

ICAC v N.B Anauth Ruling

2023 INT 161

FCD CN: FR/L28/2022

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

ICAC

V

Nazimah Bibi ANAUTH

RULING

A. BACKGROUND

1. Accused is being prosecuted for the offence of Money laundering (2 Counts) in breach of sections 3 (1)(b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act. She has pleaded not guilty and is represented by Counsel, Mr. R. Rama. The case for the prosecution is being conducted by Mr. Ponen for the ICAC.
2. During the course of the trial, the prosecution sought to admit two statements dated 17th May 2018 and 26th July 2018 by virtue of section 188C of the Courts Act. Those two statements were recorded from Miss Rishta Devi Jhugaroo (witness no.7). Mr. R. Rama had no objection to that course of action by the prosecution.
3. For the purposes of establishing the required evidential foundation under section 188C of the Courts Act, the prosecution called two witnesses.
4. CPL 6364 Budoo (witness no.9) from the Passport and Immigration Office deposed to the effect that Miss Rishta Devi Jhugaroo (witness no.7) bearing ID No: J010491461373C left Mauritius on 02nd May 2019 for England. Her date of return is unknown. He also produced a document containing the travel history of Miss Rishta Devi Jhugaroo (witness no.7) which was marked as Doc H.

5. Investigator Peerboccus (witness no.1), the main enquiring officer, stated that two statements were recorded from Miss Rishta Devi Jhugaroo (witness no.7) whilst she was working at Senator Club. The purpose of those two statements was to verify the version of accused who had explained that she had won bets at Senator Club. He also confirmed that the ID number in both statements matched the ID number of Miss Rishta Devi Jhugaroo (witness no.7).
6. Investigator Peerboccus (witness no.1) also informed Court that he only recorded one statement from Miss Rishta Devi Jhugaroo (witness no.7). The other statement was recorded by another officer of the ICAC. He also conceded that no effort has been made to contact anyone at the Senator Club or the place of residence of Miss Rishta Devi Jhugaroo (witness no.7) to ascertain her contact number and details.

B. THE SUBMISSIONS

7. Mr. Ponen submitted that Miss Rishta Devi Jhugaroo (witness no.7) is clearly abroad and it is not reasonably practicable to secure his attendance because there is no indication as to how she may be contacted. He also invited the Court not to read more than what is provided in section 188C of the Courts Act.
8. Mr. R. Rama left matter in the hands of the Court.

C. THE LAW

9. Section 188C of the Courts Act provides:

“188C. Admissibility of out of Court statement in piracy and financial crime cases where maker is unavailable

(1) In any criminal proceedings under the Piracy and Maritime Violence Act or for a financial crime offence as defined in sections 41A(5) and 80D(5), a statement made out of Court shall be admissible as evidence, with leave of the Court, of any matter stated when –

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;

(b) the person who made the statement is identified to the Court’s satisfaction; and

(c) one of the 5 conditions specified in subsection (2) is satisfied.

(2) The conditions referred to in subsection (1)(c) are that the person who made the statement –

(a) is dead;

(b) is unfit to be a witness because of his bodily or mental condition;

(c) is outside Mauritius and it is not reasonably practicable to secure his attendance;

(d) cannot be found although such steps as is reasonably practicable to take to find him have been undertaken; or

(e) through fear, does not give or does not continue to give oral evidence in the proceedings, either at all or in connection with the subject matter of the statement.

(3) Where a statement is admitted in evidence under subsection (1) any evidence which, if that person had been called as a witness, could have been admissible for the purpose of impeaching or supporting his credibility, shall be admissible for that purpose.

(4) In assessing the weight, if any, to be attached to a statement admitted in evidence under subsection (1), the Court shall have regard to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.”

10. Section 188C was introduced in the Courts Act, as a statutory exception to the rule against hearsay evidence, through the Piracy and Maritime Violence Act 2011. Section 188C of the Courts Act came into effect on 1st June 2012 and was initially applicable to piracy cases only. It was later extended to financial crime cases through the Finance (Miscellaneous Provisions) Act of 2021.

11. Being an exception to the rule against hearsay evidence, section 188C of the Courts Act sets out certain conditions which must be satisfied before admitting an out of court statement, namely:

- (i) Firstly**, the party seeking to adduce an out of court statement must ask leave from the Court;
- (ii) Secondly**, the out of court statement must be in relation to a financial crime offence;

- (iii) **Thirdly**, the person who made the out of Court statement must be clearly identifiable;
- (iv) **Fourthly**, the justification for admitting the out of court statement must necessarily be one provided for by section 188C of the Courts Act itself in terms of the witness being dead, abroad or unavailable for reasons enumerated in that section; and
- (v) **Fifthly**, the contents of the out of Court statement must itself be shown to be admissible.

12. Only upon the above conditions being satisfied that the Court will thereafter address its mind to the counterbalancing measures provided in section 188C of the Courts Act before exercising its discretion to admit or not the out of Court statement.

13. As can be gauged from the motion and submission of the prosecution, the present motion is more specifically based on section 188C (2)(c) of the Courts Act. As such, the Court must also determine whether the “...not reasonably practicable test...” provided therein has been satisfied.

14. In **R v Yu and another [2006] EWCA Crim 349**, upon an analysis of section 23 (2)(b) of the UK’s Criminal Justice Act 1988 which is akin to our section 188C (2)(c) of the Courts Act, the UK’s Court of Appeal stated:

“[30] It has to be observed that the judge has, at this stage, to form a judgment as to whether the “not reasonably practicable test” has been met. Only if it has, does he go on to the next stage, which is to exercise his discretion not to admit evidence that would otherwise be admissible under s 23.”

