ICAC v Anoussa Subrun

2023 INT 134

CN 478/19
(FCD CN 65/2020)

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

Anoussa SUBRUN

JUDGMENT

1. The accused has been prosecuted for the offence of Trafic D'Influence in breach of sections 10(4) and 83 of the Prevention and Corruption Act 2002 (POCA). The accused pleaded not guilty to the Information and was represented by counsel throughout the proceedings.

CASE FOR THE PROSECUTION

2. Witness no.4 produced the handwriting examination report as **Doc A**. In his expert opinion, the writings in question were authored by the accused and signed by both, the accused and Mr Louis Andre Lebrasse (W7).

3. Witness no.5 stated that Mr Lebrasse (W7) called at Pope Hennessy Police Station and made an entry in the Diary Book to the effect that one Anoussa Subrun took money and a mobile phone from him. He was therefore seeking police assistance to return the said items. He produced an extract of the DB entry as **Doc B**. He

further stated that Mr Lebrasse made only an entry to the Diary Book and not a declaration.

4. Witness no.1, Investigator Kowlessur, was one of the enquiring officers of the case. He produced three defence statements of the accused as **Docs C, C1** and **C2**. The witness further produced two documents representing an acknowledgement of debt, produced to the ICAC by the accused as **Docs D** and **E**. During cross-examination, he confirmed that he confronted the two documents to witnesses nos. 7 and 8. The latter admitted that they signed the documents and it was their ID cards on the documents. At first the witness could not remember if they stated that the documents were blank when they signed them. Following further cross-examination, he stated that the witnesses named 'Lebrasse' confirmed that the content of the documents was not written by them. They further said explained that they gave money to the accused so that she would do the needful for them to get a job in the public service.

5. Witness no.6, PS Mudhoo carried out an identification exercise, by direct confrontation during enquiry. The witness no.7 positively identified the accused. The witness put up a statement to that effect which he produced as **Doc G**.

6. Witness no.9, Mr Dheebaven Padyachee Soobroyen, stated that he provided information in relation to the accused to the ICAC during enquiry by virtue of a disclosure order. He explained that the accused transacted with the now defunct Bramer Bank, which was taken over by the National Commercial Bank and now the Maubank. He produced a letter and the statement of account of the accused and Mr Ravindra Subrun as Docs H, H1 and H2. He further produced six deposit vouchers and a copy of the ID card of the accused attached with a proof of address, as Docs J, J1 to J6.

7. Under cross-examination, he stated that for small sums of money, less than Rs100,000, the bank would not by practice request for purpose of transaction. At Doc J3, the purpose of transaction was personal use. Normally the one who signed the document would be making the withdrawal at the cash point.

8. Witness no.10, Mr Ananhrow Rama stated that in 2016, he was the Human Resource Manager at the Ministry of Health and Quality of Life. He explained that the recruitment for the post of hospital attendant is made internal by way of publication. The Public Service Commission would issue an internal vacancy notice. Following applications, the Ministry of Labour would provide a list of

qualified candidates. Thereafter a selection board would be set up to determine the suitable candidates. The Board would recommend the best candidates for recruitment. In relation to this case, the Ministry of Health received a list of 500 candidates from the Ministry of Labour on the 18.08.15. An interview was carried out from 10.09.15 to 24.09.15 where 163 candidates were selected and who started work on 25.01.16. Furthermore, 12 additional candidates started work in February 2016.

9. Under cross-examination, the witness confirmed that the recruitment for hospital attendants is done by the relevant Ministry and not by a private individual. Furthermore, the selected candidates must obtain clear certificates of character.

10. Witness no.7, Mr Louis Andre Lebrasse, as per the submission of counsel for the prosecution, has been granted immunity by the Director of Public Prosecutions. The witness stated that in 2015, he was working at Hitech Life Insurance, IT company found at Soreze, Pailles. During enquiry, he positively identified the accused with regards to this case. He befriended a security officer who worked at a company next to his place of work. He was told that if he wished to work in the public sector, he had to contact someone to do the needful but he would have to pay a sum of money. That someone was the accused, but he was not aware at the time, that the latter was the security officer's wife. He contacted the accused through phone and she told him that she worked at Mutual Aid offices in Port-Louis and she would help him get work for the Government in exchange of money. They agreed to meet in person in Port-Louis, at Barclays Bank. Following a previous inconsistent statement, the witness stated that he cashed out Rs10,000 on the day which he remitted to the accused. At first, he stated the amount to be Rs3,000. Furthermore, the witness uttered another inconsistent statement when he said that the total sum of money sought by the accused was Rs75,000. When confronted to his out-of-court statement, he rectified the amount as Rs34,000.

