ICAC v Hau

2021 INT 60

CN141/14

THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

The Independent Commission Against Corruption

v/s

Hok Shui HAU also known as Peter

JUDGMENT

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 throughout the Proceedings.

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

The Proceedings were held partly in English and partly in Creole.

The Prosecution Case

It was the case for the Prosecution that on or about 25-06-12 at the Divisional Supporting Unit (hereinafter referred to as DSU), Central Division, in the District of Upper Plaines Wilhems, the

Accused did wilfully, unlawfully, and criminally give to a Public Official, a gratification for abstaining from doing an act in the execution of his duties.

Particulars:

On the date and at the place aforesaid, the said Accused gave to Police Inspector Thondee (hereinafter referred to as W4):

(1) Sum of Rs3000/- in different bank notes;
(2) A flash light make Bosi Tools;
(3) Two dry cells make Sanyo; and
(4) A set of 38 screwdrivers,

so as to refrain from checking the places of entertainment operated by the said Accused.

The Defence Case

The Accused denied the charge in his 03 out-of-Court statements (Docs. A, A1, and A2) given to the ICAC.

The Accused also gave 01 statement (Doc. A3) to the Police, in which he denied the charge.

The Accused, in Court, exercised his Right to Silence, as was his Right.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has watched the demeanour of the Prosecution Witnesses and that of the Defence Witness with the utmost care. The Court has also given due consideration to the Submissions of Learned Counsel for the Prosecution and to that of Learned Defence Counsel.

The Court has in addition duly considered all the Authorities and caselaw referred to by both Learned Counsel.

S. 5 of the POCA provides as follows:

Bribery of public official

(1) Any person who gives, agrees to give, or offers a gratification to a public official for—

(a) doing, or for abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties;

[…]

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence under subsection (1), it is proved that the accused gave, agreed to give or offered gratification, it shall be presumed, until the contrary is proved, that the accused gave, agreed to give or offered the gratification for any of the purposes set out in subsection (1) (a) to (e).

And as per s. 2 of the POCA, "gratification" has the following meaning:

"gratification"—

(a) means a gift, reward, discount, premium or other advantage, other than lawful remuneration […].

The Prosecution therefore bear the burden of proving beyond reasonable doubt that:

1) The Accused;
2) Gave a gratification, i.e.
   (1) Sum of Rs3000/- in different bank notes;
   (2) A flash light make Bosi Tools;
   (3) Two dry cells make Sanyo; and
   (4) A set of 38 screwdrivers;
3) To a public official, i.e. W4;
4) For abstaining from doing an act in the execution of his duties, i.e. so as for W4 to refrain from checking the places of entertainment operated by the said Accused.

The Court proceeds to address each of the said four elements in turn.

<u>The Accused</u>

Identity

The Defence attempted to cast doubts as to whether there was perfect Identity between the person who gave the statements (Docs. A, A1, A2, and A3), and the Accused in the Dock.

First, it was only at the Trial stage, and not at the Enquiry stage, that the issue of Identity was raised.

Second, the name mentioned in the out-of-Court statements (Docs. A, A1, A2, and A3) was Hok Shui HAU alias Peter, which is also the name mentioned on the Information in the present matter.

Third, a certified copy of the Court Record (Doc. J) produced by the Defence itself, was at no stage put in doubt as to its accuracy, nor was it at any stage contested that the National Identity Card (hereinafter referred to as NIC) number contained in the statement given by Mr HAU Hok Shui alias Peter forming part of the Court Record (Doc. J) is that of the Accused in the present matter. This said NIC as contained in the Court Record (Doc. J) can therefore safely be acted upon by the Court to compare same with the NIC as contained in the 04 out-of-Court statements (Docs. A, A1, A2, and A3) in the present matter.

Having done this exercise, the Court notes that the NIC mentioned in the Accused's statement as contained in the Court Record (Doc. J) is identical to the NIC mentioned in all 04 out-of-Court statements (Docs. A, A1, A2, and A3), save that the letter 'H' does not appear on the NIC mentioned in the Accused's statement contained in (Doc. J).

Be that as it may, the numbers on the NIC on the statements in (Docs. A, A1, A2, A3) are identical to the numbers appearing in the statement given by the Accused as contained in the Court Record (Doc. J).

Further, the name mentioned in the statement of the Accused in (Doc. J) and in the statements (Docs. A, A1, A2, and A3) are the same, albeit that the surname HAU is placed before the forenames Hok Shui in the statement contained in (Doc. J).

Also, the occupation being mentioned in the said statements (Docs. A, A1, A2, A3, and in the statement contained in (Doc. J)) is Director of a Company called Microgames (whether Co Ltd or Ltd).

At no stage of the Proceedings was it even remotely suggested by the Defence that there were in fact two persons bearing the same name, with identical numbers on their NIC, and both being Directors of a Company called Microgames (whether Co Ltd or Ltd).

In light of all the above, the Court is of the considered view that the Accused is the very Hok Shui HAU alias Peter, who gave the said statements (Docs. A, A1, A2, and A3), and that there is therefore perfect identity between the Accused in the present matter and Hok Shui Hau alias Peter who gave the said statements (Docs. A, A1, A2, and A3).

