

CN 1416/2020

THE COURT OF RODRIGUES

In the matter of:

The Independent Commission against Corruption (ICAC)

v/s

Marie Antoine Davilla Cupidon

JUDGMENT

[1] The accused party has been prosecuted under a charge of conflict of interests in breach of sections 13(2) & (3) of the Prevention of Corruption Act 2002. He pleaded not guilty and was represented by Me. M. Ramano. The prosecution was represented by Me T. Naga who was assisted by Investigator Mr Ghoseawon.

A. THE COURT'S ASSESSMENT

[2] The prosecution has the duty to prove, beyond reasonable doubt, that the accused, on 12th of August 2015, whilst being a public official, whose relative, that is, his brother, had a personal interest in an application for a subsidy for the purchase of a tiller, did wilfully and unlawfully take part in those proceedings by considering and processing the said application relating to the grant of the subsidy. The Court shall firstly, assess the weight to be attached to the testimony of witnesses who deponed and secondly analyse whether the prosecution has adduced sufficient evidence to satisfy all the elements of the offence on a criminal standard.

Assessing the weight to be attached to the testimony of witness no. 9

[3] Mr J Rodney Raffaut, the then acting finance officer, produced a document of three pages (Documents J, J1 and J2) which proved that Mr Jean Aurel Cupidon was a beneficiary of the power tiller scheme. In cross examination he explained that he processed the payment from a directive of the then Departmental Head. The Court finds that his version in examination in chief remained unchallenged and unrebutted.

Assessing the weight to be attached to the testimony of witness no. 11

[4] Mrs Marie Mirella Prudence, Senior Civil Status Officer, produced the birth certificate of the Mr Marie Antoine Davilla Cupidon (Document E) and that of Jean Aurel Cupidon (Document F). Her testimony and documents produced were not challenged by any cross examination. 9

Assessing the weight to be attached to the testimony of witness no.5

[5] Mrs N Augustin, the Human Resource Executive produced documents (Documents G, G1-6 and H) explaining the career path of the accused and that as from 24.7.13 he was working as Agricultural Superintendent for the Commission for Agriculture. Her version was not subject of any cross examination hence remained unrebutted.

Assessing the weight to be attached to the testimony of witnesses no.1&2 respectively

[6] Mr J Migale, Senior Investigator was one of the main Enquiry Officers in this matter. He produced two defence statements of the accused party dated 7/8/17 and 15/8/17 respectively (Documents A and B). He was cross examined on the different steps involved in the grant of the subsidy under the power tiller scheme. His enquiry revealed that all applicants obtained funding they had applied for. Furthermore, the enquiry revealed that Mr Felicite had not stopped the process but raised the issue with the accused who told him to continue processing the application. Initially it was the Scheme Monitoring Committee (SMC) which had to take the final decision but since funds were available all applications were successful. In addition to that, the accused had received the notes of meeting held on 2nd of July 2015 and was aware of paragraph 2.2.10 which mentioned that any situation of conflict of interest should be communicated to the Departmental Head through proper channel. Witness no.2, WPC 89 Edouard further produced two additional defence statements dated 7/12/2016 and 22/2/17 (Documents C and D). During her enquiry, the accused stated that he had denied the conversation with Mr Felicite. She also stated that there was no documentary evidence of the conversation between Mr Felicite and the accused. Both witnesses deponed in a straight forward and convincing manner. Having assessed the version of the Enquiry officers, the Court shall further assess the testimonies of other witnesses who deponed in this matter.

Assessing the weight to be attached to the testimony of witness no. 6

[7] Mr J Robertson was posted as acting administrative officer at the Commission for Agriculture since 2014. In 2017 he was working for the same commission. He has been delegated by the Departmental Head of the aforesaid commission to produce relevant documents. He explained the various steps involved in the grant of the power tiller scheme which was part of the Agricultural Incentive Scheme. A set of criteria was set by management and farmers were invited to register themselves. He produced the site inspection form in relation to this matter (Documents K and K1). Part I of the document was nothing technical but merely clerical. Part II of the document contained the criteria to be completed by the field officer, witness no.8. The scheme manager's role was to further process the recommendation by deciding whether the application can be considered or not.

