

ICAC v Ashwin Raja TOOLSEEYA Judgment

2024 INT 5

FCD CN: FR/L95/2020

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

ICAC

V

Ashwin Raja TOOLSEEYA

JUDGMENT

A. Background

1. Accused is being prosecuted for the offence of Traffic d'Influence in breach of Section 10 (5) of the Prevention of Corruption Act 2002 (hereinafter referred to as the 'POCA'). He pleaded not guilty and was represented by Counsels, Mr. G. Glover, SC, and Mr. L. Balancy.
2. The case for the Prosecution was conducted by Mr. Jeeha for the ICAC.

B. Case for the Prosecution

3. According to a letter produced by Mr. Jay Ramaswamy (representing witness no.7) – **Doc A** - accused holds a permanent and pensionable post of Project Supervisor at the National Computer Board (hereinafter referred to as the 'NCB') since 01 July 2011.
4. Senior Investigator Seewooduth (witness no.1) is the main enquiring officer in the present case. He produced three statements which he recorded from accused on (i) 08 December 2016, (ii) 20 December 2016 and (iii) 16 March 2017 respectively – **Doc C, C1** and **C2** refer. According to him, the ICAC initiated an enquiry into the present case following a complaint made by Miss Poojakumari Ramjattan (witness no.3) against accused. Miss Poojakumari Ramjattan (witness no.3) was the president of Techno Woman Organization (hereinafter referred to as 'TWO'), a non-governmental organization. Senior Investigator Seewooduth (witness no.1)

conceded that the complaint made by Miss Poojakumari Ramjattan (witness no.3) came only four months after the alleged act of solicitation. He also conceded that the only evidence against accused is the allegations of Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4). He further conceded that as per these allegations, the act of solicitation was for a percentage of the amount of the project and that accused never solicited Rs. 200,000/- as particularized in the Information. However, Senior Investigator Seewooduth (witness no.1) explained that the Rs. 200,000/- does represent the 10% solicitation as alleged by Mr. Vishal Nowbuth (witness no.4) since the amount of the project was Rs. 2 million.

5. Mrs. Malini Ramsamy Singh (representing witness no.8) produced a certified copy of the Certificate of Registration of Association in respect of TWO – **Doc B** refers. As per **Doc B**, TWO was registered, as an association, on 06 September 2013.
6. Miss Poojakumari Ramjattan (witness no.3) was the president of TWO at the time of the alleged offence. TWO was promoting women in the field of technology and had been accredited by the MQA, as a training institution, since July 2014. On 10 June 2015 TWO sent a letter to several ministries in respect of a project relating to training courses in website design, PHP and CCNA – **Doc D** refers. TWO, together with the NCB, were to carry out the project with an initial amount of 432 candidates. On 16 March 2016 she sent a letter of complaint, against accused, to the ICAC – **Doc E** refers. She explained that accused told her two or three times “... *de faire labouche doux et nous bisin reste bien avec bann misse la haut* ...”. Since the project was not materializing and that the registration of TWO was about to be cancelled, she understood that “... *faire labouche doux* ...” meant that accused was asking for a bribe in order to make the project work. Miss Poojakumari Ramjattan (witness no.3) also explained that accused did not say more than “... *simplement reste bien avec ban missiés la haut la et fer la bouche doux* ...”. She could neither tell the date or year in which nor the exact place where, accused allegedly told those words. It also came to light that the project did not materialize.
7. Mr. Vishal Nowbuth (witness no.4) was involved with TWO from 2015 to 2016. He explained that in June 2015, TWO took the initiative of launching an experimental training program in Mauritius with respect to CISCO. The Ministry of Information Technology was contacted and a training program was agreed upon. The Ministry of Technology also decided that TWO and the NCB would be implementing the project together. Mr. Vishal Nowbuth (witness no.4) explained that during the implementation phase, accused initially told him “... *reste bien avec banes Officiers la haut et la haut la ca veut dire NCB et la MQA.* ...”. Further to that, TWO received visits of the MQA. On the other hand, the NCB applied to CISCO for accreditation to run the training program on its own. The MQA also sent TWO a letter to the effect that it will be closed down as a training institution. Given that turn of events, he and Miss Poojakumari Ramjattan (witness no.3) went to the NCB and met accused and one Mr. Bhoyroo, the director of the NCB. In presence of Mr. Bhoyroo, accused made him understand that “...

