

CN: 19/2022

**IN THE INTERMEDIATE COURT OF MAURITIUS  
(FINANCIAL CRIMES DIVISION)**

**In the matter of:**

**Independent Commission Against Corruption**

**v/s**

- 1. Joelle Nadine Adam**
- 2. Dharamjay Luchmun**

**RULING**

Accused no.1 is being prosecuted for the offence of Treating of Public Official in breach of section 14 of the Prevention of Corruption Act 2002 (POCA), coupled with section 44(1)(b) of the Interpretation and General Clauses Act (IGCA) under count 1 of the Information. Accused no.2 is being prosecuted for the offence of Receiving Gift for a Corrupt Purpose under count 2 in breach of section 15(a) and 83 of POCA.

Accused no.1 was represented by Mrs A. Jhowry and accused no.2 by Mr G. Glover SC together with Mr Collimalay. The motion of abuse of process was raised during the course of trial on behalf of accused no.1.

The preamble to this argument can be summarised as follows. The accused no.1 was one of the directors and one of the shareholders of Chemical and Technical Supplies (LO) Ltd (Chemtech) at the material time. A few out-of-court statements were recorded by the investigative officers during enquiry. Statements which were recorded by the accused no.1 as representative of 'Chemtech', were subject to rulings delivered by this court. Doc A is the one defence statement recorded from the accused no.1 as director and shareholder of the said company, and which was held as admissible.



The contention of the defence in a gist is that, at no point during the recording of Doc A, was the accused informed that she might have committed an offence as a person concerned in the management of the company. She was interviewed in her capacity as director and shareholder, which as per the submissions of the defence, is distinct from a person concerned in the management. As such she would be bereft of the statutory defence created under **section 44(1)(b) of the Interpretation and General Clauses Act (IGCA)**. The defence went on to state that the accused was not informed, in her capacity as person involved in the management of the said company, of the charge at the time Doc A was recorded.

I propose to deal, at the outset, with the issue of putting the charge to the accused at enquiry stage. The defence has relied on a number of cases, including **Choomka v The State 2017 SCJ 302**, where the case **Easton v The State 2012 SCJ 55** was cited. The Supreme Court's pronouncement was a qualified one, when it was held *'Whilst we are not prepared to state that a failure to put a charge to an accused party at enquiry stage invariably results in a breach of his right to a fair hearing under section 10 of the Constitution, we are of the considered view that, in this particular case, the fact that the appellant was called upon to give his defence in relation to count 1 only and the charge under count 2 was never put to him rendered the conviction under count 2 unsafe'*. It is rather clear that in the specific situation where an entirely distinct offence has been added to the Information against the accused, the latter should have been made aware of that offence at the time he was tasked to provide his defence.

The settled line of caselaw consisting of; **Seetahul v State 2015 SCJ 328**, **Grandcourt v State 2018 SCJ 56**, **DPP v Lagesse & Ors 2018 SCJ 257**, **DPP v Ducasse 2023 SCJ 20**, has been clear in that the accused needs not be confronted with the precise charge at cautioning stage but with the nature of the charge, or be made aware of the factual case built against her and to be relied upon at trial.

Count 1 of the Information is particularised as *'the said Joelle Nadine Adam, in her capacity of director of CHEMTECH, a distributor of consumer goods and medical devices, while having dealings with the Ministry of Health and Quality of Life for the supply of medical equipment, to wit: video laparoscope, offered a gratification, to wit: an air ticket amounting to MUR 40,100 ...'*.

Doc A describes the facts and circumstances of the prosecution's case as *'in about the month of October 2014, offered and paid an air ticket for Dr Dharamraj Lutchmun at Atom Travel for the sum of Rs40,100 ...'*. The facts and circumstances of the case, as confronted at enquiry stage, are therefore similar to those with which the accused



no.1 has been charged. It cannot be said that the accused no.1 was not informed of the nature of the alleged offence. However, the issue raised by the defence is with regards to who was responsible for those facts and circumstances. It is the identity of the perpetrator which is being disputed and not the alleged offence itself. Due to the coupling of the offence under POCA with section 44 of the IGCA, the nature of the complete charge cannot be limited to the circumstances of the alleged offence of treating of public official. Now it is also true, that the investigative officers are not required to put the exact charge to the accused at enquiry stage. They did not use the wording of the law, that is, *a person concerned in the management*, but informed the accused in the following terms:

*I informed her the facts and circumstances of the present case that ICAC is conducting a corruption investigation against her as she is the Director and Shareholder of the company ... CHEMTECH and she is informed that the ICAC has reasonable grounds to believe that she may have committed an offence of corruption in breach of 'POCA' for having in about the month of.*

The exact wording of the law under section 44(1)(b) of the IGCA therefore does not have to be used as long as the nature of the charge is explained to the accused. The fact that the accused no.1 has been informed that the ICAC had reasonable grounds to believe that she, as the director and shareholder of CHEMTECH, might have committed an offence under POCA, raises the issue of whether she understood that she was likely to be prosecuted as a person concerned in the management of the company.

The motion is one of abuse of process to permanently stay the proceedings on the ground that the accused was unable to prepare an adequate defence since she was not informed of the nature of the case she had to meet. In order to provide a defence, she would thus be forced to waive her constitutional right of silence at trial and give evidence under oath.