Identification Exercise

The purpose of an Identification Exercise is to establish the identity of a person who a witness testifies that he saw on a relevant occasion.

In the present matter, the Court is of the considered view that it was not essential to have an Identification Exercise and that the Prosecution case was in no way undermined by the fact that no Identification Exercise was carried out in the course of the Enquiry, as at no stage of the Proceedings was it disputed that W4 and the Accused knew each other.

There was therefore no real justification and/or need for an Identification Exercise.

(Docs. A, A1, A2, And A3)

Having found that there was perfect Identity between the Accused in the present matter and Hok Shui Hau alias Peter who gave all 04 out-of-Court statements (Docs. A, A1, A2, and A3) as highlighted above, the Court now proceeds to determine whether it can safely act on the said statements (Docs. A, A1, A2, and A3).

The Defence raised the issue during the Court Proceedings that the Accused understood neither English nor Creole. The Court, in the Interests of Justice, therefore ensured the services of an Interpreter were provided throughout the Proceedings, in order for the Proceedings to be translated from English and Creole to Hakka, and vice versa, in order to uphold the Accused's Constitutional Rights.

Be that as it may, in order for the Court to determine whether it can safely act on the said out-of-Court statements (Docs. A, A1, A2, and A3), it is paramount for the Court to address the said issue of language.

As regards the statement (Doc. A), same was given in Creole, in presence of Learned Counsel then assisting the Accused. From a careful perusal of the said statement, it is apparent the Accused used clear and precise Creole language throughout the said statement.

In the statement (Doc. A1), which was also given in Creole in presence of Learned Counsel then assisting the Accused, the question is specifically put to the Accused as to the language used by the Police at the Vacoas Detention Centre when speaking to him, and the Accused's reply is very telling:

> Zotte ti pé cause Creole avec moi et mo ti pé comprend zotte language.
>
> (i.e. They were speaking Creole to me, and I understood their language (Folio 124172 at Answer 8 of Doc. A1)).

The Accused's statement (Doc. A2) was also given in Creole, in presence of Learned Counsel then assisting the Accused. And it is apparent therefrom that Learned Counsel then assisting the Accused made a request to have a private interview with the Accused, which request was acceded to, and the said private interview lasted about 19 minutes (Folio 127559 of Doc. A2). It is clear therefrom that Learned Counsel then assisting the Accused was taking an active part in his legal representation of the Accused at the time of the recording of the said statement, and had there been any issue and/or doubt as to the Accused's understanding, or lack thereof, of the language, i.e. Creole, used by the Investigating Officers, Learned Counsel then assisting the Accused would surely have ensured the Accused's Constitutional Rights were upheld.

The statement (Doc. A3), which was the statement given to the Police, on the day following the alleged incident, was also given in Creole, and in presence of Learned Counsel then assisting the Accused.

It is therefore clear that the Accused gave his said statements (Docs. A, A1, A2, and A3) in Creole, in presence of Learned Counsel then assisting him. It stands to reason that had the Accused in

fact not understood Creole at all, or sufficiently, in order to give his said statements, Learned Counsel then assisting the Accused would have caused for the needful to be done to ensure the Accused's Constitutional Rights were upheld.

In fact, a close reading of the Accused's statements (Docs. A, A1, A2, and A3) shows the Accused's fluency in Creole. The Accused was in no way hindered in explaining the circumstances of the present matter, and thereby demonstrated a sufficient understanding of, and vocabulary in, Creole.

The Defence cannot therefore seriously contend that the Accused did not have a sufficient understanding of the Creole language at the time of the recording of his statements (Docs. A, A1, A2, and A3).

The contention of the Defence is even more untenable, for the following reasons.

First, the Information was read over to the Accused in Creole (as per page 02 of the Court Record), and the Accused's Plea is on Record. At no stage of the Proceedings did Learned Defence Counsel move for the Plea to be taken anew with the services of an Interpreter, due to the fact that the Accused had not understood what he was pleading to, given the Information was read over to him in Creole without the services of an Interpreter, which language he did not understand.

Second, when the case was first called for Trial on 13-11-14, although the Accused was duly represented by Learned Counsel, no Motion was made as to the need for the services of an Interpreter for the benefit of the Accused. It was only when the case was called for Trial a second time, that the said Motion was made.

Third, the words allegedly uttered by W4 and PS 4257 Luximon (hereinafter referred to as W3) are clearly reported in the Accused's out-of-Court statements (Docs. A and A3). Had the Accused in fact had no understanding, or no sufficient understanding, of the Creole language, as contended by the Defence, it stands to reason that the Accused would not, in the first place, have been in a position to report what allegedly W3 and W4 had said.

And fourth, the Court Record (Doc. J) of the District Court of Upper Plaines Wilhems was produced by the Defence itself and was in no way put in doubt as to its accuracy or as to the fact that it related to the Accused in the present matter, who was representing the Accused Company in the said case.