zot enna ene l'influence sur MQA ...” and that “...*si zot envie toute suite zot capave dresse tousala ... Zot capave causer ek zot ban collègues MQA et voir de sorte qui tousala régler et nous capave continuer ek nous formation.*” Mr. Vishal Nowbuth (witness no.4) further explained that “... *Nounne sorti et le temps nounne vine kot lift qui Monsieur Toolseeya la, li élaborer li dire coumsa beh, ou bizin reste bien are banes là-haut là. Ou enne grand businessman. Ou coner couman tousala dérouler. Et ou bizin faire la bouche douce. Mais nous capave, nous bien avec ça banes Officiers là-hautlà. Nous capave dresse tout, enfin bannes zaffaires coumsa.*” He understood that accused was asking for a bribe. He further explained that accused met him and Miss Poojakumari Ramjattan (witness no.3) at a place he mentioned in his statement whereby accused told them that the amount to be paid is 20% of the amount of the project. According to him, that amount would be Rs. 200,000/-.

8. During cross examination, Mr. Vishal Nowbuth (witness no.4) conceded that:
 - a. Miss Poojakumari Ramjattan (witness no.3) was his girlfriend at the material time;
 - b. accused never asked for Rs. 200,000/- but only asked 20%;
 - c. there was another officer of the NCB present in the meeting they had with accused and Mr. Bhoyroo;
 - d. both accused and Mr. Bhoyroo stated that they “... *zot capave dresse zaffaire ...*”;
 - e. he does not remember whether he made mention, to the ICAC, of that third person being present at the NCB;
 - f. he does not remember whether he got a discussion with accused about the amount of 20% despite mentioning that in his statement;
 - g. he cannot give any precision about the discussion or conversation he had with accused for the alleged solicitation;
 - h. Miss Poojakumari Ramjattan (witness no.3) should have been present when accused allegedly asked the 20%; and
 - i. he does remember if it is only at the ICAC that he mentioned the figure of 20%.

C. **Case for defence**

9. Accused did not adduce any evidence for the purposes of the trial.

D. The Submissions

10. The submissions of both prosecution and defence were geared towards showing that the main witnesses for the prosecution were either credible or not.

11. The prosecution submitted that both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4) were credible witnesses and that the Court can rely on their respective testimonies to find that the case against accused has been proved beyond reasonable doubt.

12. On the other hand, the defence highlighted the numerous contradictions and shortcomings in the testimonies of both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4) and submitted that it would be unsafe for the Court to rely on such testimonies.

E. Analysis

13. Section 10 (5) of the POCA provides:

“Any public official 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.”

14. In the present case, the prosecution must prove, beyond reasonable doubt, that:

I. accused was a public official;

II. accused wilfully solicited a gratification from another person, i.e., a sum of Rs. 200,000/- from one Poojakumari Ramjattan and one Vishal Nowbuth; and

III. in order to make use of his influence to obtain a benefit from a public body, i.e., to obtain the approval of the Mauritius Qualification Authority (MQA) for Techno Woman Organisation to be offered the training contract to deliver the Cisco Certified Network Associate (CCNA) Course.

I. PUBLIC OFFICIAL

15. As per Doc A, it is undisputed that accused was working as Project Supervisor at the National Computer Board, i.e., was an employee of the National Computer Board.

16. Section 2 of the POCA provides that:

““public official” - (a) means a Minister, a member of the National Assembly, a public officer, a local government officer, an employee or member of a local authority, a member of a Commission set up under the Constitution, an employee or member of a statutory corporation, or an employee or director of any Government company;” (underlining is mine)

17. As per section 2 of the Interpretation and General Clauses Act 1974 (hereinafter referred to as the ‘IGCA’):

““statutory corporation” means a body incorporated by an Act.”

18. Section 3 of the then National Computer Board Act 1988 provided:

“3 Establishment of the Board

(1) There is established for the purposes of this Act a board which shall be known as the National Computer Board.

(2) The Board shall be a body corporate.”

19. Since the National Computer Board is a body corporate established by an Act, it falls within the meaning of statutory corporation as provided for by the IGCA. Therefore, accused, being an employee of the National Computer Board at the material time, is deemed to be a public official for the purposes of sections 2 and 10 (5) of the POCA.

