

P v Moloo

2020 INT 41

CN192/15

THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Police

v/s

Moloo Oomesh

JUDGMENT

The Accused stands charged with one Count of **Making False Disclosure, contrary to s. 49(1)(a)(6) of the Prevention Of Corruption Act (hereinafter referred to as POCA).**

The Accused pleaded Not Guilty to the charge and was assisted by Learned Defence Counsel throughout the Proceedings.

Learned State Counsel conducted the case for the Prosecution.

The Proceedings were held partly in English and partly in Creole.

The Prosecution Case

It was the case for the Prosecution that on or about 15-11-11, at the **ICAC** Officer, Marine Road, Port-Louis, in the District of Port-Louis, the Accused did wilfully and unlawfully make a false disclosure, knowing it to be false, to an Officer that a person has been involved in an act of Corruption, to wit: the said Accused made a false Complaint to Mr Goinden (hereinafter referred to as W7), then Investigator at the Independent Commission Against Corruption (hereinafter

referred to as ICAC), to the effect that Mr Brizlall Motee (hereinafter referred to as W8), Inspector of Works at the Ministry of Education Zone 3, solicited a 10% commission from the sum of Rs313 000/- representing the value of a tender which has been awarded to the said Accused in respect of a purchase order for the supplying of materials to several schools of the Ministry of Education Zone 3, otherwise the tender will be granted to another person.

The Defence Case

The Accused denied the charge in his unchallenged out-of-Court statement (Doc. B) and in Court, the Accused elected to adduce no evidence, as was his Right.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, the Court has watched the demeanour of the Prosecution Witnesses with the utmost care, and the Court has given due consideration to the Submissions of Learned Counsel.

The Prosecution bear the burden of proving beyond reasonable doubt that:

- 1) The Accused wilfully;
- 2) Made a false disclosure;
- 3) Knowing it to be false.

The Court has duly considered all the documents produced in the course of the Proceedings in the present matter:

- 1) The Accused's statement (Doc. A) to the ICAC;
- 2) The Itemised Bill (Doc. C) of W8; and
- 3) The Itemised Bill (Doc. D) of the Accused.

The Accused Wilfully

The Accused confirmed the correctness of his statement (Doc. A) given to the ICAC in his unchallenged out-of-Court statement (Doc. B), such that the voluntariness and veracity of the said statement (Doc. A) cannot be doubted.

And from a careful perusal of the said statement (Doc. A), the Accused related therein the circumstances whereby W8, as Inspector of Works at the Ministry of Education Zone 3, allegedly asked for a 10% commission from the sum of Rs313 000/- representing the value of a tender which had been awarded to him, i.e. the Accused, in respect of a purchase order for the supplying of materials to several schools of the said Ministry, otherwise the tender would be granted to another person (Folios 101586 and 101588 of Doc. A).

All the above unequivocally establishes beyond reasonable doubt that the Accused wilfully gave the said statement (Doc. A).

Further, pursuant to s. 2 of POCA:

“officer”—

(a) means an officer appointed under section 24; and

(b) includes the Director of the Corruption Investigation Division, the Director of the Corruption Prevention and Education Division and the Chief Legal Adviser;

The said statement (Doc. A) was recorded by W7 whose testimony remained unchallenged as to the fact that in 2011, he was posted at the ICAC as Investigator, and that he recorded the Accused’s statement (Doc. A).

Further, at no point in the course of the Proceedings was it even remotely suggested that W7, who recorded (Doc. A), was not an Officer within the meaning of the POCA.

In light of all the above, the Court is of the considered view it has been established that the Accused made the said disclosure as contained in the said statement (Doc. A) to W7, who was an Officer within the meaning of s. 2 of POCA.

The Court has noted the line of cross-examination adopted by Learned Defence Counsel in relation to W7 and PC 6729 Gery (hereinafter referred to as W1) as to the fact that they recorded the Accused’s statements (Docs. A and B) without having enquired into the case. The Court however finds no merit in the said contention of the Defence given the fact that the said two Officers clearly explained that they only recorded the Accused’s statements (Docs. A and B). The said Officers were therefore Recording Officers and not Enquiring Officers, and the Court finds nothing sinister therein.