The Court has read the said Court Record (Doc. J) in its entirety and it is interesting to note that no mention was made in the said Proceedings as to the Accused's lack of understanding of Creole, giving rise to the need for an Interpreter.

Further, the Accused's statement in the said case, which was given in Creole, was produced and marked as (Doc. D), there being no objection or Motion made as to the fact that the Accused did not understand Creole.

The Court also notes that the said statement (Doc. D) in the Court Record (Doc. J) was given by the Accused on 06-02-12, i.e. about 04-05 months before the initial statement (Doc. A3) in the present matter was given to the Police.

Further, as per the Court Record (Doc. J), the Accused first appeared before the Upper Plaines Wilhems District Court on 22-08-12 when his Plea was recorded in presence of his Learned Defence Counsel and without the services of an Interpreter, and the Judgment in the said case was delivered on 11-04-14, without any issue being raised as to the Accused's lack of understanding of Creole at any stage of the said Proceedings.

It is also worth noting that the statements (Docs. A, A1, and A2) were given to the ICAC on 10-01-13, 25-06-13, and 04-10-13 respectively, i.e. between 22-08-12 (i.e. the Accused's first appearance before the Upper Plaines Wilhems District Court) and 11-04-14 (i.e. the date of the Judgment in the case before the Upper Plaines Wilhems District Court), during which period no issue was raised by the Defence as to the Accused's lack of understanding of Creole in the Proceedings before the Upper Plaines Wilhems District Court.

What transpires from all the above is that the Accused did have a sufficient understanding of Creole for the purposes of the Proceedings before the Upper Plaines Wilhems District Court but not for the present Proceedings.

In light of all the factors highlighted above, the Court reaches the reasonable conclusion that the Accused had a sufficient understanding of, and was sufficiently fluent in, Creole, to understand what was being said to him in Creole, whether at the Vacoas Detention Centre and/or at any stage of the Proceedings, including any stage of the Enquiry, and to give the said statements (Docs. A, A1, A2, and A3) in Creole, a fortiori given the statements (Docs. A, A1, and A2) for instance were recorded during a period when the Proceedings before the Upper Plaines Wilhems District Court were taking place without any issue of the Accused's lack of understanding of Creole being raised.

In light of all the above, and bearing in mind the fact that (Docs. A, A1, and A2) were not challenged by the Defence, either by way of Voire Dire or other Arguments, the Court is of the considered view that the said statements (Docs. A, A1, and A2) can be safely acted upon, and that full weight is to be attached to same.

As regards the statement (Doc. A3) given to the Police, although the Defence took objection to its production, same was ruled admissible by the Court in the Ruling No. 3. And the Court finds there are no reasons on Record to prevent the Court from safely acting on the said statement (Doc. A3) and in attaching full weight to same.

And from a reading of the said statements, the details contained therein could only have been to the Accused's personal knowledge.

First, the Accused admitted knowing W4 since 2011, given W4 had checked his Game Houses (Folio 118266 of Doc. A).

Second, the Accused admitted that he had been to W4's Office several times (Folio 118268 of Doc. A).

Third, the Accused admitted having been to W4's Office, and having met W4, on the relevant day (Folios 118268-70 of Doc. A and Folio 11 / 0495753/4 of Doc. A3).

And fourth, the Accused admitted that the money secured from him on the relevant day by the Police was shown to him at the ICAC (Folio 124174 of Doc. A1).

The Court is also of considered view that all the above-mentioned factors clearly establish that the Accused and W4 knew each other.

In conclusion, in light of all the factors highlighted above and by the very contents of the Accused's statements (Docs. A, A1, A2, and A3), the Court is of the considered view that no doubts remain as to fact that the Accused is the very person concerned with the present Proceedings, that the Accused had sufficient understanding of, and vocabulary in Creole, that the Accused is the very person who gave all 04 out-of-Court statements (Docs. A, A1, A2, and A3), on which the Court finds it can safely act.

Gave A Gratification

Contents Of The Said Bag

It was not disputed that the Accused went to the DSU on the relevant day, and this is also confirmed by the unchallenged (Serial No. 83 of Doc. C), which lists the names of the persons who went to the DSU on the relevant day.

As per the Accused's own version, he was in W4's Office, and met W4 in his Office, at the DSU Curepipe on the relevant day, and had in his possession the said plastic bag with the items (2), (3), and (4), therein, together with Rs3875/- on his person (Doc. A).

This evidence places the Accused at the relevant place, on the relevant day, with items (2), (3), and (4) in his possession. It was however still incumbent on the Prosecution to prove that the Accused gave a Gratification to W4.

The Accused admitted that the said bag, which contained items (2), (3), and (4) at the relevant time, was secured from him (Folio 118264 of Doc. A) . This was also the testimony of W4 and PC 6655 Ramhit (hereinafter referred to as W5). On this aspect, the Court therefore finds that it has been unequivocally established that the said bag, containing said items (2), (3), and (4), was in the Accused's possession at the relevant time.

It was the case for the Prosecution that the said bag contained the said items (2), (3), and (4) but also item (1), i.e. Rs3000/- in different bank notes, at the relevant time.