[8] The accused was the manager in this case. He had put his recommendations at section 4 of Document K and had put as remark "application to be considered" on the 12th of August 2015. He also produced the original application form of Mr Jean Aurel Cupidon (Document L, L1- L8) and notes of meeting and annexures (Document M, M1 to M8) held by the Scheme Evaluation Committee. It is to be noted that the accused was the only party who was absent during the said meeting. The witness explained that he had to draft the notes of meeting to be sent to all members including the accused party. Document M8 is a model conflict of interest form attached to Document M. The signature of the accused on Document M1 is proof of the fact that he had received Document M, M1- M8. However, in cross examination, over and above the mistakes on the date on the documents, he explained that the bundle of documents are prepared by the despatch clerk and despatch is done by the office attendant. Hence, with the signature of the accused on the document he can only presume that the accused received all the documents. The Court notes that the witness did not have personal knowledge of whether the whole set of documents were delivered to the accused. Having had the opportunity to assess his demeanour, the straight forward manner in which he deponed and having stood the test of cross examination, I find his version to be credible.

Assessing the weight to be attached to the testimony of witness no. 8

[9] In August 2015, Mr J A Law San was the senior technical officer who was appointed to carry out visits for applicants under the power tiller scheme. It was the accused who was the manager of the scheme. His duty was to perform a survey to verify whether the applicant met criteria as per paragraphs/parts 1,2 and 3 of the site inspection form (Documents K and K1). He received the site inspection from the registry and after his survey he sent same back to registry. He also could not remember if Mr Jerome Felicite told him if he should declare any conflict of interests. Assessing his demeanour and the straight forward manner in which he deponed, the Court believes his version.

Assessing the weight to be attached to the testimony of witness no.7

[10] Mr J Jerome Felicite was the Acting officer in charge at the Commission for Agriculture in 2015. He was the Scheme Coordinator and the site inspection form goes through him after accused filled section 4 of same. He further stated that the applications under this Scheme were received by one Mr Sabrina Clair and one Mr Christophe Meunier. He explained that the field officer may submit the results of his visit either to the manager directly or through a supervisor to the manager. Explaining Documents K and K1 he stated that section 4 was filled by the scheme manager, i.e, the accused, who had inputted "application to be considered." In cross examination (page 94 of the proceedings, question no.3) the witness agreed that should the accused *not reject any application anything that he put any remarks that is put is going to*

be forwarded to the next level. As scheme coordinator he filled section 5 of the document. He was informed by one Mr Agathe that the accused had a relative as applicant in the power tiller scheme. On that same issue he personally met the accused, informed him that according to law, he should not be signing the form of his brother and asked the accused to confirm whether his brother had made an application or not. The accused then told him to send the form to the Commission then they will decide. He sent the form to the Scheme Unit and informed the Departmental Head of the conversation he had with the accused. He admitted having attended the meeting of the Scheme Evaluation Committee and having received Documents M1 – M8. In cross examination he admitted that the accused's role did not involve any decision to award the funding or not. In cross examination, the fact that he had met the accused on this specific issue was hotly contested by the defence. Since the said Agathe and the Departmental Head were not called as witnesses, the Court can only rely on the assessment of the credibility of witness no.7 to determine whether that conversation with the accused took place or not. Defence Counsel had put to him that this was an important matter and yet there were no records kept of such an important meeting. The witness replied that *in practice in that division to discuss matters... based on our agreement, that we finally agree, then we proceed and not all meetings are recorded.*

[11] Defence Counsel had also put to the witness that he had a grudge against the accused party as in 2003/4 when the accused became Acting Officer at his expense. The witness then explained at that point when the accused was promoted despite he was a senior officer he had a grudge against him and had even complained to the ICAC. However, when he was asked that he had a grudge against the accused afterwards, he further explained that he was very respectful towards the accused and often they have collaborated and they may *differ on some points which is very natural but he would never push the accused in a pit hole.*

[12] In re-examination, he stated that based on his training it was the responsibility of the person who is in the situation of conflict of interest to declare and there are guidelines of ICAC as well on same. On the issue of the bad blood between him and witness no.7 the accused, under oath, agreed that there cannot be any reason for witness no.7 to have a grudge against him as the latter has already been promoted. Taking into consideration the whole of his testimony, despite the previous complaint made by him against the accused in the past for a promotion at his expense and the explanations he provided on the cordial working relationship they had, after the promotion incident, the fact that he was consistent throughout on the fact that he had that conversation with the accused and having had the opportunity to assess the demeanour of the witness, the straight forward manner he deponed, sustained the test of cross examination, I find his version to be credible. Having assessed the version of the prosecution witnesses, the Court shall assess the version of the accused party.

