BHEEMUL R v THE INDEPENDENT COMMISSION AGAINST CORRUPTION

2021 SCJ 237

THE SUPREME COURT OF MAURITIUS

In Chambers

SN 955/2020

In the matter of:-

Roopcoomar Bheemul

Applicant

v

The Independent Commission against Corruption

Respondent

In the presence of:

SBM Bank (Mauritius) Ltd

Co-Respondent

JUDGMENT

The applicant by way of an amended proecipe dated 1 October 2020 and supported by two affidavits has prayed for the revocation of a renewed attachment order issued against him on 14 August 2020 (sic). The respondent is resisting the present application whereas the co-respondent is abiding by the decision of the Judge in Chambers. Two affidavits have been filed by the respondent, dated 3 November 2020 and 4 June 2021, with preliminary objections which read as follows –

"A. The application is misconceived and flawed inasmuch as the prayer is not for revocation of an Attachment Order pursuant to section 57(2) of the Prevention of Corruption Act.

B. *Ex Facie the affidavit of the Applicant (AA1), the application is misconceived and flawed inasmuch as the Applicant is seeking to revoke an attachment order which is no longer valid."*

The present application has been made following an attachment order which I have initially issued on 5 June 2020 against the applicant following an ex parte application by the respondent, then applicant, under section 57(1) of the Prevention of Corruption Act (POCA) as regards –

(a) a motor vehicle bearing No.5837 JL 18, of make Toyota Estate;

(b) money held in bank account No. 006010100001431 at the SBM Bank (Mauritius) Ltd; and

(c) money held in a fixed deposit account No.00690100020584 at the SBM Bank (Mauritius) Ltd.

I have considered the oral and written submissions of the learned counsel and the authorities submitted by them, namely, **Toumany & Anor v Veerasamy [2012 UKPC 13], Planche v The PSC & Anor [1993 SCJ 128], The Director of Public Prosecutions v A A Bholah [2011 UKPC 44], Manraj D D & Ors v ICAC [2003 SCJ 75], Ex parte The Independent Commission Against Corruption [2005 SCJ 72], Technology Soft Corporation & Ors v Independent Commission Against Corruption [2005 MR 223].** As regards –

A. <u>Preliminary Objections</u>

On the basis of **Toumany & Anor v Veerasamy [2012 UKPC 13]** and given that there is no dispute of the existence of an attachment order issued against the applicant regarding the items described above, I overrule the objection raised by the respondent that the present application has no basis or "*raison d'être*". Except for the fact that the amended proecipe makes wrong reference to the date and serial number of the attachment order when they should be 19 June 2020 and Serial Number 757/20 – 120149. The date and serial number mentioned therein are in fact related to a subsequent renewal order. I am satisfied that for all intents and purposes, there is an attachment order issued against applicant for the 3 items mentioned above. Such an attachment order has been subsequently renewed on numerous occasions, that is, after the expiry of 60 days as

provided for under POCA. The applicant is therefore moving that the attachment order be revoked which I am entitled to entertain without allowing the form to override the substance of the present application.

B. <u>Merits of the application</u>

I am satisfied that the facts of the present case and the principles derived from the authorities cited below are such that it is a fit case for me to revoke the attachment order after having considered –

(a) the explanation given by applicant to justify the source of funds for the ownership of his car, the amount and source of funds that he has at bank;

(b) the provisional charge laid against applicant on 20 November 2017 in relation to an offence of operating as bookmaker by conducting fixed odds betting on local horse races outside race courses at his premises under sections 134(b) and 154 of the Gambling Regulatory Authority Act 2007 has been struck out since 23 May 2019;

(c) any attachment order which is revoked is subject to section 57(3) of POCA. Section 57(3) has not been satisfied in the present case. There is no averment made by respondent in its affidavits that it has obtained or likely to obtain substantial new information relating to an offence under POCA or the Financial Intelligence and Anti-Money Laundering Act (FIAMLA) except for a general averment at paragraph 11 of its affidavit of 3 November 2020 which speaks of verification of the averments of applicant;

