INDEPENDENT COMMISSION AGAINST CORRUPTION v DISTRIPC LTD

2019 SCJ 250

Record No. 9084

THE SUPREME COURT OF MAURITIUS

In the matter of:-

Independent Commission Against Corruption

Appellant

v

Distripc Ltd

Respondent

In the presence of:-

Director of Public Prosecutions

Co-Respondent

JUDGMENT

This is an appeal from a ruling of a Magistrate of the Intermediate Court staying proceedings against the respondent on the ground of abuse of process.

The respondent, as represented by one Mohammad Imteaz Buckus, Accounts Manager, had been charged before the Intermediate Court with wilfully, unlawfully and criminally accepting payment in cash in excess of Rs 500,000 from one Fidy Olivier Etienne Rasoanaivo for the sale of Microsoft computer software, in breach of sections 5(1) and 8 of the Financial Intelligence and Anti-Money Laundering Act ("FIAMLA") coupled with section 44(2) of the Interpretation and General Clauses Act. After the accused company represented by Mr Buckus pleaded not guilty to the charge, learned Senior Counsel moved to enter a "plea in bar" which was recorded by a learned Magistrate in the following terms –

"Def moves that the pst pros be stayed on the ground that the charge laid v/s Acc company amounts to an abuse of the process of the Court in as much as the Accd Co is the one who brought to the attention of the authorities the impugned transaction by filing an STR w/o which the authorities could not have been warned of the facts disclosed by the Accd Co which led to 1st info bearing CN 790/14 ICM wherein one Fidy Rasoanaivo was prosecuted & found guilty by this Ct".

The motion was objected to by the prosecution. At a subsequent sitting, Senior Investigator Bholah was called to give evidence in support of that objection and stated in essence that –

(a) there was a referral dated 3 May 2013 from the Financial Intelligence Unit ("FIU") to the appellant ("ICAC") with regard to Mr Rasoanaivo and another Malagasy national who had remitted the sums of Rs 1,883,000 and 10,000 Euros in cash in several instalments and Rs 700,000 in cash to the respondent (then accused) company for the purchase of a Microsoft licence;

(b) ICAC officers went to the office of the accused company where documents relating to the transactions were produced and a first statement was recorded with regard to those documents without any warning being administered to the person who gave the statement, that is, the Accounts Manager of the accused company. The accused company was not represented by Counsel at the time of the recording of the first statement;

(c) a second statement was recorded from the Accounts Manager, this time as representative of the accused company, after warning and in presence of Counsel. He confirmed all the facts stated in the first statement;

(d) the ICAC investigation was triggered by a Suspicious Transaction Report (STR) which had been raised and filed with the FIU by the accused company, but the FIU report which was referred to ICAC did not mention who had made the STR. SI Bholah only learnt later in the course of the investigation that the STR had been made by the accused company;

(e) Mr Rasoanaivo, one of the Malagasy nationals, was prosecuted with regard to the payments as a result of the referral made by the accused company to the FIU and he pleaded guilty to the offence.

In his ruling, the learned Magistrate set out the motion of the defence as follows –

> *"The defence has moved that the prosecution be stayed as it amounts to an abuse of the process of this Court in as much as the accused company raised the Suspicious Transaction Report and is now being prosecuted contrary to the provision of section 16(2)(a) of the FIAMLA."*

It is worth noting that the motion set out by the Magistrate is couched in terms which are different from those presented by learned Defence Counsel as a 'plea in bar', although Counsel did refer to section 16(2)(a) of FIAMLA in his submissions on his motion.

The learned Magistrate then recited the evidence of SI Bholah and made an analysis of the evidence in chronological order. He highlighted the provisions of sections 14 to 16 of FIAMLA and the power of a Court to stay proceedings on ground of abuse of process as confirmed in **The State v Chocalingum** [2011 SCJ 330]. He then proceeded to apply the relevant principles on abuse of process to the present case and noted that the pre-trial proceedings, "*notably the conduct of the ICAC during investigation*", are relevant and important. He found it "*improper and unfair*" that Mr Buckus who gave the two statements was not questioned under warning for the first statement and was later called upon to confirm the first statement under warning.