Assessing the weight to be attached to the testimony of the accused party

[13] The accused deponed under oath and admitted that he was the Scheme Manager for the power tiller scheme. He received applications from the Scheme Monitoring Unit (SMU) which consisted of one Mr Sabrina Clair and one Mr Christophe Meunier. After receiving the applications from the SMU he would send same to the technical team for site inspection. Witness no.8 was the team leader of the inspection team. Afterwards, the application would be forwarded to him to verify whether all criteria had been attended to. He would then send the site inspection forms to the Scheme Coordinator, witness no.7. He became aware that his brother had applied for the scheme when he received the inspection form from Mr Law San. He admitted having put the remarks "application to be considered" on his brother's application form.

[14] He confirmed having received Documents M2,3 and 4. He also stated that he was aware of paragraph 2.2.10 on the issue of conflict of interests when he considered and processed Document K. He further stated that he would have declared his interests at the sitting of the Scheme Monitoring Committee (SMC). He also did not receive Documents M5 to M8. He even denied the conversation on the issue of conflict of interest with witness no.7, who, according to him, has a grudge against him. He further stated in examination in chief that he did not have the authority to either reject the application or authorise same.

[15] In cross examination, he agreed that he was a public official at the material time and that he had signed his brother's application on 12/8/15. He further explained in cross examination (at page 100 of the proceedings- last two questions), that the purpose of the list of criteria was for the granting of subsidy to persons who were eligible. He further admitted having considered and processed the application of his brother for the grant of the subsidy. In further cross examination, part of his defence statement stating that the application was sent to the field and technical team through him was put to him. Despite he admitted that the events were fresh in his mind at the time of the defence statement, same was read over to him, he had nothing to correct and the version in his defence statement is the truth yet under oath he departed from that version of his defence statement.

[16] Furthermore, since he acknowledged having received Document M4 and admitted that he was aware of paragraph 2.2.10 and that he agreed that whenever there is a situation of conflict of interests, he had first to declare it before taking part in the process. Despite the provisions of paragraph 2.2.10 and the fact that he knew that at the time he was faced with the application of his brother he was in a situation of conflict he processed same and stated that he would have declared this conflict at the SMC.

[17] On the issue of the bad blood between him and witness no.7 he agreed that there cannot be any reason for witness no.7 to have a grudge against him as he has already been promoted. However, he further explained how in 2008 witness no.7 reported him to the ICAC. He even further admitted that if a superior officer finds *something wrong* he had a duty to report same to the ICAC. Witness no.7 deponed and maintained throughout that he had the conversation which is denied by the accused. Taking into consideration the version of the accused and that of witness no.7, I find that witness no.7 has convinced the Court that he had a conversation with the accused and was not lying. As regards the subject of his complaint against the accused in the past and that *wrong* had already been remedied as stated by the accused. The subject matter of the conversation was anyhow about the duties of an officer when he faces a situation of conflict of interest amongst others. At any rate, the accused admitted that he was aware of paragraph 2.2.10 and that he knew there was a declaration of conflict of interests' form prior to processing his brother's application. His defence throughout has been that he would have declared same at the SMC. Taking into consideration the version of the accused and evidence adduced by the prosecution, Defence Counsel submitted that the accused party did not wilfully, unlawfully and criminally take part in the proceedings of that public body relating to such decision on the following grounds, amongst others:

- i. *There were no discretion or decision afforded to the accused at this stage of the application process...His task in the process did not involve ANY recommendation on his part in respect of ANY applications let alone the applications of his brother;*
- ii. *His job was not to approve or reject but to merely check that the required criteria had been properly verified by the field survey officers...*
- iii. *At all times, he genuinely **believed and was convinced** as part of the original defined process, the Scheme Evaluation Committee/ Scheme Monitoring Committee was going to meet for the final decision on the eligibility of the criteria;*
- iv. *Having taken cognizance of his brother's application when he received the Site Inspection Form, he decided that he would then declare his interest when the matter would come in front of the Scheme Evaluation Committee. This was what he had in mind when he filled Section 4 of the Site Inspection Form.*
- v. *The prosecution cannot show with any uncertainty, that the accused had been given the opportunity to declare his interest at the future meeting of the SMC, he would not have done so.*

[18] After the case for the defence was closed, both Counsel proceeded to file written submissions. The Court appreciates the efforts of both legal representatives for filing their detailed written submissions in a timely manner. The Court shall take into consideration the version of the accused as assessed above, the evidence adduced by the prosecution, the

submissions of Defence Counsel and Prosecuting Counsel in its analysis on whether the prosecution has adduced sufficient evidence to prove beyond reasonable doubt all the elements of the offence.

