ICAC v Ho Man Cheong Patrice Sylvio

2022 INT 11

FCD CN: 75/2020
CN: 116/2015

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

Ho Man Cheong Patrice Sylvio

RULING

The accused has been prosecuted for the offence of Corruption of Agent in breach of sections 16(1) & 83 of the Prevention of Corruption Act 2002, under 17 counts as laid in the Information. He pleaded not guilty to the Information and was represented by counsel throughout the proceedings.

At trial stage, the prosecution had called three witnesses (Wit No.1, 9 and 10), at which point the prosecution proposed to close their case.

Defence counsel, Mr Domingue, SC moved to have witness no.2 tendered for cross-examination by the prosecution. The motion was objected to and the matter was argued by both counsels.

THE LAW

Both the defence and the prosecution have offered comparable submissions on the common law principles governing the tendering of a prosecution witness to the defence if the former was not called to give evidence. Both agree that the prosecution benefit from a discretion of whether to tender such a witness for cross-examination or not. At the same time, the discretion is not unfettered as same has to be exercised fairly and in the interests of justice.

The defence has filed a number of authorities and one extract in particular from **Blackstone's Criminal Practice 2014, paragraph D16.18** which encapsulates the rationale for the rule:

The rationale for the above rule is that service of the statement of a witness is an indication that the prosecution will call that witness and will secure the attendance of the witness at trial, and therefore the defence do not need to approach that witness themselves for a statement. Thus, to avoid the defence being taken by surprise and prejudiced by the loss of evidence of potential value to their case, the prosecution are in general obliged to call him at the trial.

There are evidently exceptions to the above rule so that the prosecution could have good reasons not to tender a witness for cross-examination. Those reasons have been enunciated in various cases.

In **Barbeau v R (1988) MR 247**, it was held that *if the prosecution feel that a witness will confuse, deceive or mislead the court they are not bound to call such a witness.*

The case **R v Brown and Brown (1997) 1 Cr. App. R 112** at p 114 was cited by the Supreme Court in the case **Unnuth v The State 1998 SCJ 63** where it was stated that the counsel for the prosecution *should not refuse to call a witness merely because his evidence does not fit in exactly with the case he is seeking to prove. But he need not call a witness whose evidence is inconsistent with, or contrary to, the case he is prosecuting since such witness's evidence will be unworthy of belief if his case be correct.*

The following extract from **Veeren v The State 2006 SCJ 153** is of relevance:

The record shows that the learned Magistrate duly considered the principles relating to the discretion of the prosecution to call or not to call a particular witness and quoted at length the guidelines enumerated in R v Brown & Brown [1997] 1 Cr. App. 112 at page 114. She rightly stated the law that the prosecution is under no obligation to call or tender for cross-examination a witness whom it considers "unworthy of belief" or whose testimony "is inconsistent with, or contrary to" the case it is prosecuting. She was prompt to add that, at any rate, there was not even evidence on record to suggest that the evidence of PC Bangaroo was inconsistent with the case for the prosecution. We find that the observations of the learned Magistrate were the more appropriate since it is well known that statements of potential witnesses before the Intermediate Court are, as a rule, communicated to the defence

and that in our instant case the defence was even communicated the unused materials as appears on record.

It follows that the prosecution ought not call or tender a witness from the witness list if the latter's evidence is unworthy of belief, likely to mislead the court or confuse the jury.

ASSESSMENT OF THE COURT

The prosecution called 3 witnesses out of 10 as per the list of witnesses. The discretion is primarily laid on the prosecution. The latter's submissions centred on the fact that witness no.9 has adduced evidence needed by the prosecution. The out-of-statement of witness no.2 has been communicated to the defence as part of the brief. Her evidence would be a repetition of the evidence of witness no.9. Hence it is likely to cause confusion to the prosecution's presentation of their case.

It is not the contention of the prosecution that the evidence of witness no.2 would be unworthy of belief or contradictory to their case and hence confusing to the court. Repetitious evidence runs the risk of being superfluous but can hardly be considered as confusing. It is noted that the defence have submitted to the contrary on the possibility of repetition from witness no.2.

Witness no.2 as laid out on the list of witnesses was the Fraud Risk Officer at the HSBC. The charge laid against the accused is one of corruption when he was in employment at the HSBC. At face value, there is doubt as to whether the witness will be readily cooperative to questioning from the defence. Hence it is unlikely to be in the interests of justice for the defence to call the witness as part of the defence case and have to examine her in chief. Furthermore, Doc D was produced by the prosecution and the witness no.9 could not shed light on the supposedly enclosed transactions of 2011 and 2012 as mentioned in Doc D. The court is not in possession of the out-of-court statement of witness no.2 and it is the submission of the defence that the said witness will be able to do so.

I, therefore find that it is in the interests of justice for the prosecution to tender the witness no.2 for cross-examination by the defence and I order as such.

P Rangasamy

Magistrate of the Intermediate Court
14.01.22