The Court is in presence of W4 and W5's testimony to the fact that the said bag contained item (1) as well as items (2), (3), and (4). W4's testimony was on all fours with that of W5, as regards the contents of the said bag. Further, W4 and W5 both positively identified item (1) (i.e. Exhibit I) and items (2), (3), and (4) (i.e. Exhibit II) in Court.

And the Court finds no evidence on Record to weaken W4 and W5's testimony on this aspect, and the Court finds that it can safely act on W4 and W5's testimony on this aspect.

The Accused, for his part, denied throughout the Proceedings that the said bag contained the said Rs3000/-, but admitted in 02 of his out-of-Court statements that the said money was secured from him on the relevant day and at the relevant place (Folio 118264 of Doc. A and Folio 124173 of Doc. A1)

The Accused stated at first that Rs3875/- were in his shirt pocket (Folio 118267 of Doc. A), then that Rs3000/- were secured from his shirt pocket, and Rs875/- from his back trouser pocket (Folio 118271 of Doc. A), raising the question of how the said Rs875/- made their way from the Accused's shirt pocket to the Accused's back trouser pocket. The very fact that the Accused changed his version as to how much money was secured from his shirt pocket, necessarily leaves doubts as to the Accused's version.

Be that as it may, the fact remains that the Accused admitted that he had item (1) in his possession at the relevant time and place.

In light of all the above, the Court finds that the evidence on Record establishes that the said bag contained items (1), (2), (3), and (4) at the relevant time.

Remittance Of The Said Bag

As regards the alleged remittance of the said bag, the initial version of W4 put to the Accused in his out-of-Court statement (Doc. A3) was to the effect that the Accused remitted to him, in presence of W5, a black plastic bag containing items (1), (2), (3), and (4):

> Pran sa ti Cadeau la na pa check mo banne game.

Following same, on the spot, W4 informed the Accused that he had committed an offence, i.e. "Bribing a Public Official" and informed him of his Constitutional Rights, following which the Accused replied:

> Excuse-moi missié mo fine faire aine erreur mo pé vine donne ou sa.

W4 then secured (Exhibits I and II) for Enquiry purposes.

In Court, W4's version was to the effect that the Accused shook hands with him, and handed over to him a black plastic bag, whilst stating the words:

> Prend sa ti cadeau la, arrête check mo bann games.

W4 immediately caught hold of the Accused's hand, opened the said plastic bag and found (Exhibits I and II) therein, and then informed the Accused of the offence of trying to bribe him, informed the Accused of his Constitutional Rights, including his Right to Silence, cautioned the Accused, and arrested the Accused in presence of W5.

W4 then caused for W5 to secure the said (Exhibits I and II) and for W3 to record the Accused's statement, and the Accused was arrested and brought to the Vacoas Detention Centre.

The Accused also said:

> Excuse moi mo finn erreur mo finn donne ou sa.

Now, "[i]n a criminal case it is normal to assume that the version that is put to an accused party when recording his or her defence is the very complaint that was made by the victim." (**Marday v The State [2000 SCJ 225]).**

From an analysis of the versions given by W4 at the Enquiry stage and in Court, it is apparent that they differ in a number of respects.

First, it is only in Court that W4 mentioned that the Accused shook hands with him.

Second, it is only in Court that W4 mentioned having caught hold of the Accused's hand, after the remittance of the said bag.

Third, in Court, W4 deponed to the effect that he caused for W5 to secure (Exhibits I and II), whereas the version put to the Accused was to the effect that W4 himself secured the said Exhibits.

And fourth, the sequence of events as per the said two versions is different. The first sequence of events mentioned by W4 was to the effect that the Accused remitted the said bag to him, following which he informed the Accused of the fact he had committed an offence and of his Constitutional Rights, and then he secured the Exhibits. Whereas in Court, W4 deponed to the effect that the Accused shook hands with him, remitted the said bag to him, following which he caught hold of the Accused's hand, opened the said plastic bag, and then informed the Accused of the fact he had committed an offence and of his Constitutional Rights, and caused W5 to secure the said Exhibits.

The Court is however of the considered view that the said variances in the testimony of W4 related to the circumstances surrounding the remittance of the said bag, and that W4's testimony was unwavering throughout the Proceedings as to the fact that the Accused remitted to him the said bag with (Exhibits I and II) therein at the relevant time and place.

The Prosecution also relied on the testimony of W5 as supporting Witness, and his testimony was to the effect that after having some words with W4, the Accused remitted a plastic bag to W4 by stating:

> Prend sa ti cadeau la, na pas check mo banne game.

Spontaneously, W4 stood up, caught hold of the Accused's wrist, by stating that he was committing an act of Corruption for abstaining an Inspector to exercise his duties, and cautioning the Accused.

The Accused then replied:

> Mone faire ene erreur mone vine donne ou sa.

After catching hold of the Accused's wrist, W4 signalled to W5 to come near his, i.e. W4's, table and emptied the plastic bag on his, i.e. W4's, table, and found that it contained (Exhibits I and II), and W4 instructed W5 to secure the Exhibits.