The elements of the offence

[19] At paragraph 18 of the judgment of **DPP v Jugnauth [2018] PRV 30**, the Board of the Privy Council held as follows:

In order to prove the commission of an offence contrary to section 13(2), as applicable to the present case, the prosecution is required to prove to the criminal standard the following elements which form the actus reus of the offence:

- (1) That the defendant was at the material time a public official;*
- (2) That a public body has taken a decision;*
- (3) That a relative of the defendant had a personal interest in the decision; and*
- (4) That the defendant has taken part in proceedings of the public body relating to the decision.*

...The first three elements relate to factual circumstances, whereas the fourth element is the conduct element of the offence.

[20] Furthermore, at paragraph 20 of the aforesaid judgment, it was held that *there is an obligation on the prosecution to prove mens rea in relation to each element of the actus reus of the offence contrary to section 13(2). The Board accepts the submission of the prosecution...that the resulting obligation is to prove the following mental elements to the criminal standard:*

- (1) That the defendant knew he was a public official;*
- (2) That the defendant knew, or was reckless as to the fact, that the public body was taking the relevant decision;*
- (3) That the defendant had knowledge of, or was reckless as to the existence of facts giving rise to, his [brother's] personal interest in the decision;*
- (4) That the defendant intentionally or recklessly carried out the act which amounted to participation in the proceedings of the public body relating to the decision.*

In light of the aforesaid and the evidence on record, the Court shall assess each element of the actus reus and its corresponding mens rea. 9

(1) That the accused was at the material time a public official

[21] The term "Public Official" is defined under **section 2 of POCA 2002** as follows: "*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. **Section 69 (2) of the Rodrigues Regional Assembly Act 2001** provides that [a]ny office referred to in this section shall be a public office, as from 28 June 2002, and any officer holding an office on the coming into operation of this Act, shall be considered to have held such public office as from the date of his transfer to the Regional Assembly, or from the date of his appointment to serve the Regional Assembly whilst **Section 3(2) of the Rodrigues Regional Assembly Act 2001** provides that *The Regional Assembly shall be a body corporate and the exercise of its functions shall be regarded as done on behalf of the Government of the Republic of Mauritius.*"

[22] Witness No.5 produced Document H which stipulated that the accused party held the post of Agricultural Superintendent in the Commission for Agriculture at the material time. In line with the aforesaid sections of the law, she also stated that officers on the establishment of the Central Administration, were transferred to the Rodrigues Regional Assembly within the provisions of the Rodrigues Regional Assembly Act. The accused was also promoted as per **Documents G, G1 to G6** and on 24 July 2013 he was appointed Agricultural Superintendent in the Commission for Agriculture. In cross examination he also admitted that he was a public official at the time of the offence. Hence, in line with the admission of the accused party and the evidence adduced by the prosecution, it has been proved not only that the accused was a public official at the material time but he also knew he was one.

(2) That a public body has taken a decision

[23] There is no doubt from the operation of the law and the evidence adduced by the prosecution that the Commission for Agriculture was a public body. The accused was appointed as the power tiller scheme manager. Having regard to the testimony of the accused party and his defence statements, it is clear that he was involved in the power tiller scheme as a manager and was fully conversant with the fact that the Commission for Agriculture through the RRA/ Departmental Head/ SMC had to decide to which applicants to grant the tiller subsidy. In casu, witness no.6 explained that since funds were available, all applicants, including the brother of the accused party, were granted the subsidy under the scheme. In this

matter, the accused knew that the public body, the Commission for Agriculture would have to take a decision on the grant of power tiller schemes.

(3) That a relative of the accused had a personal interest in the decision

[24] The term "relative" is defined under **section 2** of **POCA 2002** as follows:

"(a) a spouse or conjugal partner of that person;

(b) a brother or sister of that person;

(c) a brother or sister of the spouse of that person; or

(d) any lineal ascendant or descendant of that person"

[25] Documents E and F produced by witness no.11 prove that the accused and Mr Jean Aurel Cupidon are brothers. This is not even denied by the accused party. Therefore, being the brother of the accused party, he is a relative to him as per the statutory definition of relative. It is also not disputed that the brother of accused was an applicant under the power tiller scheme. The accused was the manager of that scheme and knew that his brother had applied for subsidy under that scheme and even filled his site inspection form (Document K) as scheme manager. Furthermore, the brother of accused also benefitted from the said scheme. Therefore, the accused had knowledge of his brother's personal interest in the decision.

(4) That the accused has taken part in proceedings of the public body relating to the decision.

[26] The Court has to determine whether the prosecution has adduced sufficient evidence to a criminal standard that the accused has intentionally or recklessly carried out an act which amounted to participation in the proceedings of the Commission for Agriculture relating to the decision of granting of subsidy under the power tiller scheme.