In light of all the evidence on Record and all the factors highlighted above, the Court is of the considered view it has been conclusively established that the Accused wilfully and in full knowledge, made the said disclosure as contained in the said statement (Doc. A) himself, to an Officer of the ICAC, i.e. W7, to the effect that a person, i.e. W8, had been involved in an act of Corruption, i.e. by soliciting a 10% commission from the sum of Rs313 000/-, representing the value of a tender which had been awarded to him, i.e. the Accused, in respect of a purchase order for the supplying of materials to several schools of the said Ministry, otherwise the said tender would be granted to another person.

Made A False Disclosure Knowing It To Be False

SI Perwanee (hereinafter referred to as W16) inter alia confirmed that the ICAC referred the case to the Director of Public Prosecutions (hereinafter referred to as DPP) who then referred the case to Central Criminal Investigation Division (hereinafter referred to as CCID) for Enquiry. Although W16 conceded that the Police based its Enquiry on the ICAC Enquiry, this does not per se mean that the Police did not carry out its own Enquiry into the present matter. Further, the Court is of the considered view that W16 did in fact enquire into the case, in light of the inconsistencies in the Accused's version as highlighted by W16 in his testimony in Court. The Court is of the considered view that W16's unchallenged testimony to the effect W8 had made a Declaration against the Accused for Assault further supports the conclusion that W16 did in fact enquire into the present matter.

Having duly assessed the testimony of W16 and having duly watched the demeanour of W16, the Court is of the considered view that no doubt was cast on W16's testimony, who withstood the test of cross-examination, and the Court therefore finds no reason not to act on W16's testimony.

The Court has duly assessed the testimony of Mrs Simla Goonjur (hereinafter referred to as W6) and has watched the demeanour of W6 with the utmost care, and the Court finds that it can safely act on W6's testimony, who was thoroughly cross-examined and who withstood the test of cross-examination, W6 maintaining her version throughout the Proceedings.

W6 maintained having enquired into the Complaint made by the Accused at the ICAC against W8, and explained that there were 18 calls made between the Accused and W8. Further, W6

deponed to the effect she found many discrepancies in the Accused's version, following which the matter was referred to the Police.

Although W6 confirmed that there were no calls between the Accused and W8 on 10-11-11 as per (Doc. D), and that the variance as to the calls made between the Accused and W8, when comparing W8's version to the Itemised Bills (Docs. C and D) was never put to W8, the Court finds that the fact there were no calls made between the Accused's mobile number and W8's mobile number on the said date does not automatically exclude the possibility of calls having been made by the Accused from a number other than his mobile number, such as a landline, which the Accused confirmed having in his Quincaillerie (Folio 101583 of Doc. A). Further, W6 explained in clear terms she was enquiring into the Complaint made by the Accused to the ICAC, and not into the case of possible offence of Making False Disclosure. The Court therefore finds that the fact that the said Itemised Bill (Doc. D) does not show any calls made between the Accused's mobile phone number and W8's mobile number on the said day does not, per se, put in doubt W8's version.

Also, the Defence attempted to amalgamate the various Enquiries and statements recorded from the Accused and W8 in the present matter. However, as is apparent from the evidence on Record, the Accused made an initial Complaint to the ICAC against W8, which Complaint was duly enquired into as deponed to by W6 as highlighted above. And it was in light of the discrepancies in the Accused's version that the matter was referred to the Police for Enquiry, as per W6.

The Court is of the considered view that Mr Sheik Abdool Bashir Punjoo (hereinafter referred to as W9)'s testimony does not assist the Court in the determination of the present matter, given the fact that W9's testimony was to the effect that he accompanied W8 to the Accused's Quincaillerie on 10-09-11 and hence gave no testimony in relation to 10-11-11.

The Prosecution case rested also on W8's testimony, and the Court has duly assessed the testimony of W8 and has watched the demeanour of W8 with the utmost care.

W8 was lengthily cross-examined, and the Court has noted that several times W8 stated there were things he did not remember.