11. The specimen handwriting from Doc A was shown to the witness. He recognised his signature but he was not the author of the other writings. He stated that he remitted Rs34,000 to the accused, in the year 2015, in multiple instalments. He also gave the accused two mobile phones. He produced **Docs K** and **K1** to that effect. He further gave two bottles of whisky to the accused. He denied the version of the accused in that he owed her Rs75,000 which he borrowed for the construction of his house. He stated that the Rs34,000 that he gave to the accused came from a loan he received from the bank for the construction of his house. The witness was shown Doc J5 and he identified his signature on the said document.

He stated that Doc J5 shows that he deposited Rs2000 into the bank account of the accused, which represented a part payment to the total of Rs34,000. His son, witness no.8, effected two deposits into the bank account of the accused for the same reason. Following a previous inconsistent statement, he confirmed his out of court statement in that the accused related to him that she was working at the Ministry of Health and not Mutual Aid. He explained that he understood that the accused had connections at the Ministry and she would get him a job in the public sector. The witness reiterated that the accused asked him to sign a sheet of paper where there was nothing written on it. He does not know how to write. He attended school until standard one.

12. During cross-examination, the witness gave a hazy account of the total amount that he paid the accused with. He stated that the accused asked for Rs75,000 and he gave her Rs34,000 plus Rs60,000. He added two mobile phones and two bottles of whisky. The accused first contacted him by phone and they met in Port-Louis near Barclays Bank. Upon further questioning, the witness stated that the accused had asked Rs60,000 to help his son in getting the latter a job for the Government. The sum of Rs75,000 was for the witness himself and he was told that he would work at the Municipality of Port-Louis. With regards to Doc A, the witness added that he was asked by the accused to provide a photocopy of his Identity Card. He could not recall the date he signed the alleged acknowledgement of debt and he did not produce same to the ICAC during enquiry. He denied having borrowed Rs75,000 from the accused in spite of the signed acknowledgement of debt. He was questioned on his inability to write and he stated that Doc J5, the deposit voucher, was filled in by his son. However, he failed to mention same to the ICAC. Doc D was shown to the witness and he did not recognise the said document. During re-examination, he confirmed that Doc J5 was filled in by his son. Furthermore, his son deposited the cash into the accused's bank account.

13. Witness no.8, Mr Avinash Lebrasse, identified his signature at the bottom right corner of Doc D. He also found a copy of his ID card on the document. He denied being the author of the writings on the document, nor did he enter into any debt acknowledgement. He simply signed a blank sheet of paper which he remitted to his father (witness no.7). The latter asked him to sign the paper so that steps could be taken to secure a job in the public sector. He identified the accused in court as the one whose name is found on the document. The witness further identified Doc E and his father's signature on the said document. His relationship with his father was cordial and he stated that the latter could not have written the words recorded on Doc E, as he was unable to write. He described Doc J2 as a credit voucher which

shows that he credited Rs5000 to the accused's bank account, as per his father's instructions. Similarly, Doc J4 shows a credit of Rs2000 which the witness effected to the bank account of the accused as payment to her. The accused had contacted him by phone with regards to the matter of getting him a job in the public sector. He accompanied his father to Port-Louis at some point in time to meet with the accused. His father told him that the accused would help in the procedure to get them jobs.