II. ACCUSED WILFULLY SOLICITED A GRATIFICATION FROM ANOTHER PERSON, i.e., A SUM OF RS. 200,000/- FROM ONE POOJAKUMARI RAMJATTAN AND ONE VISHAL NOWBUTH

20. As per the information, the prosecution has to prove that accused solicited a sum of Rs. 200,000/- from both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4). It is undisputed that the case for the prosecution rests solely on the testimony of those two witnesses. Miss Poojakumari Ramjattan (witness no.3), during her testimony, stated that accused said no more than “... *simplement reste bien avec ban missiés la haut la et fer la bouche doux ...*” which she understood that accused was asking for a bribe. On the other hand, Mr. Vishal Nowbuth (witness no.4) stated that it was during another meeting that accused explicitly asked for 20% of the value of the project amounting to Rs. 200,000/-. At this juncture, it is apt to refer and reproduce, in toto, part of the statement of accused dated 20 Dec 2016 – **Doc C1** refers – whereby accused was confronted with the versions of both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4); it reads as follows:

“O15 If Mr Nowbuth and Miss P. Ramjattan say that at the end of December 2015, he and miss Ramjattan came across you near the office of the NCB and when Mr Nowbuth told you that it seemed that they would lose the project with the Ministry, you told him as follows: “ou ene businessman. Mo ti fini dire ou qui ena pou faire et surtou ena gros pou gagner la dans” and when he asked you as to the number of projects that TWO could obtain within the framework, you told him as follows: “pas encore tard, Ena ene budget 50 millions pou training. Ena quatre dimounes, moi, missié Bhoyroo, missier Ramdass et missier Mooten. Normalement ene project government zotte prend vingt pour cent mais pou ou a cause cést plus ene travail social, dix pour cent nous pou fini faire zaffaire la”. If Mr Nowbuth also says that he told you that 10 percent would amount to Rs 200,000 and that it was too much money, you stated the following to him “pas tracas, nous capave faire ou ene advance payment pou acheter bannes equipments tous sa la pou facilite ou travail””. (Underlining is mine)

21. It is obvious, from the above extract, that that both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4) should have been present when accused allegedly asked a percentage 10% of the project amounting to Rs. 200,000/- and that accused allegedly solicited that sum of money from both of them. As is indeed the case for the prosecution, accused solicited Rs. 200,000/- from both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4). However, Miss Poojakumari Ramjattan’s (witness no.3) testimony resolves to the fact that accused did not say more than “... *simplement reste bien avec ban missiés la haut la et fer la bouche doux ...*”. The prosecution, not having confronted Miss Poojakumari Ramjattan (witness no.3) with any previous inconsistent statement on this issue, has led that material part of her testimony to be diametrically different from that of Mr.

Vishal Nowbuth (witness no.4) who stated that accused solicited 20% amounting to Rs. 200,000/-.

22. Both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4) have also been more than scrumpy in their respective testimonies. Given that 7 years has elapsed since the alleged act of solicitation, it is understandable that a witness may not remember certain things, including exact dates and time. However, the place where accused allegedly made the solicitation of Rs. 200,000/- would be a conspicuous occurring that should normally be easily remembered. However, Miss Poojakumari Ramjattan (witness no.3) could not remember the place where accused allegedly stated “...*reste bien avec ban missiés la haut la et fer la bouche doux ...*”. Mr. Vishal Nowbuth (witness no.4), on the other hand, could not remember the place where accused allegedly solicited the Rs. 200,000/-. He could merely remember that accused asked for Rs. 200,000/- and nothing more. He could neither narrate nor remember the conversation which must have taken place, namely that (i) accused told him that there was Rs. 50million for training, (ii) accused told him that there were 4 persons involved, himself, Mr. Bhoyroo, Mr. Ramdass and Mr. Mooten and that they take 20%, (iii) because it was a social project, they would only take 10%, (iv) he told accused that 10% would amount to Rs. 200,000/- and that was too much money and (v) accused told him that they could make an advance payment (extract at paragraph 18 refers). On the contrary, during examination in chief, he stated that on being informed by accused of the 20%, he told accused “...*beh aster la qui zot pe dir moi ca banes zafaires la. Beh, couman nous pour capave run ca cours-la avec le coute de running cost du project.*” During cross examination, he stated that he remained silent on being informed by accused of the 20% and that he does not remember any discussion with accused on that quantum.

23. The Court is alive to the fact that not all contradictions amongst the testimonies of prosecution witnesses are material. As was held in **Rajbally v The State (2016) SCJ 340**:

“It is not uncommon, before our Courts, for witnesses to give a version in court which, upon close scrutiny, is either inconsistent with or contains certain contradictions in comparison to statements made on previous occasions by him or her. 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.

If the contradictions or inconsistencies are on minor matters, or relate to peripheral issues or relate to matters unconnected with the case and do not affect the substance of the witness’s testimony, the Magistrate can choose to discard or ignore those inconsistencies and contradictions; at the same time, if the substance of the testimony of the witness is credible

on the whole, there is nothing wrong for the Magistrate to act on it to convict the appellant.

