

ICAC v JOTTEE Dharmanund- Ruling

2019 INT 3

CN 205/2009

THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

The Independent Commission Against Corruption

V

JOTTEE Dharmanund

RULING

The accused stands charged with whilst being a public official, wilfully, unlawfully and criminally, soliciting from another person, a gratification for doing an act which is facilitated by his duties in breach of **Sections 4(1)(b)(2) of the Prevention of Corruption Act 2002 (The POCA)**.

The case was heard by a differently constituted Bench of the Intermediate Court, which dismissed the matter against the accused (2nd of May 2013).

The DPP then appealed to the Supreme Court against the acquittal relying on two grounds and on the 2nd of August 2017, the Supreme Court delivered its judgment. The conclusion went as follows:

“In the circumstances we consider that the prosecution has indeed proved the offence for which the accused had been charged and uphold both grounds of appeal. We consequently quash the decision of not guilty entered by the learned Magistrate and enter a finding of guilty on both counts.

*We take notice that the learned Magistrate who heard the case is no longer a member of the judiciary. This Court has decided that on a correct understanding of the scope of the principle in **Sip Heng Wong Ng & Anor v R (Privy Council Appeal No 52 of 1985)** [[1985 MR 142](#)], another magistrate may pass sentence. (See **Jean Marc Sevene v The State** [[2005 SCJ 204](#)]).*

We therefore direct the matter be remitted to the lower Court and that the Presiding Magistrate designate another magistrate to hear evidence on the appropriate sentence to be passed and proceed to sentence.”

Mr G. Glover, Learned Senior Counsel, objected that another Bench be appointed solely for the purpose of sentencing as it will be in breach of the fundamental rights of the accused in as much as the Bench which heard all the evidence and saw the witnesses depose, will not be the one hearing evidence at sentencing stage. He therefore moved that the matter be referred back to the Supreme Court under Section 84 of the Constitution, for a pronouncement on the issue. He, later on, expatiated on the questions relating to the interpretation of the Constitution as follows:

1. Whether the Court on appeal can remit back a case to the lower Court with the direction that another Magistrate, other than the trial Court should hear evidence and proceed to pass sentence in the teeth of Section 10 of the Constitution.
2. Whether a newly constituted bench can sentence an accused without hearing all the evidence on record in light of the Privy Council decision of **Sip Heng Wong Ng and Ng Ping Man v R**, in as much as the decision of **J M Sevene v The State** is not one which interprets the decision of **Ng** in the manner the court in this case on appeal says it does.

He acknowledges the fact that this Court has been directed by the Supreme Court to hear evidence on the appropriate sentence to be passed and proceed to sentence, but further submitted that the mandatory aspect of **Section 72 (4) of the District and Intermediate Courts (Criminal Jurisdiction) Act** cannot in any manner whatsoever be contradicted by a directive of the Supreme Court.

Section 72(4) of the DIC reads: “*After hearing what each party has to say and the evidence adduced the Magistrate shall consider the whole matter and either dismiss the information or convict the accused and pass such sentence (stating the law on which it is grounded) as the nature of the offence and the law may require.*”

Learned Senior Counsel went on to differentiate between the Judgments of **Ng** and **Sevene** as in the case the **Sevene** the Supreme Court had already decided on the sentence and had only remitted it back in order for the Court to consider a Community Service Order in the light of the findings that were already made. So, in his submission, when the Supreme Court in the present matter says that **Sevene** gave the same right to direct another Magistrate to hear evidence on the appropriate sentence to be passed, this is in breach of Section 72(4) of the DIC and in breach of the principle enunciated in **Ng**.

At the end of the day, this is a matter of constitutional importance because it will decide whether the accused would benefit from a fair trial or not. This is an apt case for this court to

remit the matter back to the Supreme Court and ask directions on the constitutional aspect of the matter, that is, the accused would benefit from a fair trial as guaranteed by the Constitution in light of Section 72(4) of the DIC and the Judgment of **Ng**.

Miss Bisnathsing offered submissions on behalf of **ICAC** and she highlighted the fact that the Supreme Court had addressed its mind to the fact that the Magistrate who gave the judgment is no longer available to pass sentence. This is in line with the decision of **B. Teeluck v The State 2014 SCJ 16**, where the Court found that before passing sentence, there is need for a fair hearing and this is to ensure due process, fairness and that the bench passing the sentence is fully alive to all the relevant evidence which is a fundamental requirement for the Court to be able to discharge its duty to pass sentence.

It is her submission that there is no need to refer the matter back to the Supreme Court and the Court can proceed to the sentencing stage.