The Court makes allowances for the passage of time, given W8 was deponing in 2019 for an incident which allegedly occurred in 2011, and further the Court bears in mind that the Court is to be satisfied that W8 was speaking the Truth in substance as to the circumstances of the present matter, applying the principles set out in the Authority of **Vythilingum v The State** [\[2017 SCJ 379\]](#):

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.

W8 maintained having never spoken to the Accused prior to 10-11-11.

The Court has noted that the date mentioned by W8 in Court was 10-11-11, when the alleged conversation between the Accused and W8 as to their meeting in the parking of Sai Baba Centre is meant to have taken place on 13-11-11. Be that as it may, the Court makes allowances for the passage of time, given W8 was deponing in 2019 for incidents which had allegedly occurred about 08 years earlier, i.e. in 2011.

Considering only the period of 01-11-11 to 14-11-11, although the Court has noted that all the calls and SMS were made and sent by the Accused to W8, W8's version he only spoke to the Accused for the first time on 13-11-11 is put in doubt in light of the Itemised Bills (Docs. C and D), which evidence no less than 14 calls and 14 SMS sent by the Accused to W8.

Further, W8 stated several times in Court he did not remember why the Accused would have called him so many times during the relevant period, and that he did not remember what the Accused had said then.

The Court has noted the line of cross-examination adopted by the Defence as to the fact that no Enquiry was carried out as to how the Accused had obtained W8's personal mobile phone number. The Accused himself, however, explained that he had met W8 about 04 years prior to the relevant time, and that W8 had then given him his mobile number. It is further on Record, and remained undisputed, that W8 obtained mobile phone credit from his Office, and that he used same on his personal mobile phone number.

Learned Defence Counsel also attempted to put in doubt W8's testimony, by putting questions for instance as to the procedure used by W8 for the inspection of the goods to be supplied by the Accused to the said Ministry, the reason as to why W8 had to verify the said goods twice, given same had been found in order by W8 himself, and the reasons for the said telephonic communications between he and the Accused as per the Itemised Bill (Doc. D), and the Court is of the considered view that the explanations given by W8 in relation to all the said issues raised by the Defence are satisfactory, in particular when bearing in mind W8's explanation that the Accused had delivered goods to Basant Rai Government School prior to 13-11-11, which goods were found not to be in order.

Even if W8 overstepped his powers by disclosing to the Accused that the goods he was inspecting were allegedly not as per the specifications, this does not per se put in doubt W8's version.

The Court is of the considered view that the said inconsistencies in W8's testimony related to collateral issues only, and were not of such a nature as to significantly undermine W8's categorical denial he solicited a commission from the Accused at the relevant time in order for the said tender to be awarded to him, i.e. the Accused.

W8 struck the Court as being a truthful Witness, who readily admitted when there were things he did not remember, and the Court is satisfied it can safely act on W8's testimony.

W8's version to the effect the Accused had assaulted him, as a result of which he had made a Declaration against the Accused for same at the Police Station is supported by W16's testimony, as highlighted above. Although no specific date on which the said alleged incident allegedly occurred was mentioned in Court by W8, the Court notes that the proximity in time, and the link, between W8's visit to the Accused's Quincaillerie and the said alleged Assault reported by W8 was not challenged by the Defence, as is apparent from the line of cross-examination adopted by the Defence, and tends to support W8's version.

The timing of the said allegation made by the Accused against W8 assumes all its importance. Although it was the Accused's version that W8 solicited a commission from him at the beginning of November 2011, and then a second time on 13-11-11 (Doc. A), the Accused nonetheless did not shy away from being in contact with W8, as evidenced by the unchallenged Itemised Bills

(Docs. C and D), but also by the Accused's own version that he went to the parking of Sai Baba Centre to meet W8. The said factors thereby appear inherently suspicious. Also, the Accused's version is further put in doubt given the delay of no less than about 14 days between the first alleged solicitation and the date on which the Accused reported the alleged matter to the ICAC, and a delay of no less than 02 days between the second alleged solicitation of 13-11-11 and the Accused reporting the said alleged matter on 15-11-11 to the ICAC. Although the Accused explained that he did not take W8's alleged solicitation seriously the first time, no explanation was provided by the Accused as to why, he not only waited for 02 days before reporting the said alleged matter to the ICAC, but also as to why he contacted W8 on 14-11-11 (Doc. C and D), i.e. on the day following the said alleged second solicitation.

