CN 1182/2015

THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

THE INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC)

V

JUGDISHWAR SHIBOO

RULING

The accused stand charged with the offence of "**Bribery by Public Official**" in breach of **Section 4(1)(a)(2) of the Prevention of Corruption Act.**

He is represented by Mr. G. Glover, Senior Counsel.

Mr Glover SC raised an objection with regard to the production of the 2nd statement of the accused recorded on 19 June, 2014 on the ground that it falls foul of *Rule III (b) of the Judges Rules and Administrative Directions to the Police*. The 2 other statements of the accused dated 5 June, 2014 and 3 July, 2014 are already on record (**Doc B-B1**)

Submissions

Mr G.Glover SC based his submission on the decision of the Intermediate Court in the case of **Police v. N. Ramgoolam & Ors (2018 INT 272)**. He added that the Court will have to decide whether the objection is well taken, and secondly, whether the Court, through the exercise of its discretion to allow the statement, will consider the weight to be attached to that part of the statement.

Mrs. Rengasamy, Counsel for the ICAC, took the view that the purpose of the recording of the 2nd statement was also to clarify matters already contained in the 1st stament of the accused which has already been produced (Doc B). Hence, there is no breach of Rule III(b) of the Judges' Rules. She referred to a string of authorities to support her submissions.

In reply Mr. G.Glover SC stated that the charge against the accused was already put to the accused in his 1st statement. The 2nd part of the contested 2nd statement does not relate to any clarification of the 1st statement.

For the purpose of this present argument he moved that the 2nd statement dated 19 June, 2014 be put in before the court. The said statement was accordingly produced by the prosecution as **Doc B2**.

The status of Judges Rules and Administrative Directions to the police

In **The State v S. Bundhun (2006 SCJ 254),** the Supreme Court explained the purport of the Judges Rules in the following:

"*The Judges Rules in their present form were, as indicated in the introductory notes preceding them, made by the Judges in England for the guidance of police officers conducting investigations. They were formulated by a Committee of Judges and approved by a meeting of all the Queen's Bench Judges. They were made applicable to Mauritius in March 1965, as indicated in a letter dated 12 March 1965 written by Tom Vickers, Chief Secretary, on behalf of the Governor of Mauritius, and addressed to the Commissioner of Police. As pointed out in the introductory notes referred to above, the Judges Rules were made in response to a request for guidance made by the Chief Constable of Birmingham to the then Lord Chief Justice, "in consequence of the fact that on the same circuit one Judge had censored a member of his force for having cautioned a prisoner whilst another Judge had censored a constable for having omitted to do so". This underlines the essential conflict of interests – between the need of not unduly hindering the police in its investigations and the need of protecting the accused against unfair treatment – which the Judges Rules attempted to reconcile. And the norms of fairness contained in the Rules are reflected in the provisions of our Constitution."*

Rule II reads: "*As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.*

The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

Rule III (a) stipulates that: "*where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:*

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

Rule III (b) states: *"It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other persons or to the public or for clearing up an ambiguity in a previous answer or statement.*"

It was stated in **The Queen V M. Boyjoo and Anor 1991 SCJ 379** that the constitutional principle against self-incrimination is not limited to cases where the accused is charged before a court of law. At the stage of the police enquiry, when he has been charged and before he is questioned, the accused must be told of his right of silence, leaving it to him to make the choice whether he wishes to waive the privilege or not.

In **The State v M.A. Coowar 1997 SCJ 193**, the Court of Criminal Appeal adopted the pertinent points made by **Davis J.A** in the Court of Appeal of Trinidad and Tobago and concluded that both the right to retain a legal adviser and the right to protection against self-incrimination are constitutional rights which are legally enforceable and the construction of the Judges' Rules and the administrative appendix thereto must be considered against the background of the Constitution.