The Court is alive to the fact that there were variances between the testimony of W4 and that of W5.

First, W4's version was that he had not told W5 to leave, meaning that he had to tell W5 to leave, for W5 to leave. Then, W4 stated that he had signalled to W5 to remain in his Office. On the other hand, W5 deponed to the effect that W4 told him to stand by in his Office, and raised his right hand.

Second, no hand shake between the Accused and W4 was mentioned by W5, whereas W4 mentioned such a handshake in Court.

Third, W4's different versions as to the sequence of events immediately following the remittance of the said bag as highlighted above, is to be taken together with W5's version to the effect that as soon as W4 caught hold of the Accused's wrist, he informed the Accused he was committing an offence, and then opened the said plastic bag.

Fourth, at no point did W4 mention that he had signalled to W5 to come near his table and had emptied the contents of the plastic bag on his table, and only said he had opened the said bag and had found (Exhibits I and II) therein. However, W5 clearly deponed to the effect that W4 signalled to him to come near his table, and then emptied the plastic bag on the table.

And fifth, W4 in examination-in-chief deponed to the effect that he caused W5 to secure the Exhibits. However, in cross-examination, W4 deponed to the effect that he secured the Exhibits in presence of W5, then that they both secured same, then that he secured the Exhibits and remitted same to W5. There is also on Record (Doc. D), which mentions that W4 secured the Exhibits himself, in presence of W5. On the other hand, W5's version was to the effect that W4 had instructed him to secure the Exhibits.

Also, the Court has noted that from a close reading of W5's testimony, it is apparent that W5 contradicted himself in his testimony in Court, by stating in examination-in-chief twice, that the Accused came towards him together with CPL 2398 Mootoosamy (hereinafter referred to as W6), and by stating in cross-examination, that W6 never brought the Accused to him, but that the Accused had come by himself to his Office.

It is worth noting that W6 deponed to the effect he diverted the Accused to the Office, thereby necessarily implying that he never accompanied the Accused to W4 or W5's Office.

Be that as it may, the said variances relate to the surrounding circumstances of the said alleged remittance, whereas W4 and W5's respective testimonies were consistent as regards the alleged remittance of the said bag with items (1), (2), (3) and (4) therein to W4.

The Court is, in light of all the above, of the considered view that it can safely act on W4 and W5's respective testimonies, which were consistent as to the fact that the Accused remitted to W4 the said plastic bag with items (1), (2), (3), and (4) therein at the relevant time and place.

The Court is comforted in reaching the said conclusion for the reasons given below.

As per the Accused's own version, he was still standing in W4's Office, when W4 asked him what was in the said plastic bag, upon which the Accused replied same contained tools for his Company and said that W4 could check same, following which W4 opened the said plastic bag in his presence (Folio 118269 of Doc. A). The fact that W4 opened the said plastic bag necessarily implies that the Accused had given W4 the said bag.

Further, in his statement (Doc. A3), given to the Police, the Accused's version was to the following effect:

> "[…] et mo ti donne li sa sac plastique couleur noir […]" (Folio 11 / 0495753 of Doc. A3); and
>
> "Mo aina pour faire ressortir ki en faites après ki sa jour là le 25-06-12 kan mo fine fini remette sa sac en plastique couleur noir là à Inspecteur Thondee […]" (Folio 11 / 0495754 of Doc. A3).

From all the above, it is apparent that the Accused maintained his version given to the Police (Doc. A3) in his statement given to the ICAC (Doc. A) as regards the fact that there was remittance of the said bag to W4 by the Accused.

The Accused, however, whilst initially contending it was because W4 had asked him what the said bag contained that he remitted the said bag to W4 for W4 to check its contents, in Court, disputed that he had remitted the said black plastic bag, with its contents, to W4 in his Office, at all.

In light of all the above, the Court finds that these diametrically opposed versions given by the Defence cannot all be true and give the lie to the Accused.

It was also incumbent on the Prosecution to establish the intention with which the said bag was remitted to W4 by the Accused, i.e. whether it was meant as Gratification, at the relevant time and place. And it is trite Law the said intention is to be inferred from the circumstances of the case at hand.

In the first instance, the Court finds it suspicious that the Accused would have had items (2), (3), and (4) in their original packaging with him at the relevant time and place. The Court has borne in mind the Accused's explanation that same was due to the lock of his van being broken, but the Court finds no merit in the said explanation for the reasons given in the section Lock Of The Accused's Van below.

Further, although the Court is of the considered view that had the Accused remitted the said bag with items (2), (3), and (4) only, albeit in their original packaging, to W4 at the relevant place and time, it would have been unreasonable for the Court to conclude therefrom that same was meant as Gratification, the Court is in presence of W4 and W5's testimony, which the Court accepts, as regards the fact that the said bag also contained item (1), i.e. the Rs3000/- in different bank notes.

The Court also bears in mind the reason why the Accused went to see W4 on the relevant day as per his own out-of-Court statements.