On the other hand, if the inconsistencies and contradictions are on matters of substance to such an extent that it would render a conviction unsafe, the Magistrate is in duty bound to reject the testimony of the witness and to give the appellant the benefit of the doubt should there be no other evidence to sustain a conviction.

However, the point that we wish to stress at this stage, is that the analysis referred to above should be quite clear in the judgment of the trial Magistrate. It is not sufficient for the Magistrate to relate the facts, or make a few comments or to make imputations that, upon being read in between the lines, would lead to one or another conclusion. The principle of transparency requires that the reader, be it the appellant or the victim or any other person perusing the judgment, should be able to see clearly from it why the Magistrate chose to convict or to give the appellant the benefit of the doubt. This is not to say that the judgment of the Magistrate should be excessively detailed or long; but the reasoning on the issues of inconsistencies and contradictions must be clear.”

24. Recently, in **Neeroo v The State (2023) SCJ 116**, it was held that:

“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. It is a rule of thumb that a witness, victim of an attempt against his or her person, is expected to be consistent in the manner the assault was committed and when it comes to the material facts and circumstances leading to the commission of the offence, any inconsistency in the actual perpetration of the impugned act is a factor to be considered against credibility.” (Underlining is mine)

25. The testimony of both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4) in respect of the alleged solicitation of Rs. 200,000/- is material and goes to the crux of whether accused did solicit that sum of money from them. The Court cannot rely solely

on the testimony of Mr. Vishal Nowbuth (witness no.4) and disregard what has been stated by Miss Poojakumari Ramjattan (witness no.3) given that:

- i. the case for the prosecution is that the Rs. 200,000/- was solicited from both of them;
- ii. the prosecution did not to confront Miss Poojakumari Ramjuttun (witness no.3) with any previous inconsistent statement on this crucial issue; and
- iii. the difference in both testimonies on this crucial issue amounts to a material contradiction which renders their respective versions unsafe.

26. In fact, Miss Pooja Kumari Ramjattan (witness no.3) did not depose at all in relation to the alleged act of solicitation which was confronted to accused (extract at paragraph 18 refers). On the other hand, Mr. Vishal Nowbuth (witness no.4) seriously contradicted himself as to what happened after that money was allegedly solicited by accused. His version on this issue, as explained earlier, was not only different in chief and during cross examination but was also different from his version he gave to the ICAC. He could not even relate the conversation which took place between accused, himself and Miss Poojakumari Ramjattan (witness no.3) when accused allegedly solicited Rs. 200,000. Mr. Vishal Nowbuth (witness no.4), in fact, conceded that he does not remember anything of that conversation. To remember, verbatim, such a conversation would surely be a herculean task that is not expected from a witness. However, such a witness would be expected to relate, at least 'en gross modo' the conversation which took place. It cannot and does not suffice that a witness merely remembers 20% and Rs. 200,000/- in respect of the act of solicitation. The conversation, be it 'en grosso modo', which brought along the act of solicitation is material for the Court to assess the overall credibility of such a witness.

27. Given the material contradictions and scantiness in the testimony of both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4) as highlighted above, the Court finds it unsafe to rely on such testimonies to find that that accused solicited a sum of Rs. 200,000/- both Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4). The Court also finds it quite disturbing that, as per the letter sent to the ICAC by Miss Poojakumari Ramjattan (witness no.3), there is no mention of the percentage of the contract amount nor Rs. 200,000/- allegedly solicited by accused – **Doc E refers**. That would normally be an important piece of information that one would expect to find in that letter.

28. The Court therefore concludes that the prosecution has failed to prove, beyond reasonable doubt, that accused solicited a sum of Rs. 200,000/- from Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4).

III. IN ORDER TO MAKE USE OF HIS INFLUENCE TO OBTAIN A BENEFIT FROM A PUBLIC BODY, I.E., TO OBTAIN THE APPROVAL OF THE MAURITIUS QUALIFICATION AUTHORITY (MQA) FOR TECHNO WOMAN ORGANISATION TO BE OFFERED THE TRAINING CONTRACT TO DELIVER THE CISCO CERTIFIED NETWORK ASSOCIATE (CCNA) COURSE

29. Given that the prosecution has failed to prove, beyond reasonable doubt, that accused solicited a sum of Rs. 200,000/- from Miss Poojakumari Ramjattan (witness no.3) and Mr. Vishal Nowbuth (witness no.4), the Court need not proceed to make a determination on this aspect.

G. Conclusion

30. For the reasons above, the charge against accused is dismissed.

A.R.TAJOODEEN
Ag Magistrate of the Intermediate Court (Financial Crimes Division)
24.01.2024