14. Under cross-examination, the witness confirmed that he signed a blank sheet of paper when he was shown Doc D. His father asked him for his ID card which he was told was needed for the process of a getting a job. He further explained that he filled other forms and provided other academic documents to his father who in turn remitted them to the accused. He was not aware whether his father sent the PSC form that he had filled in, to the address of the PSC. It is assumed that the Public Service Commission was being meant. He denied having borrowed Rs75,000 from the accused. On two occasions he credited money into the bank account of the accused. He met with her along with his father. He was supposed to financially help her out as she would help in getting him a job for the government. He never mentioned that he filled in an application form for the PSC in his out of court statement. He said that he must have forgotten to do so. When confronted with the case theory of the accused, he stated that he would not know if his father had borrowed Rs75,000 from the accused. The latter told him that she worked for the government and she would do the needful to get him and his father a job each. He asked for her ID card but she did not have it with her when he met her for five minutes.

CASE FOR DEFENCE

15. No evidence was adduced as part of the defence case.

ASSESSMENT OF THE COURT

16. The issues as submitted by the prosecution and the defence are mostly factual, except the one point raised by the defence regarding the Information. The contention of the defence is that an essential element of the offence is lacking from the Information as the phrase 'real or fictitious' has not been averred.

The law

17. Section **10(4) of the Prevention and Corruption Act 2002** (POCA) is reproduced below:

Any person who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

It is recognised by the defence, following **Ramloll v The State 2017 SCJ 266**, that the offence of Trafic d'influence is committed irrespective of whether the influence is real or fictitious.

More recently the above pronouncement has been affirmed in the case **Peermamode v The State 2022 SCJ 25**, as follows:

In our view, the words "real or fictitious" are not elements of the offence of Trafic d'influence which the prosecution has to prove under section 10(4) of the Act which creates the offence of Trafic d'influence by individuals (who are not public officers).

The Supreme Court further held the following:

*We are also comforted in our views by the following note from **Dalloz Répertoire de Droit Pénal et de Procédure Pénale (2e édition), 1992 Tome II at note 76**, referred by learned Counsel for respondents nos. 1 and 2 and which reads-*

> *"Il importe peu que l'influence soit réelle ou supposée; il suffit que les dons ou promesses aient été sollicités ou agréés à raison de la croyance dans cette influence. Il n'est même pas nécessaire que des démarches aient été faites pour faire croire à cette influence…"*

18. It has therefore been settled by the Supreme Court that the words 'real or fictitious' are not part of the constitutive elements of the offence. It has equally been well established that *pursuant to section* **125 (1) of the District and Intermediate Courts (Criminal Jurisdiction) Act**, *an information should contain the essential elements of the offence as per the wording of the law creating such an offence; vide* ***Beekhan v The Queen [1976 MR 3], Moolbaccus v R***

***[1990 MR 328]*, *D. Lobogun v The State [2006 SCJ 227]* *and* *Rama v The State [2010 SCJ 249]*.**

19. Since the words 'real or fictitious' are not an element of the offence, there is no requirement that they are averred in the Information. The averment that the accused obtained a gratification in order to make use of her influence to obtain an employment from a public body, suffices to create the offence. If the accused made use of her influence irrespective of whether that influence was real or fictitious, the former has not been misled or prejudiced in her defence of the case. It only matters that all the elements of the offence have been disclosed in the Information. Adapting the elements of the offence as laid out by the Supreme Court in **Peermamode (supra)**, the prosecution had to prove the following:

    (a) The accused obtained a gratification;
    (b) From another person, namely Mr Louis Andre Lebrasse (witness no.7);
    (c) In order to use her influence;
    (d) To obtain an employment from a public body for the said Mr Lebrasse.

Factual assessment

20. It is not disputed that the accused received money from witness nos. 7 and 8, i.e., Mr Lebrasse and his son. In fact, at Doc C, the defence statement of the accused, she was confronted with the allegation of payments made to her by the two individuals named Lebrasse. The total amounted to Rs34,000. She did not deny that payments were made to her without specifying the exact amount. However, she stated that those were reimbursements for a debt owed to her. She thereafter produced to the ICAC two documents which allegedly represented a debt of Rs75,000 owed to her. The two documents have been produced as Docs D and E at trial. The accused denied having written the words on the documents other than her signature. Witness nos. 7 and 8 stated at trial that they simply signed blank sheets of paper.