15. As to what amounts to “not reasonably practicable”, in **Yu and another (supra)**, it was held:

“[28] We were referred to the 2004 edition of Archbold and the passage at para 9-136 on p 1251, which gives some assistance on the interpretation of s 23(2)(b). The passage recites: The words ‘reasonably practicable’ involve a consideration of the normal steps which would be taken to secure the attendance of a witness, and the qualification of reasonableness includes other circumstances such as the cost and the steps which may be available to secure attendance.

Then the opening words of 9-137: The mere fact that it is possible for the witness to attend is not conclusive.” (Underlining is mine)

16. In **R v Castillo and others [1996] 1 Cr App Rep 438**, the UK's Court of Appeal held that:

“The word 'practicable' appears in many statutes as a qualification of duties or obligations imposed on those required to carry out the relevant acts by the statute. It is to be noted that in s 23, the statements referred to may be statements of the prosecution or of defence witnesses, and the obligation which normally attaches to those who are presenting cases in the Crown Court is to secure, so far as possible, the attendance of witnesses to give evidence orally in court, but the word 'practicable' is not equivalent to physically possible. It must be construed in the light of the normal steps which would be taken to arrange the attendance of a witness at trial. Reasonably practicable involves a further qualification, of the duty to secure the attendance at trial by taking the reasonable steps which a party would normally take to secure a witness's attendance having regard to the means and resources available to the parties. Therefore, in our judgment, the mere fact that it is possible for the witness to come does not answer the question.

The judge has to consider a number of factors. First, he has to consider the importance of the evidence that the witness can give and whether or not it was prejudicial, and how prejudicial it would be to the defence that the witness did not attend.

Second, we have to consider the expense and inconvenience of securing the witnesses attendance, which the judge took into account. It may well be that if a witness is part of the prosecution team, so to speak, that should not be a major consideration, but it is a matter of considerable expense to bring a witness all the way from Venezuela simply to give evidence on a matter which it seems to this Court could not seriously be challenged in cross-examination.

Third, the judge has to consider the reasons put forward as to why it is not convenient or reasonably practicable for the officer to come. This is a question of fact, and this Court does not lightly interfere with findings of fact by the trial judge. This is not a case where any credibility arises but, nevertheless, the judge had to make a decision as to what was reasonably practicable... ” (underlining is mine)

17. It is noteworthy, that the first factor as explained in **Castillo and others (supra)** need not be considered for the purposes of the “not reasonably practicable test”. It would only apply upon that test being met and would be relevant for the purpose of a judicious exercise of discretion under section 188C (2)(c) of the Courts Act – See paragraph 30 of **Yu and another (supra)**.

D. ANALYSIS

18. It is undisputed that leave of the Court has been sought by the prosecution to have two statements of Miss Rishta Devi Jhugaroo (witness no.7) admitted by virtue of section 188C (2)(c) of the Courts Act in relation to a financial crime offence. It is equally undisputed that this witness is clearly identifiable and is outside Mauritius. The Court has now to assess whether the “not reasonably practicable test” has been satisfied.

19. As was explained in **Castillo and others (supra)** and **Yu and another (supra)**, this involves looking at two things. Firstly, the normal steps which should be taken to arrange the attendance of that witness for the trial. Secondly, if the attendance of that witness is possible, whether such attendance would be reasonably practicable because of the costs and expenses to be incurred by the party seeking his attendance or for any other reason.

20. In the present case, the normal steps which the prosecution would have been expected to take to secure the attendance of Miss Rishta Devi Jhugaroo (witness no.7) are, amongst others, to:

- (i) get her contact number and details either from her relatives residing in Mauritius, or from the place where she was previously working;
- (ii) contact her to ascertain in which country and place she is actually;
- (iii) inform her that she is a witness in the present case and that her attendance is required on such date in Mauritius for the trial; and
- (iv) get her to state whether she would be able to come on such date to Mauritius for the trial.

21. The testimony of Investigator Peerboccus (witness no.1) is revealing of the fact that no such basic normal steps have been taken to secure the attendance of Miss Rishta Devi Jhugaroo (witness no.7). Despite knowing where she was residing in Mauritius and that she was previously working at Senator Club, no effort has been made to get her contact number and details. It is unfortunate that the prosecution is luring under the wrong premise that it is not reasonably practicable to secure her attendance because there is no indication as to how she may be contacted. On the contrary, there is no indication as to how she may be contacted

because no basic effort, in terms of normal steps, has been made to get her contact number and details.

22. Moreover, given the testimony of Investigator Peerboccus (witness no.1), it cannot be excluded that Miss Rishta Devi Jhugaroo (witness no.7) is absent simply because she is unaware that she is needed as a witness the more so when the present case was lodged on 10th August 2022, which is much after she had left for the UK. Such unawareness on her part is explained by the fact that the basic normal steps to contact her have been clearly overlooked.
23. Given that the normal steps to secure the attendance of Miss Rishta Devi Jhugaroo (witness no.7) have not been taken, the Court need not embark on an analysis of whether the ‘further qualification’ involved in the “not reasonably practicable test” (see **Castillo and others (supra)**) has been satisfied.

E. CONCLUSION

24. For the reasons explained above, the prosecution having failed to prove, beyond reasonable doubt, that it is not reasonably practicable to secure the attendance of Miss Rishta Devi Jhugaroo (witness no.7), the motion of Counsel for the prosecution is set aside.

A.R.TAJOODEEN
Ag Magistrate of the Intermediate Court (Financial Crimes Division)
22.06.2023