

CN141/14

THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

The Independent Commission Against Corruption

v/s

Hau Hok Shui also known as Peter

RULING No. 5 (ABUSE OF PROCESS)

The Accused stands charged with one Count of Bribery Of Public Official, contrary to s. 5(1)(a)(2) of the Prevention Of Corruption Act (hereinafter referred to as POCA).

The Accused pleaded Not Guilty to the charge and was assisted by Learned Defence Counsel.

Learned Counsel for the Independent Commission Against Corruption (hereinafter referred to as ICAC) conducted the Arguments for the Prosecution.

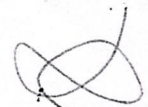
The Proceedings were held in English for the purposes of the Arguments at the request of Learned Defence Counsel.

In the course of the cross-examination of PI Thondee (hereinafter referred to as W4), Learned Defence Counsel reiterated his Motion to have the present Proceedings permanently stayed on the Grounds that the ICAC Enquiry was unfair.

Learned Counsel for the Prosecution objected to the said Motion and the matter was hence set for Arguments.

The Defence Case

The Motion of the Defence was as follows:



"In the face of the testimonies of all the Prosecution witnesses heard so far before this Court under oath and particularly that of Inspector Thondee just now who is not only a witness but the main complainant. It has become abundantly clear that the enquiry conducted by the ICAC was tainted with a major irregularity leading to unfairness towards the accused if he were to continue to be tried. The said enquiry was unfair, one sided and prejudicial to the accused in as much as his version of the facts were neither inquired upon nor put to the Prosecution witnesses such that it bears taints of arbitrariness which did not open out a fair enquiry in the interest of the public. It fell short of being independent, complete and objective which are prerequisites to inspire public confidence including the confidence of those directly afflicted.

In view of the Court, that the Court have an inescapable duty to ensure fair treatment for those who are brought before it and in order to safeguard its integrity by ensuring that its process is not undermined through it being put in a situation where it cannot in the face of the testimonies on record fairly appreciate the version of the accused, I move that the present proceedings be permanently stayed on the ground of abuse of process of the Court."

Learned Defence Counsel on the day of the Arguments, proceeded to offer Submissions, making reference to specific elements which had not been enquired into by the ICAC, as was apparent from the testimony of the Prosecution Witnesses on Record, concluding that the said failure to enquire into the said elements rendered the Enquiry "conducted by the ICAC not fair, was not impartial, not transparent and not objective such that the accused cannot benefit from a fair trial anymore. A permanent stay of proceedings is not only justified but necessary in the present case to preserve integrity of the Court and The Criminal Justice System".

Learned Defence Counsel also filed his Written Submissions, to which the Court has given due consideration.

The Prosecution Case

Learned Counsel for the Prosecution offered Submissions to the effect that the Court was in a position to assess all the evidence placed on Record, that there was no obligation on the Investigating Authorities to investigate each and every aspect of a case, but that the obligation for the Investigating Authorities was "to collect sufficient evidence so as to establish the charge.

against" the Accused, that it was open to the Defence to adduce evidence in support of its case without the Accused himself having to depone under Oath, and that there was nothing on Record to establish any bad faith, unlawfulness and executive manipulation on the part of the investigating and prosecutorial Authorities in the present matter.

Analysis

The Court has duly considered the Submissions of both Learned Counsel as well as the caselaw referred to by both Learned Counsel.

The Court has an overriding duty to promote justice and prevent injustice, and from this duty arises an inherent power to stay the Proceedings should the Court be of opinion that to allow the Proceedings to continue would amount to an abuse of the process of the Court.

It is trite Law that it is only when an Abuse of Process is clearly established, and that there are no other means of ensuring a fair Trial, that the Court should intervene (see also **R v Hector & Another [1984 All. E. R. 785]** referred to in **The State v Velvindron [2003 SCJ 319]**).

Abuse of process has been defined "as something so unfair and wrong that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case (*Hui Chi-Ming v R* [1992] 1 A.C. 34, PC). 'Unfair and wrong' is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the defendant: *DPP v Meakin* [2006] EWHC 1067).

This discretionary power to stay Proceedings is to be used most sparingly, as has been set out in **R. v. Horseferry Road Magistrates Court Ex p. Bennett (No.1) [1994] 1 A.C. 42.**

It is trite Law that the decision of the DPP whether to prosecute or not, is his decision, and his alone.

The Court's role is to assess all the evidence which is placed on Record, in order to give a reasoned decision.

The Court has duly considered all the issues canvassed by both Learned Counsel in the course of the Arguments. And the Court is alive to the fact that the Defence have reserved their Right to

further cross-examine W4. This means that the testimony of W4 has not yet been completed, and that there may be further cross-examination, and maybe re-examination.

The Court also bears in mind that the Accused is at large in the present matter.

True it is that to every story, there are potentially at least 02 versions. Were there an obligation on the Investigating Authorities to systematically revert back to the Complainant/s and/or other Prosecution Witness/es once an Accused Party has given his version, for the said Complainant/s and/or Prosecution Witness/es to give a statement as regards the Accused Party's version, this could be an exercise which could potentially go on ad infinitum.