In **S. Peart V The Queen [2006] UKPC 5**, Lord Carswell distilled '*four brief propositions*' with regard to the exercise of the discretion whether to admit an evidence notwithstanding a breach:

> "*(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.*
>
> *(ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.*
>
> *(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increase vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incriminating or causing prejudice to his case, militate against admitting such a statement.*
>
> *(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.*"

Whilst at some point in time, the Judges' Rules were qualified simply as administrative directions given to the police when recording the statement of a suspect, meaning that a breach of the Rules will not entail the exclusion of the statement at trial stage, it is now settled that in so far as the rights guaranteed by the Constitution are concerned (for example right to silence and right to counsel), the Rules have the force of law. Following the principles laid down in **Peart**, the court should also consider whether it will be fair to admit the statement.

The requirements of Rule III

The issue is whether the "*charge*" referred to in Rule III relates to a formal charge before the Court as suggested by Learned Counsel for the prosecution.

In **The DPP v T.P.J.M. Lagesse and Ors 2018 SCJ 257,** it was held that the baseline is that the accused be made aware of the case against him. Either, he is informed of the facts and circumstances against him or reproached of him. It is only if the final charge is totally different or more serious than what had been put to the accused at enquiry stage that there would be ground for concern. Or, it suffices that the version of the complainant is put to him so that he is made aware of the case against him and the evidence on which it is based so as to enable him to prepare his defence: **V.Seetahul v The State 2015 SCJ 328.**

The letter that preceded the Judges' Rules relate to two forms of caution according to the stage which an investigation has reached. One is to be given when the police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence. After this caution questioning may continue, but a record must be kept of the time and place at which such questioning began and ended and of the persons present. The second form of caution is to be given as soon as a person is charged with, or informed that he may be prosecuted for, an offence. Thereafter questions relating to the

offence can be put only in exceptional cases, where they are necessary for the purpose of preventing or minimising harm or loss to any person or to the public or for clearing up an ambiguity in a previous answer or statement.

These rules do not affect the principles that when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence: **Paragraph 39(d) of the Introductory Notes to the Judges' Rules.**

Lord Devlin in ***The Criminal Prosecution in England (1960), p 26*** pointed to the reason underlying the prohibition in Rule III (b):

"The enquiry that is conducted by the police divides itself naturally into two parts which are recognisably different, although it is difficult to say at just what point the first part ends and the second begins. In the earlier part the object of the inquiry is to ascertain the guilty party and in the latter part it is to prove the case against him. The distinction between the two periods is in effect the distinction between suspicion and accusation. The moment at which the suspect becomes the accused marks the change." (Underlining in mine).

The Board in **Peart V The Queen (Supra)** went on to state that:

"Once the suspect has been charged, the efforts of the police interviewers are directed to establishing his guilt. He is under a greater disadvantage at that stage, in that he may feel under greater compulsion to answer questions, notwithstanding a caution. These factors may tend to produce a feeling of pressure upon the accused to speak where he might otherwise have remained silent and to result in unreliable statements from him when seeking to tell exculpatory lies to get himself out of trouble. The most cogent expression of this risk is contained in the dissenting judgment of ***Pigot CB*** *in* ***R v Johnson [1864] 15 ICLR 60 at 121****:*

> *"The danger is that an innocent person, suddenly arrested, and questioned by one having the power to detain or set free, will (when subjected to interrogatories, which may be administered in the mildest or may be administered in the harshest way, and to persons of the strongest and boldest or of the most feeble and nervous natures) make statement not consistent with truth, in order to escape from the pressure of the moment....The process of questioning impresses on the greater part of mankind the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in some way, deprives the prisoner of his free agency, and impels him to answer from the fear of the consequences of declining to do so. Daily experience shows that witnesses, having deposed the strict truth, become on a severe and artful cross-examination involved in contradictions and excuses destructive of their credit and of their direct testimony. A prisoner is still more liable to make statements of that character under the pressure of interrogatories urged by the person who holds him in custody; and thus truth, the object of the evidence of admissions so elicited, is defeated by the very method ostensibly used to attain it. This relative position of the parties does not, therefore, tend to truth as the result of the enquiry."*

But the basic fundamental reason for the prohibition is the principle that to interrogate the prisoner at this stage tends to be unfair as requiring him possibly to incriminate himself."