He went on to state that section 16(2)(a) of FIAMLA "*clearly provides a guarantee for whistle blowers and encourages the reporting of suspicious transactions. It provides a sort of immunity to those who report suspicious transactions*". He found that the accused, having raised the STR, collaborated with ICAC and remitted documents which led to the prosecution and conviction of another person, was entitled to "*the protection of the law as provided in section 16(2)(a)*". He rejected the submission of ICAC that only exempt transactions are not subject to prosecution and found that the accused's acts in this case show the good faith of the accused for the purposes of section 16(2)(a).

The learned Magistrate found in the light of the above that this is a fit and proper case for him to exercise his discretion to order a stay of proceedings on the ground of abuse of process and ordered accordingly.

The appellant is now appealing from the ruling on the following four grounds –

> *"1. Because the Learned Magistrate erred when he found that accused company was a whistle blower who had reported his suspicion in good faith.*
>
> *2. Because the Learned Magistrate failed to consider that accused company was in fact a particeps criminis in the said transaction.*
>
> *3. Because the Learned Magistrate failed to appreciate that Imteaz Buckus had given his first statement in his capacity as accounts manager whereas the second statement was given as representative of the company.*
>
> *4. Because the Learned Magistrate erred when he applied section 16(2) of FIAMLA 2002 to the present set of circumstances."*

The appeal is being resisted by the respondent. Learned Counsel for the co-respondent has concurred with the submissions of learned Counsel for the appellant.

We propose to deal with all four grounds together as they purport in effect to state that the learned Magistrate erred in ordering a stay of proceedings for the reasons set out in those grounds.

We have carefully considered the evidence of SI Bholah, the submissions of learned Counsel and the ruling of the learned Magistrate and we have no hesitation in finding that the learned Magistrate clearly erred both when considering the recording of the statements by ICAC officers and the effect of section 16(2)(a) of FIAMLA. We say so for the following reasons.

<u>Recording of statements</u>

It is well established now that a Court has the power to stay proceedings where the prosecution amounts to an abuse of the process of the Court and is oppressive and vexatious. Such cases may generally fall in two categories –

(a) where the defendant would not receive a fair trial; and

(b) where it would be unfair for the defendant to be tried.

(see **R v Beckford [1996 1 Cr. App. R 94] at 100G**).

The second category is the one that is invoked when allegations of misconduct during the enquiry, generally by the police, are made. The threshold to be met however is a very high one and the discretion to stay proceedings is to be exercised sparingly, as such misconduct can usually be dealt with during the trial itself; there should also be evidence of prejudice to the accused (see **DPP v Hussain, The Times, June 1, 1994**). It has been said in that regard that a stay would only be justified in exceptional cases, where to proceed with the prosecution would be "an affront to the public conscience" or would "undermine public confidence in the criminal justice system and bring it into disrepute" (see, for example, **R v Latif, R v Shahzad [1996 1 W.L.R. 104]**). In the recent case of **DPP v Beeharry & Ors** [2018 SCJ 242], the Supreme Court, on appeal, thus endorsed the decision of the Intermediate Court to stay proceedings on ground of abuse of process where the police had deliberately failed to submit all documents when referring the police file to the DPP for him to decide whether or not to prosecute in that case.

We find no evidence of high-handed, unconscionable conduct on the part of ICAC at enquiry stage that would warrant a stay of proceedings on ground of abuse of process in the light of the above principles. The learned Magistrate, as is clear from his use of the pronoun 'he' when referring to the accused company, made no distinction between the company and its representative, Mr Buckus who, as Accounts Manager, produced the relevant documents when ICAC proceeded to the office of the accused company following the referral made. SI Bholah stated that he did not know at the time that the accused company had made an STR to the FIU. Subsequently, and presumably after the documents produced had been examined by ICAC, the latter required the accused company to give a statement under warning and Mr Buckus was the officer who represented the accused company for that purpose. He was assisted by Counsel and chose not to exercise his right of silence but to confirm the contents of his earlier statement.