[27] From the evidence on record it is not disputed by the defence that the accused knew his brother made an application under the power tiller scheme. The only dispute relates to the fact that he became aware at the time he received the application as Scheme Manager. However irrespective of the timing he became aware of same, he admitted having processed the application by filling section 4 of Document K and inputted "application to be considered." The contention of the defence is that he would have declared the conflict of interest at the sitting of the SMC. Firstly, the Court having found the version of witness no.7 to be credible, the Court believes that the accused had a conversation with witness no.7 on the issue of conflict of interests as regards his brother's application. Even if the version of the accused was to be believed, the accused admitted that he was aware of paragraph 2.2.10 of Document M4 and that he knew he had to declare his conflict of interest first before taking part in the process. In further cross examination he also admitted that the moment he came across the application or site inspection form of his brother he knew there was a conflict of interest situation. He also

stated that he did not receive the conflict of interest form. In cross examination however he admitted that he was aware that there is a declaration of conflict of interest form prior to 2015. He again maintained that he knew he had to declare his interests when there was a conflict of interests and would have done so at the SMC.

[28] From the Privy Council judgment of **DPP v Jugnauth (supra)**, it would seem that *the mischief which that provision is intended to avoid, namely that an official should not put himself in a situation where he has a conflict of interest*. In this matter the accused was fully aware that he had to declare his conflict of interest once he was faced with such a situation and he was also aware that there was a conflict of interest form prior to 2015. The Court finds that the law makes it clear that an official should not put himself in a situation where he has a conflict of interest and therefore faced with such a situation, that it was for the accused to declare his interests through the appropriate channel prior to processing that application, that is, filling in section 4 of the site inspection form of his brother. Hence by filling in section 4 of Document K, instead of avoiding that conflict of interest situation he did otherwise and processed same. The Court finds that the duty was on the accused to declare his interest at the time he received the application form. The Court rejects the submission of the defence in that the accused was not given the opportunity to disclose his interests as he was already aware that he had to disclose same prior to process the application and knew there were conflict of interest forms prior to 2015.

[29] Defence Counsel also submitted that his job did not involve any discretion or decision and therefore that part of the process could not amount to participation in proceedings. It is also to be noted that the accused in cross-examination has admitted having processed the application of his brother. He even explained the different steps involved prior to the granting of the subsidy under that scheme. In cross examination, he further explained that if an applicant did not meet the criteria he would have not written "to be considered." In addition, witness No.7 explained the role of scheme managers which was to "check that the data are correct" and "recommend that the application goes to the other step of the chain" He also stated that when the accused inserted "application to be considered", this was indeed part of the processing the application. In the case of **DPP v Jugnauth (Supra)**, the Board of the Privy Council held at paragraph 29:

"29...The use of the words "any proceedings" in section 13(2) and the underlying policy of the provision strongly suggest that these words are to be given a wide interpretation so as to include any proceedings, including a single event, which are capable of leading to a situation of conflict of interest of the sort described in that provision. In particular, the words are sufficiently wide to include both acts leading up to the formation of a contract and acts

performed in the execution of a contract once concluded. Furthermore, the signing of the minute in this case was not a merely procedural or administrative act...."

[30] Applying the aforesaid test, the Court finds that considering and processing the site inspection form of his brother by filling in section 4, for the application to proceed to the next step prior to the ultimate decision making of granting the subsidy amounted to taking part in proceedings relating to the decision of whether or not to grant the subsidy. Furthermore, it is irrelevant whether all the applicants obtained the subsidy and that the accused was not aware that all applicants would have obtained the subsidy at the time he was processing the application of his brother. However, his contribution at section 4 of the Document K pushed the application to the next level prior for same to be considered for the grant. Therefore, same did not amount to a merely procedural or administrative act. The Court therefore finds that the evidence adduced by the prosecution proves on a criminal standard that the accused intentionally participated in proceedings by filling in section 4 of Document K and sent same to his superior for the public body to decide on the grant of the subsidy. Even if the version of the defence were to be believed, the Court finds that the accused still recklessly carried out an act, that is, inputting 'application to be considered' under section 4 of Document K which amounted to participation in the proceedings which also satisfies the mens rea required in such cases.

B. CONCLUSION

[31] In light of the foregoing and taking into consideration all the evidence on record, the Court finds that the prosecution has proved beyond reasonable doubt all the elements of the offence against the accused party. I therefore find the accused guilty as charged.


R. Hardwar
SDM

This 31st of August 2022