I also find that the underlined part by the prosecution in the Canadian case of **D.S. Kalanj V The Queen (1989) 1 SCR**, should not be read in isolation. I further read in that judgment that: "A *person could be considered in a general or popular sense to be charged with an offence when informed by one in authority that 'you will be summoned to court' or upon arrest when in answer to a demand to know what all this is about an officer replies: "You are*

arrested for murder" ...the word "charge" has no precise meaning at law, but merely means that steps are being taken which in the normal course will lead to a criminal prosecution."

It follows therefore, that the "*charge*" can only refer to the accused being informed at the enquiry stage as to what evidence there is against him.

For means of comparison, I find it relevant to refer to the case of **The State v S. Bundhun (supra),** where the Appellant was brought before the District Court of Port Louis on a provisional charge before he was invited to give a statement. Learned Counsel for the Appellant referred to Rule III (b) of the Judges Rules to the effect that questioning should not normally take place after a suspect has been "*charged*". In his Interlocutory Judgment, E. Balancy J. (as he then was) had the following to say:

"*I am unable to agree with the submission of Counsel for the accused that Rule III (b) was applicable in the present case in as much as the accused had been provisionally charged. A provisional charge in the Mauritian context is simply an indication of the offence which a person is suspected of having committed and is normally lodged at a very early stage of the enquiry, when investigation may have hardly started and is certainly not over. The purpose of such a charge is to serve as a basis for the detention or conditional release of the suspect. Accordingly, when only a provisional charge has been laid against a suspect, he cannot be considered as a person "charged" within the meaning of Rule III (b). In the circumstances of the present case, police investigation was clearly still on and the applicable Rule was Rule II: the police was therefore entitled, within the wording of that Rule, to question or further question the suspect, relating to the offence which it suspected him to have committed, after giving the appropriate caution and upon keeping an appropriate record of any such questioning and of any statement offered."*

In the present case, the circumstances of the recording of the 2nd statement from the accused are revealed in the very same statement. In fact, the 1st part is concerned with an identification exercise following the 1st statement. The 2nd part is with regards to the failure by the accused to report the incident which occurred on 14 December, 2013 in the Diary Book of Pamplemousses Police Station.

The court does not agree that the enquiry was carried out under Rule II. It is clear that the ICAC already had evidence against the accused. The mere fact that the accused was cautioned and the allegation put to him and the manner in which it was put, renders Rule III operational.

To that extent, I endorse the submission of Learned Senior Counsel for the accused that he was charged as per Rule III. There is of course, no contention on record from the prosecution that further questioning was necessary for the purpose of preventing or minimising harm or loss to some other persons or to public or for clearing up an ambiguity in a previous answer or statement.

Therefore, in absence of the exceptional circumstances laid down in Rule III (b), the court finds that there has been a breach of the said rule.

Discretion of the Court to admit evidence in the event there has been a breach of the Rules.

Lord Devlin in *The Criminal Prosecution in England 1960* expressed the view that:

"The essence of the thing is that a judge must be satisfied that some unfair or oppressive use has been made of police power. If he is so satisfied, he will reject the evidence notwithstanding that there is no rule which specifically prohibits it; if he is not so satisfied, he

will admit the evidence even though there may have been some technical breach of one of the rules. It must never be forgotten that the Judges' Rules were made for the guidance of the police and not for the circumscription of the judicial power."

The issue is whether it is fair to admit the evidence even if it was obtained in breach of the Judges' Rules. It seems that there has been simply a technical breach of the Rules. I can simply say that the fairness and the relevance of the statement can only be assessed after it is placed on record and after the evidence has been adduced by both prosecution and defence.

With much relevance, I reiterate the principle adumbrated in the case of **The State v Peter Wayne Roberts (Supreme Court Ruling) 2015** where B. Joseph J. stated:

"*In a criminal trial the judge, in the exercise of his overriding duty to ensure the fairness of the trial, has the discretion to exclude even admissible evidence where its prejudicial effect outweighs its probative value…*"

For all the above reasons, this court considers that the 2nd statement of 19 June, 2014 should be admitted as evidence and the court will assess the overall fairness at the close of the case and subsequently the weight to be attached to it.

The Court, accordingly, sets aside the objection raised by Learned Senior Counsel for the accused.

Mr Raj Seebaluck
Vice-President
Intermediate Court - Criminal Division
This 6 September, 2019.