The situation might well have been different if the appellant had led the respondent to make the STR or to give the first statement by giving a clear and unequivocal undertaking not to prosecute the respondent and later reneging on the undertaking, but there is no evidence of any such representation having been made by the appellant.

Further, section 5(1) of FIAMLA makes it an offence for a person to make or accept payment in cash in excess of 500,000 rupees. It is worth noting that, in the case of **Beezadhur v ICAC & Anor [2014] UKPC 27**, the Judicial Committee commented on the fact that the person making the payment under section 5(1) was alone prosecuted for the offence which on the face of it was also committed by the bank accepting the payment, finding it curious that the bank in that case had not also been prosecuted. We find nothing sinister therefore in the appellant's decision to record a statement under warning from the respondent after securing documents which seemed to establish that the respondent had accepted cash payment of Rs 700,000 in breach of sections 5(1) and 8 of FIAMLA as averred in the information.

Section 16(2)(a) of FIAMLA

Section 16(2)(a) of FIAMLA reads as follows –

"No proceedings shall lie against any person for having –

(a) reported in good faith under this Part any suspicion he may have had, whether or not the suspicion proves to be well-founded following investigation or prosecution or any other judicial action"

(the underlining is ours).

While the learned Magistrate was right to consider that this provision is meant to encourage the reporting of suspicious transactions, section 16(2)(a) can hardly be interpreted as bestowing a "sort of" immunity on any person reporting a suspicious transaction from being prosecuted for any offence, including an offence under section 5 of FIAMLA. All that this provision does is to provide that a person who has reported in good faith any suspicious transaction is not to be prosecuted, nor sued, with respect to the reporting of the suspicion; he cannot therefore be prosecuted for effecting public mischief, if the suspicion proves to be ill-founded, nor for breaching statutory confidentiality provisions, whether or not the suspicion is well-founded, nor can he be sued for defamation in relation to the report he has made. In short, a person should not be victimised for having reported a suspicion in good faith under the Act.

Were it to be otherwise, any person having committed an offence under section 5 of FIAMLA would, as rightly observed by learned Counsel for the appellant, only need to make an STR to evade liability for that offence. It is interesting to note

that, in the Prevention of Corruption Act, a sister Act to FIAMLA, this "limited immunity" is made even clearer in section 49(1)(2) by the use of the words "*as a result of such disclosure*" or "*by reason only of such disclosure*".

We hasten to add that it is open to the DPP to consider on a case-by-case basis whether to offer, pursuant to section 72 of the Constitution and in the public interest, immunity from prosecution under section 5 of FIAMLA to a person making an STR under that Act, but he is certainly not debarred, under section 16(2)(a) of FIAMLA or otherwise, from prosecuting for breach of section 5 (as in this case) a person making an STR.

For the reasons given above, we hold that Grounds 2, 3 and 4 are well taken and that the learned Magistrate was wrong to find that a stay of proceedings on ground of abuse of process was justified because of the conduct of the enquiring officers or in view of the provisions of section 16(2)(a) of FIAMLA. We therefore quash the order of stay of the proceedings and refer the case back to the Intermediate Court for the case to be heard and determined promptly.

With costs against the respondent.

O.B. Madhub
Judge

A.D. Narain
Judge

20 September 2019

Judgment delivered by Hon A.D. Narain, Judge

For Appellant	**:**	**Mr S. Sohawon, Chief Attorney, ICAC** **Miss P. Bissoonauthsing, Principal Legal Adviser, ICAC**
For Respondent	**:**	**Mr J. Gujadhur, SA** **Mr G. Glover, SC together with** **Mr J.R.L. Balancy, of Counsel**
For Co-Respondent	**:**	**Mrs D. Dabeesing-Ramlugan, Principal State Attorney** **Mrs J. Moutou-Leckning, Senior Assistant Director of Public Prosecutions, as she then was**