Whilst bearing in mind all the principles authoritatively set out in all the Authorities referred to by Learned Counsel, the Court is of the considered view that the facts of the case of **Police v Beeharry & Ors [2014 INT 67]**, which is of persuasive value only, can be distinguished from the present matter. The qualm of the Defence in the present matter is that the ICAC did not verify the version of the Accused. In the said case of **Beeharry (supra)**, the issue was altogether different, inasmuch as the Investigating Authorities had evidence which they chose not to communicate to the DPP. It is not open to the Investigating Authorities to pick and choose what evidence to send to the DPP. The Investigating Authorities are under a duty to send all the evidence to the DPP, who then decides as to Prosecution or otherwise. This decision is the DPP's decision, and his alone, as highlighted above.

Moreover, the Court takes Judicial Notice of the fact that it was always open to the DPP, had the DPP been of the view that Further Enquiries were required in order for him to take an informed decision, to ask for Further Enquiries to be carried out. The Court is not aware whether Further Enquiries were requested or not in the present matter, and the fact remains that the Court cannot go behind the DPP's decision to prosecute in the present matter. The Court is to duly assess all the evidence on Record, and only the evidence on Record, to determine the present matter.

The Court fails to see how the ICAC investigating the conduct of W4 and his supporting Witnesses would have permitted the assessment of the veracity of the version of the Accused. At any rate, full latitude is given to the Defence to canvass all relevant issues according to the Defence.

Further, the fact that the version given by a Complainant has been, to use the word of Learned Defence Counsel, verified, be it by other Prosecution Witness/es and/or Reconstruction Exercise, for instance, does not, per se, automatically, entitle the Court to rely on same without more. The Court is duty-bound to analyse and assess all evidence which is placed on Record, and determine the issues at hand solely on the said evidence, before reaching a decision, which must be a reasoned one.

A parallel may be drawn with the evidence of an Expert Witness, whose testimony is not accepted de facto purely and simply because it is the testimony of an Expert Witness. Although s/he may have expertise in a specific field, and deposes accordingly, the Court still has a duty to assess the said Witness' evidence, and determine whether it can safely act on same, giving reasons as to why it is reaching the said decision.

Although the Court is of the considered view that had the ICAC checked the said lock, it could potentially have assisted the Defence, the fact remains that there is nothing on Record to establish same was not done, either intentionally, unlawfully, and/or in bad faith.

All the issues raised by the Defence, including the Accused's van having never been examined in relation to its lock, the version of the Accused not having been put to the Prosecution Witnesses at any stage of the Enquiry, no Reconstruction Exercise having been carried out in relation to the Accused, or any break in the chain of custody of the Exhibits, for instance, do not, in the Court's considered view, amount to "[...] something so unfair and wrong that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case (**Hui Chi-Ming (supra)**).

Even if the Court were to accept the contention of the Defence that some prejudice has been caused to the Accused, for instance by the fact that his van's lock was not verified by the Investigating Authorities, or by the fact that no Reconstruction Exercise was carried out in relation to him, the question which arises then, is what would be the appropriate remedy. And the Court is of the considered view that such prejudice is not of such nature as to result in the Accused being deprived of a Fair Trial, such that the only possible remedy is a permanent stay of Proceedings.

The Court further is of the considered view that there is no evidence on Record to establish any male fides, unlawfulness, and/or intentional omission on the part of the ICAC.

No obligation can be placed on an Accused Party to give sworn evidence, as per the supreme Law of the Land, and even when an Accused Party chooses to exercise his Right to Silence whether at the Enquiry stage, at the Trial stage, or both, this does in no way release the Court of its duty to analyse and assess all the evidence on Record before reaching a decision, which must be a reasoned one.

The Court also bears in mind that the burden lies squarely on the Prosecution to prove its case against the Accused beyond reasonable doubt.

In light of all the evidence on Record, the Court is of the considered view that all the factors raised by the Defence, whether taken severally and/or cumulatively, are not of such a nature as to render the said ICAC Enquiry unfair to such an extent that it causes such prejudice to the Accused that no Fair Trial can take place, rendering a permanent Stay of Proceedings in the present matter the only possible remedy.

Conclusion

In light of all the evidence on Record so far, all the circumstances of the present matter, and all the matters highlighted above, the Court is of the considered view that the Defence have not established, on the balance of probabilities, that the ICAC Enquiry was carried out in such an unfair manner, and/or that there was bad faith, unlawfulness, and/or intentional omission on the part of the Investigating Authorities, such that it causes such prejudice to the Accused, which can only be cured by a permanent Stay of Proceedings, and the present Motion for a Stay Of Proceedings is accordingly set aside, and the present matter is to be fixed for Trial (Continuation).

Full latitude will be given to the Defence to canvass all relevant issues as the Proceedings continue.


[Delivered by: D. Gayan, Magistrate]

[Intermediate Court (Criminal Side)]

[Date: 13 August 2020]