

M I I PATEL v POLICE

2023 MBG 9

IN THE DISTRICT COURT OF GRAND PORT

Provisional Cause No.: 340/19

Mohmed Imran Ibrahim Patel

Applicant

v/s

Police

Respondent

Ruling

The applicant stands provisionally charged with the offence of « Money laundering » in breach of Sections 3(1)(b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act. As per the provisional information dated 1st March 2019, the applicant stands provisionally charged with having on or about the 30th January 2019 willfully, unlawfully and criminally been in possession of property which, in whole or in part, directly or indirectly, represented the proceeds of crime and where he had reasonable grounds for suspecting that the property was derived, in whole or in part, directly or indirectly, from a crime.

As per the particulars of the provisional information the accused stands provisionally charged with having been in possession of 200,000 USD and 4.7 million ZAR which is equivalent to a sum of about 18 million Mauritian rupees, which represented, in whole or in part, directly or indirectly, the proceeds of a crime.

The applicant has, through his Counsel, moved for the present provisional charge to be struck out on the ground of delay. The applicant was represented by Me Cassim Jeehan of Counsel while Me Rangasamy-Parsooramen appeared for the respondent.

The Enquiring Officer from the Independent Commission Against Corruption (ICAC), CI Seeruthun, was deputed to resist the present motion and he deponed under oath.

The Enquiring Officer produced an affidavit dated 23rd November 2022 sworn by himself and detailing the circumstances in which the applicant was arrested and namely how he was intercepted at the SSR International Airport with foreign currency equivalent to around MUR 18,776,000. The Enquiring Officer's affidavit also relates the course of the enquiry in the present matter. According to the latter, 5 statements have been recorded from the applicant, the last one being recorded on the 12th April 2019. A request for Mutual Legal Assistance (hereinafter referred to as 'MLA') was sent to the South African authorities on the 22nd June 2020 and was approved by the Ministry of Justice of South Africa on the 29th June 2022. In September 2022, the Enquiring Officer was informed that the request had been forwarded to the relevant investigating authority in South Africa for execution.

The Enquiring Officer has given further evidence to the effect that he has already contacted an officer involved in the investigating team in South Africa and nothing else remains to be done in Mauritius until the MLA is executed and all the relevant information is obtained from South Africa. The Enquiring Officer has also stated that as per his experience with related countries, applications for MLA take a minimum of 3 years for execution.

The Enquiring Officer was duly cross-examined and revealed that the applicant had stated that he would stop collaborating with the ICAC. The Enquiring Officer further stated that he had contacted one Mr Suleiman who according to the applicant is his employer and to whom the money secured belongs. Mr Suleiman however refused to come to Mauritius to be interviewed. The Enquiring Officer also revealed that it is in September 2022 that the ICAC was informed that the request for MLA had been approved since 29th June 2022. He could not however give a time frame for the execution of the MLA.

The applicant, under oath, stated that before being intercepted in Mauritius, he had lived in South Africa for more than 15 years although he was born in India. He also testified as to the prejudice being caused to him and to his family due to his lengthy and ongoing presence in Mauritius. He was duly cross-examined.

Submissions by Learned Counsel for the applicant

Learned Counsel for the applicant submitted in a gist that the respondent has so far failed to justify the delay. He referred to the fact that the MLA request has only been

approved but has not yet been executed and the Enquiring Officer has not been able to give a time frame for the execution of the MLA. Learned Counsel for the applicant has further referred to the latter's testimony on the prejudice suffered by his family and him. He submitted that the ICAC cannot hide behind the complexity of the case, its international ramifications or the COVID-19 periods to justify the delay.

Submissions by Learned Counsel for the respondent

Learned Counsel for the respondent relied upon the judgment in the case of **The State v Bissessur [2001 SCJ 50]** and namely upon the factors referred to therein in carrying out the balancing exercise. According to Learned Counsel for the respondent, the delay in the present matter does not arise from a manipulation by the prosecuting authorities and significant progress has been made. She submitted that the provisional charge should remain live against the applicant.

The Law

The existence and function of a provisional information has been recognised and accepted in our legal system and is as such an instrument which is widely used. A provisional information is a mechanism whereby a Court is informed of the reason for the arrest of an individual. The police may well inform the Magistrate orally but the use of a provisional information is now a well established practice. Only an offence known to the law and not any act not sanctioned as an offence should give birth to the provisional information¹.

The function of a provisional information in providing judicial control and supervision over the detention of a suspect who has been arrested has been well established and set out in the judgment in the case of **DPP vs Indian Ocean International Bank and Ajay Shanto [1989 MR 110] [1989 SCJ 187]** as follows:

« Our law does not permit administrative detention. The more so since the inscription of a fundamental right to personal liberty in section 5 of the Constitution. Any interference with this right requires the supervision

¹ **Gordon-Gentil Alain v State Of Mauritius [1995 MR 38] [1995 SCJ 118]**

and control of the Courts. And where, this supervision and control are sought to be avoided, the writ of habeas corpus will run.