The Court is therefore satisfied that the only reasonable and irresistible conclusion which could be reached from the Accused's said action of remitting the said bag with items (1), (2), (3), and

(4), coupled with the words uttered by the Accused at the relevant time as deponed to by W4 and W5, is that the Accused intended for W4 to take the said bag with items (1), (2), (3), and (4) therein as Gratification (as defined in s. 2 of POCA).

W3

Now, in relation to W3, the Court notes that he was examined in chief as to an incident which allegedly occurred on 26-06-12, although the alleged incident in the present matter allegedly occurred on 25-06-12. This was also the date mentioned in the Written Submissions of the Prosecution. Be that as it may, the Court is of the considered view that the said discrepancy in the Prosecution case is not significant in as much as it was not disputed that the Accused was present at the relevant place at the relevant time on the relevant date.

The Court granted the Motion of the Prosecution to refresh W3's memory from his out-of-Court statement given on 05-04-13, i.e. about 10 months after the alleged incident. W3's said statement was not contemporaneous to the alleged incident, however W3 confirmed in Court that same was a reflection of what had happened on 25-06-12.

It is apposite to reproduce the following extract from the Authority of **Hanumunthadu v The State & Anor** [2010 SCJ 288]:

> Under the same ground, counsel also submitted that it was wrong for the Magistrate to allow the witness to refresh his memory from his statement inasmuch as the statement given by witness No. 5 was not contemporaneous with the events which took place in the office of the appellant. Counsel pointed out that whereas the events took place on 29 July 2002, the witness gave his statement on 1st October 2002.
>
> The following extracts from Blackstone 2003 Edition page 2039 paragraph F6.8] may be aptly cited here:
>
> > "*A document, in order to be used for the purposes of refreshing a witness's memory, must have been made or verified contemporaneously, although not necessarily literally so, with the events to which it relates. […] The*

> *question of contemporaneity is a matter of fact and degree (Simmonds [1969] 1 QB 685). The document must have been written (or verified) either at the time of the transaction or so shortly afterwards that the facts were fresh in the memory, a definition which provides a measure of elasticity and should not be taken to confine witnesses to an over-short period (Richardson [1971] 2 QB 484, per Sachs LJ). 'Much will depend on the nature of the evidence to be given'. […] In certain circumstances, a witness who has begun to give evidence but who cannot recall the detail of events, because of the lapse of time since they took place, may be permitted by the judge, in the exercise of his discretion and in the interests of justice, to refresh his memory in the witness-box (or out of court) from a statement made near to the time of the events in question, even though it was not made at the time of the events or so shortly thereafter that the facts were fresh in the memory".*

W4's version was to the effect that he caused W3 to record the Accused's statement, and that W3 was on duty at the relevant time, his denying that he called W3. W3 deponed along the same lines as W4, but did not answer when the version he gave at the time of the Enquiry, which was to the effect that he was on mobile patrol when he was called back to the Office for an urgent duty, was put to him.

Also, as per W5's testimony, W4 called W3 after the incident.

The Court is of the considered view that the inconsistencies highlighted above in no way undermine the Prosecution case, as W3's testimony related only to circumstances subsequent to the said incident, and in no way contradicted W4 and W5's testimony as regards the remittance of the said bag with (Exhibits I and II) therein by the Accused to W4 at the relevant place and time.

In conclusion, in light of all the above, the Court is of the considered view it can reasonably be inferred that the Accused remitted the said bag with items (1), (2), (3), and (4) therein to W4, at the relevant time and place as Gratification.

Public Official

As per s. 2 of the POCA, "Public Official" is defined as follows:

> "public official"—
>
> (a) […]a public officer […].

In the present matter, the fact that W4 was a Police Officer at the relevant time is borne out by the unchallenged letter dated 23-05-19 (Doc. F) as regards the Official Status of W4, who retired from the Mauritius Police Force as Police Inspector.

Further, the very fact that the Accused admitted having been to see W4 in his Office at the DSU Curepipe, necessarily establishes that the Accused knew that W4 was a Police Officer, the more so as the Accused mentioned in his statement that W4 was not wearing his Police shirt at the relevant time (Folio 118268 of Doc. A). It was therefore not disputed that W4 was a Police Officer at the relevant time.

It is therefore amply borne out by the evidence on Record that W4 was, at the relevant time, a Public Officer, and hence fell within the definition of Public Official for the purposes of s. 2 of the POCA.

To Abstain From Doing An Act In The Execution Of His Duties

It was the case for the Prosecution that the purpose for which the said bag was remitted to W4 was for W4 to abstain from doing an act in the execution of his duties, i.e. so as for W4 to refrain from checking the places of entertainment operated by the said Accused.

W4's initial version was that the Accused said to him:

> Pran sa ti Cadeau la na pa check mo banne game.

In Court, W4's version was to the effect that the Accused said to him:

> Prend sa ti cadeau la, arrête check mo bann games.