As was held in **DPP v Phatully 2023 SCJ 14**; *It is, therefore, now well settled that the Court has an inherent power to stay criminal proceedings for abuse of process in two categories of case, namely: (i) where it will be impossible to give the accused a fair trial; and (ii) where a stay is necessary to protect the integrity of the criminal justice system. It is also well settled that proceedings are only stayed in "exceptional circumstances" and the power to stay proceedings "should only be exercised sparingly and only if there is no alternative course" (see DPP v. Humphrys [1977] 1 A.C., at 26 and R. V. Haringey Justices, ex p. DPP [1996] 1 All E.R. 828). As stated in, The State v Wasson S J & Ors [2008 SCJ 209], "The test to be applied is that of fairness".*



The surrounding circumstances of the case are of relevance on the issue of fairness. The accused no.1 had put up three out of court statements prior to the fourth, marked as Doc A. The first three statements were deemed inadmissible by this court, following arguments and a ruling delivered on 14.07.23. The said statements were recorded from Mrs Adam, as representative of the company 'CHEMTECH'. It is therefore manifest that any reasonable person in the accused's shoes, would have been aware that the first three statements were put up in a different capacity to the last one. At Doc A, she was informed that *ICAC is conducting a corruption investigation against her as she is the Director and Shareholder of the company.* By contrast to the other statements, the investigation had been redirected against her in some personal capacity, which led to the recording of Doc A when the facts and circumstances of the case were once again confronted to her. The accused was cognizant to such turn of events, as portrayed in her answer at Doc A Folio 241059, *'I wish to state that I have already in my capacity as a representative of CHEMTECH and manager of the company disclosed all the facts within my personal knowledge regarding the present enquiry'*.

The section 44(1)(b) of the IGCA is reproduced below:

(1) *Where an offence is committed by—*

(b) *a body corporate, every person who, at the time of the commission of the offence, was concerned in the management of the body corporate or was purporting to act in that capacity,*

*shall also commit the like offence, unless he proves that the offence was committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence.*

The above section creates two possible offenders, namely, the body corporate itself, or a person concerned in the management of the said body corporate. In the latter situation, the person will be prosecuted in his or her personal name, in the capacity of a person concerned in the management of the company. The first three statements were recorded with Mrs Adam as representative of the company. The fourth was recorded in her personal capacity as director and shareholder. The fact that there had been a change in the wording used by the recording officers could only mean that she was then being investigated as a person concerned in the management of the company. There would be no alternative under section 44(1)(b) of the IGCA.

It is clear from the cross-examination of the prosecution witness called for this argument, that the accused no.1 was not the only director and shareholder. It is also



settled that a director and/or shareholder is not invariably a person concerned in the management of the company, even more so when there is more than one. However, the investigative officers are not required to quote the section of the law at cautioning stage, nor use the same wording of the relevant section. Still less, are they under any duty to disclose any defence in law that might be available to a suspect. On the other hand, if the question was whether the capacity of the accused could have been more explicitly stated, the answer would have been in the affirmative. But the motion here is one of abuse of process where the court has been tasked to decide whether it would be impossible for the accused to receive a fair trial or whether it would be unfair to put her on trial. Such an exceptional remedy necessitates an element of serious prejudice.

From **DPP v Ducasse 2023 SCJ 20**, the following extract is of relevance:

*It is therefore clear that all imperfections during the enquiry by the police will not necessarily be fatal to the prosecution's case unless it is of such a nature as to result in irreparable prejudice being caused to an accused.*

The body of the Information avers 'a person concerned in the management of a body corporate'. In the particulars section, the accused no.1 is described as 'director and shareholder' of CHEMTECH. Clearly the defence statement Doc A was recorded with the view from the prosecution that Mrs Adam, as director and shareholder was a person concerned in the management of CHEMTECH. Whether that was indeed the case, is a matter of evidence to be canvassed at trial. Therefore, no improper motive from the investigative officers can attached to the way Doc A was recorded.

Although no evidence was adduced on behalf of the defence, the latter offered submissions to the effect that the accused no.1 had suffered irreparable prejudice when she was deprived of the statutory defence created under section 44(1)(b) of the IGCA. There is no actionable evidence on record indicating that the accused no.1 was not a person concerned in the management of CHEMTECH. At the current stage of trial, the end of the prosecution's case has yet to be reached. Generally, the burden rests on the defence to show prejudice in a motion of abuse of process. The mere allegation that the accused no.1 might or might not have benefitted from a statutory defence cannot, inevitably, amount to irreparable prejudice. The only sliver of evidence ushered by the defence through the cross-examination of the prosecution witness (W1) was that the accused was not the only director and shareholder of CHEMTECH.



## CONCLUSION

Applying all the surrounding circumstances of this case, it can reasonably be inferred that the accused no.1 was sufficiently made aware that she was being investigated in her personal capacity, and therefore as a person concerned in the management of the said company for the reasons given above.

Furthermore, having asserted irreparable prejudice due to the inability of the accused to prepare a proper defence, the defence has not satisfied the court during the course of this argument that such is the case.

For the above reasons, I hold that it is not impossible for the accused to benefit from a fair trial, nor is it unfair to try the accused. The motion for abuse of process is therefore set aside.



**P K Rangasamy**  
**Magistrate of the Intermediate Court**  
**19.06.24**