As everybody knows, a provisional information is entered when a suspect is arrested or is brought into custody. Its purpose is to bring the detention of the individual under judicial supervision and control so as to prevent an administrative detention and to enable a judicial authority to decide whether the detainee should be released on bail or not and, if not, for how long he should be detained. No detainee pleads to a provisional information and no trial takes place. Consequently no question arises as to whether evidence is required to be given in those proceedings. When the need arises for evidence to be given, the provisional information is simply struck out and an information is lodged to which the accused pleads and in respect of which a trial takes place. »

Having set out the principles propounded by our case law in respect of the provisional information, I find it apposite to also refer to **Section 10(1) of the Constitution** which provides for what has been termed as the reasonable time guarantee as follows:

Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established

Analysis

The applicant was arrested on the 28th February 2019 following which his detention was brought under the judicial supervision and control of the present Court on the 1st March 2019 by virtue of the present provisional information. I note that the applicant was bailed out on the 1st March 2019 itself and has since then appeared before this Court on several occasions. In all, the applicant has been under the present provisional charge since nearly 4 years.

The motion which has been made on behalf of the applicant for the provisional charge to be struck out is on the ground of delay. I note that this is the fourth time that the present District Court is hearing such a motion made on behalf of the applicant.

The issue of delay which is intrinsically linked with the reasonable time guarantee has been entrenched in our Constitution in the provision which I have reproduced above. In the case of **Celine v State of Mauritius [2012 UKPC 32]**, the Judicial Committee of the Privy Council took into account the delay as from the date on which the accused was cautioned and charged. It is clear that although no trial takes place under a provisional information, the delay which has elapsed while the suspect was provisionally charged might be computed to assess whether the reasonable time guarantee has been breached if he is cautioned and charged during that time.

In the present case, according to the Enquiring Officer, as at the 12th April 2019, 5 statements had been recorded from the applicant under caution. However, there is no evidence on record to show that in any of those statements, the present charge or any specific charge has been put to the applicant. I am therefore unable to conclude whether the period of nearly 4 years which has elapsed, since a statement was last recorded from the applicant, has already gone into the computation of the overall delay to assess any breach of the reasonable time guarantee.

That being said, I consider that the issue that this Court is being called to determine in the present case is whether by reason of the delay of nearly 4 years which has elapsed since the lodging of the provisional charge, its process is being abused. Indeed, it is an established principle that Courts have a judicial discretion to stay proceedings as abuse of process². In addition, the Court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused³. It bears reminding that the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety should be kept to a minimum⁴.

The factors to be considered in determining whether a stay of proceedings should be granted on the grounds of delay have been set out in the judgment in the case of **The State v Bissessur [2001 SCJ 50]** - in which formal charges had been lodged against the accused parties - as follows:

² **Director Of Public Prosecutions v Dayal J R & Anor [2010 SCJ 314]**

³ **Regina v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42**

⁴ **Bissoon Mungroo v The Queen (Privy Council) [1990 PRV 22]**

« 1) The court should exercise its discretionary power to order a stay of the proceedings only in exceptional cases and a staying order is an exception rather than the rule.

2) There is no mathematical calculation for how long is too long, it differs from jurisdiction to jurisdiction and each case has to be decided on its own facts.

3) A stay of criminal proceedings should not be ordered simply as a form of disciplinary disapproval of the DPP's office.

4) The Court ought to carry out a balancing exercise which requires an examination of the length of the delay in the light of other factors, namely: (1) the seriousness of the offence; (2) limits on our institutional resources; (3) reasons for the delay and (4) trial-related prejudice, in order to determine where the attainment of justice lies. »

In carrying out the balancing exercise, I bear in mind that a stay of proceedings in respect of a provisional information carries far different repercussions than a stay of proceedings in respect of a main case. I also have assessed both the Enquiring Officer's testimony and affidavit on the reasons for the delay in the present case and the applicant's evidence on the prejudice being caused to him as a result thereof. I find that particular regard must be paid to the fact that the applicant is not a Mauritian citizen but an Indian national who prior to his interception had been living and working in South Africa and has his family there.

The offence with which the applicant stands provisionally charged is undoubtedly a very serious one not only by reason of the heavy penalty which it carries but also by reason of the large amount of money involved in the present matter. That the applicant is a foreign national who lives and works in yet another country but was intercepted in Mauritius with that amount of money renders the case more complex. That the applicant, as per his own admissions, was travelling with the money from South Africa to Dubai via Mauritius adds to the complexity of the matter. I therefore find that the cross-border elements and international ramifications inherent in the present matter make it a very complex one. A complex case undeniably requires more investigation which may take more time.