The Court has noted the slight variance in the words used by W4 in his initial version and in his version in Court. The Court is however of the considered view that given W4 was deponing about 08 years after the said incident, the said variance is minimal. Further, the fact that W4 related almost identically the words allegedly uttered by the Accused at the time of remitting the said bag with items (1), (2), (3) and (4) therein at the relevant time and place, in fact tends to lend credence to W4's testimony as regards the central issue to be determined.

W5's testimony was along the same lines as W4:

> Prend sa ti cadeau la, na pas check mo banne game.

In light of the above, it is apparent that W5's testimony was on all fours with the initial version given by W4. Further, the testimony of W4 and W5 is consistent as to the reason why the said bag was remitted by the Accused to W4 at the relevant time and place.

Now, the fact that it was the Accused's Company which was prosecuted and not the Accused in his personal name before the Upper Plaines Wilhems District Court (Doc. J) does not detract from the fact that the Accused himself admitted that he had gone to see W4 on the relevant day as regards W4 checking his gaming houses (Folio 118267 of Doc. A), and this therefore establishes a direct link between the Accused, his game houses, and the present matter.

Further, the Accused admitted he went to see W4 on 25-06-12, to ask W4 why he was checking his Gaming Houses as he had his licences and as the Municipal Council had told him he could operate (Folio 118267 of Doc. A and Folios 11 / 0495752-3 of Doc. A3), which Gaming Houses were in Forest-Side and Floréal (Folio 118266 of Docs. A).

The Accused also admitted that W4 had checked his Gaming Houses, and at no stage was it, in fact, contested that checking Gaming Houses did form part of W4's official duties, and that the Gaming Houses of the Accused situated in Forest-Side and Floréal were within the Jurisdiction of W4.

These elements support W4 and W5's testimony as to the reason why the Accused had remitted the said bag with (Exhibits I and II) therein to W4 at the relevant time and place.

The Court has noted the contention of the Defence to the effect that there was no reason for W4 to check the Accused's game houses, as they were all in order and held all relevant licences at the relevant time, as established by (Docs. B and B1).

It however stands to reason that the mere fact that a game house holds all relevant licences does not prevent a Police Officer from checking the said game house.

In conclusion, the Court finds that the evidence on Record cogently establishes that the reason why the Accused remitted the said bag with items (1), (2), (3), and (4) therein on the relevant day at the relevant place was for W4 to refrain from checking the Accused's gaming houses.

The Defence Case

Save for the evidence of the Defence Witness, the Accused exercised his Right to Silence, as he was entitled to.

Remittance Of The Said Bag

At the Enquiry stage, the Accused admitted he had given the said bag, albeit for a legitimate purpose according to the Accused, to W4 at the relevant time, as highlighted above.

The Accused however effected a volte-face as regards the remittance of the said bag in Court, as highlighted above.

Whilst bearing in mind that the burden lies on the Prosecution to prove its case beyond reasonable doubt, the Court cannot ignore the fact that this volte-face inevitably undermines the Defence case in a significant manner.

In light of all the evidence on Record and all the factors highlighted above, the Court finds no merit in the various versions advanced by the Defence.

W4 Had A Grudge Against The Accused

Now, the Accused's contention, in effect, was that W4 had a grudge against him, as his, i.e. the Accused's, Son, had put a case against W4 at the ICAC.

W1 however stated that as per the Records at the ICAC, there was no case recorded by the Accused against W4. There is no evidence on Record as to whether the Accused's Son had reported a case at the ICAC against W4.

W4, in Court, denied having given his mobile number to the Accused's Son. However, upon his out-of-Court statement being put to him, W4 said that maybe he had personally given his personal mobile number to the Accused's Son to have contact in privacy, and conceded having received no information from the Accused's Son.

Also, W4's reply that when a person would come to see him with a diary, he would refuse and let the person go, although it is a bribe, whereas W4's specific reply, that if the Accused came to him with a diary, he would not let the Accused leave, as it was a bribe, does appear to be arbitrary.

It is clear from all the above that W4, the Accused, and the Accused's Son all knew each other, and that there may have been some friction between them, for instance due to W4 establishing contraventions against the Accused's gaming houses.

Nonetheless, the Court finds that these abovementioned factors are not sufficient for the Court to reasonably conclude that W4 did indeed have a grudge against the Accused and/or his Son, such as to make such an allegation against the Accused.

Lock Of The Accused's Van

At no stage did the Accused mention to W4, at the relevant time, that he had had to take the said bag along with him given the lock to his van was broken, but rather merely stated to W4 that he was to use the said items (2), (3), and (4) for his Company (Folio 118269 of (Doc. A)), without more. This inevitably raises the question as to why the Accused had brought the said items into W4's Office at the relevant time in the first place.

Be that as it may, the Accused first mentioned the said explanation of his broken van lock in his statement given to the ICAC on 10-01-13 (Folio 118273 of (Doc. A)), i.e. more than six months after the events. Given the said delay, it was not essential for the ICAC to check the said lock, as the examination would in no way have conclusively established that the lock to the Accused's van was indeed broken at the relevant time.

The Court therefore finds the contention of the Defence that the Investigating Authorities' failure to check the Accused's van lock resulted in a biased and blinkered investigation, without merit.