(d) the issue of proportionality summarized by Lord Sumption in **Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700** at paragraph 20 and referred to in the case of **Williams v The Supervisory Authority [2020 UKPC 15]** at paragraph 88 finds its application and relevance to the present case albeit in the case of **Williams [supra]**, the applicant had been convicted of a drug offence and was subject to a freezing order –

"...*the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i)*

whether its objective is sufficiently important to justify the limitation of a fundamental right*; (ii)* ***whether it is rationally connected to the objective****; (iii)* ***whether a less intrusive measure could have been used****; and (iv)* ***whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community****. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.”* ***(emphasis being mine);***

(e) paragraphs 96 and 97 in the case of **Williams v The Supervisory Authority [2020 UKPC 15]** also find their relevance to the present application –

“96. As was pointed out by Lord Bingham in the McIntosh case at para 35, the defendant can be expected to know the source of his income and his assets. He is in a much better position than the Authority to know how he came to acquire his property and, having regard to the legitimate preventive aims of the legislation, it is fair to put the burden of proof on him. In practice, if the defendant calls evidence to show innocent derivation of property, an evidential onus will arise on the Authority to discredit or disprove the defendant’s case. In the Board’s view, the legislature’s assessment that this aspect of the combined regime is a proportionate measure in support of the legitimate aim of the regime and maintains a fair balance between the rights of the defendant and the interests of the general community is one within its margin of appreciation and does not involve any breach of the Constitution.

97. The making of the civil forfeiture order in the present case was a proportionate measure which did not violate the appellant’s constitutional rights. It is not necessary in this case for the Board to decide definitively whether in every possible case brought under the combined regime in the MLPA the award of a civil forfeiture order will be proportionate. As presently advised, the Board thinks it unlikely that many, if any, cases would arise in which the due application of the combined regime in accordance with its terms would be disproportionate and in breach of a defendant’s constitutional rights under section 3(a) or (c) or section 9. However, the Board notes that if a situation arose in which it would be disproportionate to make a civil forfeiture order, it would be open to the court, in applying section 20A(1), to hold that although the statute says that the Authority may apply for such an order, it would be inconsistent with the defendant’s constitutional rights under section 3(a) or (c) or section 9 to permit it to do so. Further, it would be possible to read an appropriate qualification into section 20A(2), so that it required the making of a civil forfeiture order “except in so far

as such order would be disproportionate and thus breach section 3(a) or (c) or section 9 of the Constitution",

(f) The case of **R v Waya [2012] UKSC 51** is a confiscation order following a conviction which was referred to in the case of **Williams [supra]**. At paragraphs 12 and 93 of **Waya [supra]** –

> *"12. It is clear law, and was common ground between the parties, that this imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the State in, inter alia¸ the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation. That rule has consistently been stated by the European Court of Human Rights: see for example its iteration in Jahn v Germany (2006) 42 EHRR 1084, para 93:*
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> *93. The Court reiterates that an interference with the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [see, among other authorities, Sporrong and Lönnroth, cited above, p. 26, § 69]. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions [see Pressos Compania Naviera SA and Others v Belgium, judgment of 20 November 1995, Series A no. 332, p. 23, § 38].*
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> *In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question [see Chassagnou v France [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III]."*

An attachment order is a temporary measure of depriving someone of his property and as confirmed by **Ex parte The Independent Commission Against Corruption [supra]** is only a "*mesure conservatoire*". The cases of **Williams [supra]** and **Waya [supra]** are respectively in relation to a freezing and confiscation order following conviction. However, I find that the principles enunciated in paragraphs (d), (e) and (f) above find their relevance and application even to an attachment order. I am satisfied that maintaining the attachment order against applicant in the present case does not pass the

proportionality test. I, consequently revoke the attachment order (SN 757/20-120149). Any subsequent renewal order also lapses accordingly.

With costs and I certify as to counsel.

M J Lau Yuk Poon
Judge

16 July 2021

For Applicant: **Mr A.O. Jankee, Senior Attorney**
Mr J. Beeharry, of Counsel

For Respondent: **Ms D. Nawjee, Attorney at Law**
Ms P. Bissoonauthsing, of Counsel
Mr D. Gunesh, of Counsel