21. Doc A is the expert handwriting report with the conclusion that the writings between the ID card of Mr Lebrasse (W7) and the signatures at the bottom of the page, were authored by the accused. The handwriting specimens which were examined bore significant similarities to that of the accused. I am alive to the principle that expert evidence such as handwriting examination report is not conclusive on the fact in issue. Having perused the report and observed the specimens used for examination and comparison, it is rather clear that the

signature of Mr Andre Louis Lebrasse (witness no.7) differs significantly from the other writings found on Doc E. There is evidence on record which suggests that the witness no.7 did not learn the skill of writing. He dropped out of school quite early in his formative years. However, I further note that the handwriting expert, witness no.4, did not examine any handwriting specimen from witness no.8, Mr Avinash Lebrasse. Since the unwavering version of the accused was that she did not author the writings of the two documents in question, and the possibility that witness no.7 could have been the author can be discarded, there remains one other possibility. Witness no.8, the son of Mr Andre Louis Lebrasse, was to a large extent involved in the whole transaction. For unknown reasons, there was no comparative study made between the impugned writings and the handwriting of the witness no.8. The results could have been a higher degree of similarity for witness no.8 than that of the accused. I also take note of the dictum in **Begue v The State 2015 SCJ 252**: *What was stated in the case of Ramputh v. R. [1952 MR 317] in relation to the weight to be attached to expert evidence applies to the case in hand, although in that case it was a handwriting which was under consideration. The testimony of experts in handwriting is admissible for the purpose of pointing out features in the handwriting on a particular document; but the question whether a particular writing is to be assigned to a particular person remains one of fact to be determined by the court in each case*. As a result, I find that the weight to be attached to the expert handwriting report, Doc A, is significantly reduced.

22. The case for the prosecution is predominantly based on the testimony of witness no.7, Mr Andre Louis Lebrasse. The evidence of witness no.8 has not been corroborative to a large extent to that of witness no.7. The gist of his evidence centred on the fact that he was instructed by his father (W7) all along, and his interactions with the accused have been sparse. The variance in the two case theories, lies in the purpose for which the money was remitted to the accused. The purpose attached to the money is relevant to the proof of 'gratification' as per **section 2 of POCA**. If the version of the accused is to be adopted, in that the money was a repayment of a debt owed to her, the remuneration would not have been effected in a criminal context, vide **Jhurry v ICAC & Anor 2015 SCJ 258** and **ICAC v Seeneevassen 2012 SCJ 328**.

23. At the outset it is clear that the evidence of witness no.7 has been shown to be inconsistent with his out of court statement in a few instances. Those inconsistencies arose both in examination-in-chief and cross-examination, but mostly touched upon the issue of the amount of money paid to the accused. At

first, the witness stated that he cashed out Rs3,000 when he first met the accused, but rectified it to Rs10,000 when his statement was read to him. Thereafter, he stated that the accused sought Rs75,000 from him, but again reviewed the amount to Rs34,000 when confronted to his previous inconsistent statement. Similarly, he rectified his statement as to where the accused said she worked, that is, at the Ministry of Health and not Mutual Aid. Furthermore, during cross-examination, he contradicted himself when he stated that the accused asked for Rs75,000 and he paid the accused Rs34,000 plus Rs60,000. The latter payment of Rs60,000 was for needed for his son, witness no.8, to get a job. The Rs75,000 sought was for him to get a job.

24. The Supreme Court has addressed the issues of inconsistency and contradiction on numerous occasions. In **Joomeer v The State 2013 SCJ 413**, the difference between the two was explained:

They are basically terms of art in law and there are specific texts of the criminal procedure which apply to them. An inconsistent statement is where a witness deposes to something in course of his evidence which is not consistent with what he had said in a previous out-of-court statement. What is involved here is the comparison between a previous out of court statement and a court deposition. A contradiction is a different matter. It is what he says differently at one point in his deposition from what he stated earlier at another point in his deposition. What is involved here is the comparison between his deposition at one point with his deposition at another point in course of his examination, his cross examination or his re-examination.

