ICAC v Rudolph Dereck JEAN JACQUES and Ors

FCD CN: FR/L89/2020

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

ICAC

V

1. **Rudolph Dereck JEAN JACQUES**
2. **Louis Roger JEAN JACQUES**
3. **Dharamdeo BALKISSUR**
4. **Bruno Wesley CASIMIR**
5. **Roukesh HEMRAJ**
6. **Jean Fabrice Danilo FRANCOIS**

RULING

All six accused are being prosecuted, on separate Counts, for Money Laundering offences in breach of Sections 3(1)(a), 6 and 8 (Counts 1-13 and 25-28] of the Financial Intelligence and Anti-Money Laundering Act 2002 and Sections 3(1)(b), 6 and 8 (Counts 14-24 and 29-32) of the Financial Intelligence and Anti-Money Laundering Act 2002. They have all pleaded not guilty and are represented by Counsel.

During the course of the trial, the prosecution called SI Papain (Witness No.1) who identified, read and produced two statements which she had recorded from Accused No.2 on 12 July 2013 and 28 October 2013, after having cautioned and explained latter his constitutional rights. Those two statements were marked as Docs B and B1 respectively.

SI Papain (Witness No.1) also explained that during the recording of the statement dated 28 October 2013 (Doc B1), she referred and read to Accused No.2 a statement which latter had given to the ICAC on 22 October 2012. That statement was recorded from Accused No.2 following an Order of the Court to the effect that he should give an explanation as to the properties he possessed. She further stated that this statement was not taken under warning.

The prosecution then sought to produce the statement dated 22 October 2012 as being part and parcel of Doc B1. Counsel for Accused No.2 objected to the production of this statement as being hearsay evidence and in breach of Accused No.2's constitutional rights.

Counsels for the other accused informed Court that they are not concerned with the present Arguments and therefore, will not offer any submissions. The case was then fixed for Arguments on 15 March 2022.

On 15 March 2022, the prosecution informed Court that it will not need any witness for the purposes of the Arguments. Counsel for Accused No.2, on the other hand, requested that SI Papain (Witness No.1) be tendered for cross-examination to which the Prosecution did not agree. Both the prosecution and Counsel for Accused No.2 offered submission on this issue on the same day.

Counsel for the prosecution submitted that SI Papain (Witness No.1) will not be tendered for cross-examination because she has already explained the circumstances in which the statement dated 22 October 2012 was shown and read to Accused No.2 during the recording of Doc B1 and that there is no dispute that when the statement dated 22 October 2012 was recorded, it was not under warning.

Counsel for Accused No.2 on the other hand submitted that SI Papain (Witness No.1) should be tendered for cross-examination since her evidence will be crucial in shedding light as to the Order which the Court gave to record the statement dated 22 October 2012 and that he had some questions to put to her in that respect.

I have considered both the submissions of the prosecution and counsel for Accused No.2. It is trite law that the prosecution is under no duty to call all the witnesses on its list of witnesses. When the prosecution chooses not to call a witness who is on its list of witnesses, the prosecution has a discretion of whether or not to tender that witness for cross-examination. However, that discretion must be exercised fairly and may be subject to the Court's intervention in appropriate circumstances. In that respect, in **Barbeau v R [1988] SCJ 384**, it was held that:

> *"The principles governing the calling of witnesses by the prosecution may be summarised as follows –*
>
> *(i) The prosecution, as a general rule, should have present in Court all the witnesses whose names appear on the list of witnesses but they have a discretion whether to call all of them or not (Archbold 42nd Ed. para. 4-182, page 335).*
>
> *(ii) Where the prosecution chooses not to call a witness, two courses are open to them: they can either tender the witness for cross-examination or just*

leave it to the defence to call him. (R v. Dauphine 1959 MR 179; R v. Teerumalai 1972 MR 131). Where they opt for the second course of action, it is their duty to make available to the defence any statement made by the witness (R v. Nellayah [1985 SCJ 106]; R v. Teerumalai (supra)).

(iii) The discretion of the prosecution not to call a witness is theirs only and should be exercised fairly. It will not be interfered with by the court unless there are strong reasons for so doing (R v. Oliva (1965) 49 C. App. 298; Adel Muhammed El Dabbah v. Attorney-General for Palestine (1944) AC 156).

(iv) If the prosecution feel that a witness will confuse, deceive or mislead the Court they are not bound to call such a witness (R v. Teerumalai (supra); R v. Nugent (1977) 3 A11 ER 662."

Instances where the Court may interfere with the discretion that the prosecution possesses has been aptly summarized in the case of **Vengrasamy v The State [2009] SCJ 62** whereby the Court held that:

"Besides, it is a settled principle that the decision for calling or tendering a witness is that of the prosecution and the Court will not interfere unless the prosecution has failed to exercise its discretion judiciously or has gone wrong in principle – ***vide Nundah K v. The State [2002 SCJ 282]; Barbeau v R [1988 MR 247]; Adel Muhammed El Dabbah v Att-Gen for Palestine 1944 A.C. 156; R v Russell-Jones [1995] 1 Cr. App. R. 538.****"*

In the present case, Counsel for Accused No.2 objected to the production of the statement dated 22 October 2012 because it has been obtained in breach of the constitutional rights of Accused No.2 and that it would also amount to hearsay evidence. In that respect, SI Papain (Witness No.1) has been unequivocal on the fact that this statement was recorded from Accused No.2 following an Order from the Court and that it was not taken under caution. The issue to be determined by this Court is therefore whether that statement will be admissible given the circumstances in which Doc B1 was recorded.

There is no dispute as to the fact that the statement dated 22 October 2012 was not taken under caution and was shown and read to Accused No.2 whilst Doc B1 was being recorded. There is also no dispute as to the fact that accused gave that statement to the ICAC following an Order of the Court to explain his properties. Therefore, this Court fails to see how tendering SI Papain (Witness No.1) for cross-examination will be crucial or be of any further help to the Accused when it is already undisputed that this statement was not taken under caution.

In the circumstances, it cannot be said that the Prosecution has failed to exercise its discretion judiciously or has gone wrong in principle in refusing to tender SI Papain (Witness No.1) for cross-examination. The motion of Counsel for Accused No.2 to tender SI Papain (Witness No.1) for cross-examination is accordingly set aside.

A.R.TAJOODEEN
Ag Magistrate of the Intermediate Court (Financial Crime Division)
23.03.2022