In light of all the above, the Court is of the considered view that the issue of the Accused's van lock was a non-issue.

The Accused's Rs875/-

As regards the Rs875/-, upon being confronted with the Prisoner Property Lock Up Register (Doc. E), the Accused denied that the said Rs875/- had been returned to him, explaining that when he was searched, he only had his watch and mobile phone with him (Folio 124170 at Answer 5 of Doc. A1), which were duly returned to him. The Accused maintained that the Police did not return to him the said Rs875/-, despite identifying his signature on the Detainee Charge Sheet, and it mentioning that he had been returned all his personal belongings, including the said Rs875/- (Folio 124171 at Answer 6 of Doc. A1).

Whilst maintaining not having been returned the said Rs875/-, the Accused conceded not having reported any case of Larceny in relation thereto to the Police, as there were some clarifications he had wanted to give to the ICAC first (Folio 127561 of Doc. A2).

It is therefore clear that the Accused, who made a live issue of the said Rs875/-, which were allegedly not returned to him, despite his identifying his signature of the Detainee Charge Sheet, as highlighted above, did not in fact make any complaint as regards the alleged Larceny of the said Rs875/-.

At some stage of the Proceedings, it was put to Ex-CPL 1778 Pompeia (hereinafter referred to as W11) in cross-examination that the said Rs875/- could not have been with him, i.e. W11, as same had already been returned to the Accused's Son.

It is therefore apparent from all the above, that the Defence have put forward varying versions as to the said Rs875/-, which cannot all be true, and hence give the lie to the Accused as regards the said specific issue of the said Rs875/-.

In light of the ever shifting versions as regards the said Rs875/- put forward by the Defence, from the Enquiry stage up to the Trial stage, the Court is of the considered view that no credit can be attached to the said versions, and rejects the unsworn and untested versions of the Accused.

Prima Facie Case

The Court bears in mind the principles set out in the Authority of **Vythilingum v The State [2017 SCJ 379]**:

> Giving evidence in Court is not a memory test and failure to recollect with precision all the circumstances and details of an incident is understandable. What is important is for the Court to be satisfied that a witness is speaking the truth in substance.

The Court makes allowances for the passage of time, given W4 and W5 were deponing in 2020 and 2018 respectively, as regards an incident which allegedly occurred in 2012, i.e. about 08 and 06 years later respectively.

Having duly assessed the testimony of W4 and W5, the contradictions contained in W5's own testimony, and the inconsistencies between the testimony of W4 and W5, the Court is of the considered view that the said contradictions and inconsistencies relate only to the circumstances surrounding the remittance of the said bag and do not adversely affect the Prosecution case as regards the central issue to be determined. In fact, W4 and W5 maintained unwaveringly their testimony in Court as regards the Accused remitting to W4 the said bag with (Exhibits I and II) therein at the relevant time and place, and thereby corroborated each other on this central issue.

The Court has also duly assessed the demeanour of W4 and W5 in Court, and is of the considered view that they were speaking the Truth in substance. They struck the Court as credible Witnesses, who related in a consistent manner the central circumstances of the present matter.

The Court has noted that W4, whilst at first denying same, eventually admitted he may have given his mobile phone number to the Accused's Son, when he was confronted with his statement. These factors are however not of such a nature as to put in doubt W4's testimony.

Further, both W4 and W5 withstood the test of a lengthy cross-examination, and maintained their version throughout the Proceedings are regards the central issue in the present matter.

In light of all the above, the Court is satisfied that W4 and W5 were Witnesses of Truth, and that it can safely act on their testimony.

The Court therefore finds that the Prosecution has established a strong prima facie case against the Accused. The Court further finds that there is no evidence on Record to weaken or counter the Prosecution case, applying the principles set out in the Authority of **Andoo v R [1989 MR 241]**:

> […] where the evidence for the Prosecution establishes a strong and unshaken prima facie case and the accused chooses not to swear to his statement and expose himself to cross-examination, the trial Court is perfectly entitled to conclude that the Prosecution evidence remains unrebutted. It is of course true that the burden of proving the guilt of an accused squarely lies on the Prosecution and that the accused is entitled to remain silent. His right to silence, however, is exercised at his risk and peril when, at the close of the Prosecution case, a prima facie has been clearly established since the burden then shifts on him to satisfy the Court that it should not act on the evidence adduced by the Prosecution."

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and all the factors highlighted above, the Court is of the considered view that it has been established that the Accused remitted, on the relevant day, at the relevant time, and place, the said bag with items (1), (2), (3), and (4) therein as Gratification, so as for W4 as a public official, for W4 to abstain from doing an act in the execution of his duties, i.e. so as for W4 to refrain from checking the places of entertainment operated by the said Accused, and in the absence of any evidence on Record to weaken or counter the Prosecution case, the Court finds hence that the Prosecution has proven its case against the Accused beyond reasonable doubt, and the Accused is therefore found Guilty as charged.

[Delivered by: D. Gayan, Vice-President]
[Intermediate Court (Civil Division)]
[Date: 29 June 2021]