. Gojudhur is yet to be heard and the evidence of the two officers of the MRA who were directly involved as far as the identity of the accused as the suspect is concerned, is not clear on that score.
- 9.1.1. The evidence led so far suggests that when Mr. Gojudhur first reported the matter to the Internal Affairs of the MRA, the complaint was against an officer of the MRA who had come to solicit a bribe from him and he gave the name of Mr. Bhowany. Mr. Gojudhur gave a very general description of that person as being slim, tall, with hair. It turned out that Mr. Bhowany was practically bald.
- 9.1.2. There is nothing on record so far as to the exact complaint made. Mrs. Wade embarked on questioning and prompting Mr. Gojudhur on leading and specific details, when she enquired from him where the suspect was seated during the Committee.
- 9.1.3. Furthermore, according to Mr. Jeebun, Mr. Gojudhur told him that it was Mrs. Wade who stated to him that the person he was referring to was not Mr. Bhowany but it was Mr. Ramdonee. Such evidence is admitted, at this stage, to show that such a statement was made and not for the truth of its contents. Mrs. Wade, for her part, could not remember having told Mr. Gojudhur that the person he was referring to as Mr. Bhowany was in fact not called Bhowany.
- 9.2. On the state of the evidence set out above, it can safely be held that the complaint was directed towards an officer of the MRA and the name of a person, other than the accused, was given by the complainant. The identity and the name of the accused came to light through Mrs. Wade. The witness, whose evidence is being objected to at this stage, was told who the suspect was. The identity of the suspect was known beforehand when the exercise outside the building of the MRA was carried out and it can be said that it was the MRA who at that stage produced the suspect to the complainant. The resulting unfairness and prejudice to the accused in the manner in which such exercise was carried out is therefore manifest and self-explanatory.

9.2.1. The prosecution seems to consider the evidence of Mrs. Wade and Mr. Jeebun disjunctively. This is where the misconception in the reasoning of Learned Counsel for the ICAC lies, when he submits that MRA officers neither tutored Mr. Gojudhur nor did they assist the latter in any manner whatsoever to prompt a positive recognition of the accused.

9.3. In a situation where the identity of a suspect becomes known, an identification parade or a group identification are the recommended ways of carrying out an identification exercise so that the “*the recollection of the identifying witness is tested objectively under safeguard by placing the suspect in a line made up of the like-looking suspects.*”³

9.3.1. A confrontation, ‘*as a mode of identification should, if it is to be resorted to at all, be confined to rare and exceptional circumstances. And the reason being, as held in the Privy Council case of Williams v The Queen [1997 1 W.L.R 548], that “it would be improper for the police to tutor the witnesses. Once, a suspect is in their custody he should be kept apart from eye witnesses to the incident. Nothing should be done at that stage which might assist the eye witnesses in their identification of him as a perpetrator. This is why, unless there are exceptional circumstances he should be shown to them by means of an identification parade”...*’⁴

9.3.2. I agree with the submissions of Learned Senior Counsel for the defence that the exercise carried out by the MRA does not fall within any of the recognized and known category of identification exercise commonly held out by investigating bodies.

9.3.3. This being said, irrespective of such a fact, whichever the chosen mode of identification, the overall purpose is one of adopting fair identification practices and adducing reliable identification evidence. Furthermore, care must be taken not to direct the complainant’s attention to any individual.

9.3.4. Bearing in mind that we are here dealing with a purported exercise carried out during an internal investigation by the MRA and without in any manner suggesting what the MRA should have done upon the complaint being

³ **Terrell Neilly v The Queen [2012] UKPC 12** referred to in **Fokeerbux v The State [2014 SCJ 225]**

⁴ **Ramlugan v The State [2005 SCJ 84]**

received from Mr. Gojudhur, the steps taken by the MRA which led to the complainant pointing to the accused as being the person who had allegedly called at his place, falls foul of the above safeguards which are recommended, to avert the dangers of a mistaken identification.

10. The prosecution has taken a very simplistic approach of the circumstances leading to the evidence, pointing to the accused as being the person against whom the complaint was in fact made, having been gathered.

10.1. Learned Counsel for the prosecution has watered down the surrounding circumstances in which the name of the accused was revealed to the complainant, when he submits that there was only a confusion in the name of the person.

10.1.1. There are several grey areas surrounding the testimony of Mrs. Wade as far as prompting and directing the complainant to members of the Committee and putting the name of the accused into the mouth of the complainant. I will, for obvious reasons, not go into further details of the same at this stage.

10.2. In an attempt to justify the manner in which the accused was 'identified' by the complainant and to support its case that an identification parade would have been futile in the present case, the prosecution has sidestepped the real issue when it submits that the exercise carried out at the level of the investigation undertaken by the Internal Affairs of the MRA, was a 'recognition exercise' rather than an 'identification exercise'.

10.2.1. However, upon being asked to expatiate further on the nature of a 'recognition exercise' and whether it was known to the law, Learned Counsel for the ICAC, candidly stated that to be 'precise in legal term' (sic), it is in fact a confrontation exercise.

10.2.2. The evidence on record does not disclose any exceptional circumstances as to warrant a 'confrontation' exercise as set out at paragraph 9.3.1. above and found in case law referred to by the prosecution itself.

10.2.3. *"Recognition takes place, in the context of identification evidence, when a witness knows an accused before the offence and then "recognizes" him*

*at the time of the commission of the offence.*⁵ Here, all we know is that Mr. Gojudhur was present in the Committee chaired by the accused on 01 December 2011 and Mr. Gojudhur could have been seated about two chairs away from the accused.

10.2.4. The facts and circumstances of the present matter are a far-cry from the situation where, for example, the complainant came across the accused by pure coincidence and spontaneously and without being prompted, recognizes the accused either as the Mr. Bhowany he had referred to in his complaint or as the person who came to see him to solicit for a bribe.

10.2.5. The evidence placed before this Court surrounding the circumstances in which the alleged 'recognition' was made found in the fact that the complainant attended the Committee chaired by the accused on 01 December 2011 and in the exercise which took place about six weeks later, is tenuous.

10.2.6. Without hearing Mr. Gojudhur, this Court cannot assess the quality of such evidence and such issue is in any event outside the ambit of the present ruling.

11. For all the reasons given above, this Court is satisfied that although the evidence of identification which Mr. Jeebun has witnessed is *prima facie* admissible, the circumstances culminating in such exercise and the manner in which it was gathered do not meet the threshold criteria for its production before a court of law without jeopardizing the right of the accused to a fair trial as guaranteed under the Constitution. In this case, the MRA has, since the complaint was made and during the internal investigation which ensued, had insufficient regard in adopting a fair identification practice.

11.1. I take the view that the prejudicial effect of the evidence of Mr. Jeebun, in relation to the identification of the accused by Mr. Gojudhur conducted by the internal affairs department of the MRA, outweighs its probative value.

⁵ **Latona v The State [2016 SCJ 93]**

- 11.2. As part of my duty to ensure that the accused receives a fair trial, I accordingly exercise my discretion to exclude such evidence which the prosecution proposes to tender in that respect.
- 11.3. The objection raised by the defence is therefore well taken.
- 11.4. Any evidence being led from Mr. Jeebun in relation to the internal affairs investigation, in relation to an alleged identification of the accused by the complainant, is accordingly disallowed.

A.HAMUTH (Miss)

**[Delivered by: A.HAMUTH (Miss), Magistrate, Intermediate Court]
[Delivered on: 16 November 2020]**