However, as rightly submitted by Learned Counsel for the applicant, the complexity of the case in itself cannot justify any delay. Nevertheless, I find that the ICAC's

institutional resources are limited in the present matter. I consider that an investigation into the source of the funds is an important part of the enquiry, be it to establish the tainted origins of the money or to investigate the applicant's defence. Indeed, it is the applicant's version that the money that he was travelling with belongs to one Mr Suleiman, a South African national with whom he works. It is undisputed that the version of the said Mr Suleiman has not been recorded by the ICAC and that the latter is not in Mauritius. That Mr Suleiman was told by the Mauritius Revenue Authority, on the 4th February 2019 when he was in Mauritius, that he was not needed, cannot bind the ICAC which is an entirely different statutory body. In addition, as per the Enquiring Officer's evidence, it is only on the 6th February 2019 that the matter was referred to the ICAC for enquiry.

Reference has also been made by the Enquiring Officer to a report from the South African Revenue Authorities which contains damning information against the applicant but which cannot be used as evidence in Court as it was shared with the Mauritius Revenue Authority under a SADC Protocol confidentiality clause. The Enquiring Officer's testimony additionally shows the information and/or documents that the ICAC requires from South Africa. In the circumstances, I am satisfied that the MLA request to South Africa was required and does not amount to a fishing expedition by the ICAC.

While the ICAC's Board had approved the application for MLA request in September 2019, the MLA request was sent to the South African Authorities on the 22nd June 2020⁵. To all intents and purposes, the investigating body in the present case is the ICAC. I however find that the ICAC does not have complete control over the present enquiry. It was in fact subject to the Central Authority in Mauritius, namely the Attorney General's Office, for the sending of the MLA request. It was subject to the South African authority for the approval of the MLA request. It may also be subject to yet other departments in South Africa for the execution of the MLA.

In light of the above, I am satisfied that the extent to which the ICAC could have carried out this undeniably complex enquiry in Mauritius without any assistance from a foreign country was limited. In addition, the ICAC has had to rely on other national and foreign institutions and was submitted to the limitations on those institutions. Indeed, as per the Enquiring Officer's affidavit evidence, between the time that the ICAC's Board had

⁵ Paragraphs 23 and 30 respectively of the Enquiring Officer's affidavit dated 23rd November 2022

approved the application for MLA request in September 2019 and the time that the said request was made by the Central Authority in Mauritius to the South African authorities in June 2020, Mauritius went through one period of National Lockdown. I take judicial notice of the fact that the COVID-19 pandemic had given rise to a situation of sanitary crisis not only in Mauritius but also worldwide. I also take into account the Enquiring Officer's undisputed affidavit evidence to the effect that in October 2021, he had been informed that the relevant unit in South Africa was working with reduced staff due to the COVID-19 pandemic⁶. The MLA request was finally approved by the South African authorities on the 29th June 2022.

Taking into account the sanitary crisis situation caused by the COVID-19 pandemic, I find that there is nothing on record before me to suggest that the time taken to make the MLA request and for same to be approved has been abnormally long and unjustified. I further consider that between the hearing of the applicant's previous motion for striking out of the provisional charge on the ground of delay and the present one, progress has been made. Not only has the MLA request been approved but the Enquiring Officer has also been informed of the contact details of an officer from investigating team appointed by the South African authorities. The Enquiring Officer has additionally been able to explain the ICAC's endeavours since being imparted with that information.

In light of the evidence adduced and reasons put forward by the Enquiring Officer, I find that the delay which has elapsed from the date of lodging of the present provisional charge has been explained and justified. I also find that behind the present provisional charge being kept live against the applicant, there is no malicious intent, delaying tactics or unrelated investigations by the ICAC.

As regards the applicant, I find that he has been able to clearly set out the prejudice being caused to him as a foreign national living in Mauritius for the past 4 years without his family, and without being able to work and financially support himself in Mauritius. The uncertainty and anxiety that he is bound to suffer from as a result of the present provisional charge remaining live against him is furthermore undeniable.

Taking into account, on the one hand, the prejudice being caused to the applicant while under the present provisional charge, and on the other hand, my above conclusion to

⁶ Paragraph 46 of the Enquiring Officer's affidavit dated 23rd November 2022

the effect that the delay of nearly 4 years since it was lodged is justified, I am satisfied that this Court's process is not being abused. I further find that the attainment of justice lies in keeping the provisional charge against the applicant live. The more so as the MLA request has been approved.

Conclusion

In light of the above, I set aside the applicant's motion for striking out of the present provisional charge. I however urge the investigating body to exercise all reasonable diligence in expediting the execution of the MLA and completing the enquiry.

A Dhunnoo (Miss)

District Magistrate

This 2nd February 2023