All the above factors tend to suggest that the Accused made the said allegation against W8 at the ICAC in order to exculpate himself in relation to the alleged case of Assault.

The Court is comforted in reaching the said conclusion that W8's testimony was cogent given the very fact that all the calls and SMS were sent by the Accused to W8. Had W8 in fact solicited a commission from the Accused, the question arises as to why the Accused would have called W8 on no less than 14 occasions and would have sent no less than 14 SMS to W8, in the space of about 15 days, between 01-11-11 and 14-11-11 (Docs. C and D).

The Court has noted the line of cross-examination adopted by Learned Defence Counsel in relation to the said Itemised Bills (Doc. D) which makes mention of a call of 103 seconds' duration between the Accused's number and that of W8, whereas the Itemised Bill (Doc. C) mentions same as being an incoming SMS, between 13:54:29 and 13:54:31 on 13-11-11. Be that as it may, the Accused's version was to the effect that he called W8 around the said time and on the said date, and therefore the Accused admitted he did call W8 on the said date. Further, at no stage was the call made by the Accused to W8 at 13:40:11 of 58 seconds' duration challenged by the Defence.

In light of the above, the Court finds that it has been established that on 13-11-11, the Accused did call W8 at 13:40:11 as evidenced by the two Itemised Bills (Docs. C and D), which call was not challenged at all in the course of the Proceedings, and that hence the Accused contacted W8 at the said time.

The Accused confirmed the correctness of his statement (Doc. A) given to the ICAC in his unchallenged out-of-Court statement (Doc. B), as highlighted above.

The Court has however noted that the version given by the Accused in his statement (Doc. A) to the ICAC differed from the one given by the Accused to the Police as per the Accused's unchallenged out-of-Court statement (Doc. B).

In his Complaint made at the ICAC (Doc. A), which the Accused confirmed was correct, the Accused's version was to the effect that he called W8 on Sunday 13-11-11 to ask W8 about the status of the order from the Ministry of Education, when W8 asked him to meet him at the Sai Baba Centre Parking in Curepipe. However, in his unchallenged out-of-Court statement (Doc. B), the Accused's version was to the effect that on Sunday 17-11-11, he called W8 to enquire from W8 as to the status of the said order from the Ministry of Education, following which he asked W8 to meet him on the parking of the Sai Baba Centre.

From the above, it would appear that the Accused's initial version was that it was W8 who asked him to meet him, whereas the Accused's subsequent version was to the effect that he asked W8 to meet him. Both said versions cannot be true and the said discrepancy has remained unaddressed by the Defence.

The fact the Accused called W8 is evidenced by the unchallenged Itemised Bills (Docs. C and D) and the very fact the Accused called W8 on a Sunday appears suspicious, and tends to support the conclusion that it was the Accused who asked W8 to meet him and that it was the Accused who was seeking to be in contact with W8.

The Court having duly assessed all the evidence on Record, in light of all the evidence on Record and all the circumstances of the present matter, coupled with all the factors highlighted above, in particular W8's cogent testimony, and the varying versions given by the Accused in his statements (Docs. A and B), which statements have remained unchallenged throughout the Proceedings, and in the absence of any explanation as to why the Accused called W8 so many times during the said period, the Court is of the considered view that the only reasonable and irresistible inference to be drawn is that the disclosure as contained in (Doc. A) made by the Accused to W7 was a false disclosure, it being made in an attempt by the Accused to exculpate

himself as regards the said alleged case of Assault, and that hence the Accused knew that the said disclosure as contained in (Doc. A) was false.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter and all the factors highlighted above, the Court is of the considered view that the Prosecution has proven its case against the Accused beyond reasonable doubt and the Accused is therefore found Guilty as charged.

[Delivered by: D. Gayan, Magistrate]

[Intermediate Court (Criminal Side)]

[Date: 26 February 2020]