The Supreme Court opined the following in **Rajbally v The State 2016 SCJ 340**; *This is not an automatic ground to reject the testimony of the witness in toto. Rather, the situation calls for a close analysis by the Magistrate who is hearing the case.*

However, the cautionary pronouncement of the Supreme Court in **Neeroo v The State 2023 SCJ 116** is equally taken into account;
'we wish to point out however that such principles should not be used as a blank cheque. Inconsistencies of any kind or departures from the original complaint cannot invariably be placed on account of the fact that deposing in court is not an exercise of memory test and to simply brush them aside. Where the trial court is accepting a particular version in the face of contradictions and

inconsistencies it is the duty of the trial court to explain which part of the witness' testimony is being accepted and the reasons thereof.

…any inconsistency in the actual perpetration of the impugned act is a factor to be considered against credibility.'

25. The main issue on which the witness no.7 was unable to give a clear account, was the sum of money paid to the accused. The Information avers Rs34,000, and the witness has been inconsistent and contradictory throughout his examination-in-chief and cross-examination. It has been submitted by the prosecution that such departures with regards to the exact amount is not material enough to shake the prosecution's case. The point is duly considered especially since the accused admitted that she received repayments in her defence statement. However, whilst the witness has been copiously inconsistent and contradictory, there is one figure which has remained consistent throughout his testimony. Before being confronted to his out of court statement, he stated that the accused asked Rs75,000 from him. He rectified it to Rs34,000 which might have shown an acceptable momentary failure in memory. But he gave evidence during cross-examination and he confirmed that the accused sought Rs75,000 from him. Now the only documents on record which disclose the figure of Rs75,000, are Docs D and E, the alleged acknowledgements of debt. The witness no.7 has maintained that he did not write the said acknowledgement and he was not aware of the writings in Doc E. Yet, he volunteered the same exact figure, both in examination-in-chief and cross-examination. As such, doubts are raised as to the authorship of the Docs D and E, or as to whether the witness no.7 was unaware of the content of the documents or not.

26. Another material averment in the Information was 'in order to make use of her influence at the Ministry of Health'. The witness no.7, Mr Lebrasse stated in chief that the accused worked at Mutual Aid before he was confronted to his out of court statement. Again during cross-examination, the witness gave evidence to the fact that he was supposed to get a job at the Municipality of Port-Louis.

27. The prosecution has relied on **Andoo v The State 1989 MR 241** to minimise the effect of the unsworn evidence of the accused party. For completeness, Andoo (supra) has to be read together with **Annia v The State 2006 SCJ 262** when the following was held:

Of course a trial court cannot, in all cases where no evidence is called on behalf of an accused party, perfunctorily rely on Andoo and convict. Andoo has not created any new species of burden or standard of proof in a criminal trial. It is clear from the above-quoted passage from Andoo that the court hearing a criminal matter has indiscriminately to analyse the evidence adduced by the prosecution to see that all the elements of the offence charged have been established and that the state of that evidence, when pitted against the version of the accused as elicited through the cross-examination of the prosecution witnesses and the unsworn statement of the accused, is such that there is no room for any reasonable doubt. The fact that no evidence has been adduced on behalf of an accused party does not absolve the trial court of such a duty.

28. The version of the accused is that Mr Lebrasse owed her Rs75,000 which she gave for the construction of his house. The debt is exhibited at Docs D and E, signed by witness nos.8 and 7 respectively. The testimony of witness no.8 does not carry much weight with regards to the proof of the elements of the offence since he was instructed by his father throughout. The testimony of witness no.7 is riddled with inconsistencies and contradictions on material issues such as the amount of money he was asked to give by the accused and the job he was supposed to get.

29. I have had the benefit of observing the witness no.7 throughout his testimony. His account of his version was vague to a degree where questions had to be repeated numerous times before answers could be extracted from him. He was hesitant and out of context during examination-in-chief. His demeanour did not depict the hallmarks of a highly credible witness. Equally, the gist of the testimony of his son, witness no.8, held the thread of his non-involvement in the whole transaction. He mostly maintained that his father led the negotiations with the accused and he did as instructed by his father.

30. I find that the version of the accused has created a reasonable doubt in the case for the prosecution, which has not been dispelled by the evidence of both witnesses, no.7 and no.8. The prosecution has not been able to establish a prima case through those witnesses, which have proved to be less than credible.

31. For the above reasons, the benefit of the doubt is given to the accused and the case against her is dismissed.

P K Rangasamy
Magistrate of the Intermediate Court
30.05.23