The referral to the Supreme Court

Section 84 of The Constitution reads:

“(1) Where any question as to the interpretation of this Constitution arises in any Court of law established for Mauritius (other than the Court of Appeal, the Supreme Court or a court martial) and the Court is of opinion that the question involves a substantial question of law, the Court shall refer the question to the Supreme Court.

(2) Where any question is referred to the Supreme Court in pursuance of this section, the Supreme Court shall give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision.”

The issue which this Court has to determine is whether the passing of sentence by another bench other than the bench which heard the evidence and concluded on the trial is in breach of the Accused's right to a fair hearing under Section 10 of the Constitution.

This court is of the opinion that such a question only involves the application of the constitutional right of the accused and does not call for an interpretation of the Constitution.

The court is comforted in its view by the case of **Police v A. Roheman 2010 SCJ 415**, where the Court on Appeal concluded that:

“...The need for interpretation of a constitutional provision only arises when the wording of that provision is unclear or ambiguous such that there is a dispute as to how it should be construed and the Supreme Court has not yet ruled on the correct construction of that provision. It is only when such need for interpretation arises that a reference under section 84 (1) of the Constitution is appropriate.”

The Supreme Court also observed that:

*“It is important that lower courts should be able to distinguish between questions involving the interpretation of the Constitution and questions involving the mere application of the Constitution. Although this court has on some occasions condoned references of questions of the second type, and simply given its decision thereon, we believe that a stricter insistence on what is precisely provided for in section 84(1) of the Constitution is called for in order to avoid an abuse of the reference contemplated in that section. The wise words of the learned Judges in **Accountant General v Baie du Cap Estates** [1988 MR 1] with reference to that section of the Constitution are apposite here:*

“The whole range of our criminal law or civil law affects in one way or another some provision or other of the constitution and it would simply be unacceptable if matters were, for this reason alone, automatically upon application, to be referred to the Supreme Court.”

The Court therefore finds that there is no justification in referring the matter to the Supreme Court by virtue of Section 84(1) of the Constitution.

Whether there is any breach of a fair hearing

The Full Bench of the Supreme Court in **J. P. Makound v The State 1997 SCJ 58**, recalled the “*ratio decidendi*” of **Ng**, where the Privy Council had to interpret **Section 124(2) of the Courts Act** as it then stood.

Section 124 read as follows: -

“124. Replacement of Magistrates

(1) If any Magistrate is by reason of illness or challenge or for any other reason incapable of acting, the Chief Justice may direct another Magistrate to replace him.

(2) Any Magistrate so directed shall have power to take, follow up and determine any case, cause or proceeding begun before the Intermediate Court.

(3) The Chief Justice may, if he thinks it desirable in the interest of the administration of justice direct a Magistrate of the Intermediate Court to perform, in addition to his duties, the duties of a District Magistrate for such time as he may determine. “

The Privy Council held that the interpretation given to Section 124(2) in **Syea v R 1968 MR 100** where it was held that *“the power of magistrates to take, follow up and determine a case begun before other magistrates enabled those magistrates who had not actually heard and seen witnesses to return a verdict”* was wrong as it was inconsistent with the principle of fair trial embodied in Section 10(1) of the Constitution.

The Law Lords concluded in **Ng**:

“If, after part of the evidence has been heard in a trial on which the accused pleads not guilty it becomes necessary to replace a Magistrate, there is no alternative but to recommence the trial and recall the evidence so that all the Magistrates hear all the evidence and the submissions made on behalf of the accused. Syea v. The Queen [1968 MR 100] was wrongly decided and should not be followed.”

Further to that decision, section 124 was amended by the Courts (Amendment) Act [\[Act No. 46 of 1988\]](#) and by the Judicial and Legal Provisions Act 1990 to render it consistent with our Constitution.

Section 124 now reads: -

“(1) Subject to the Constitution, where a Magistrate is, by reason of illness, challenge or for any other reason incapable of acting, the Chief Justice may direct another magistrate to replace him.

(2) In this section, “magistrate” means a magistrate of the Industrial or Intermediate Court, a Senior District Magistrate or a District Magistrate.”

The Full Bench in **Makound** also made an analysis of the decision reached in **Ramburn v The State 1996 SCJ 64** and opined that: *“With respect to the learned Judges who heard Ramburn, that finding is not supported by the evidence as elicited in their own judgment since Magistrates Domah and Juggernaut did listen to all the evidence. Whilst the first two Benches dealt strictly with points of law which did not necessitate the hearing of any witness, all the witnesses were indeed heard by the two Magistrates who delivered the judgment. The principle of fair trial invoked in Wong and Curpen is undoubtedly sound but that principle, on a proper analysis of the facts, was not in issue in Ramburn.”*

Whilst there is a strict application of the decision on **Ng** to the effect that the same magistrate giving the verdict should hear and see all the witnesses, a distinction has been made with regard to a magistrate actually hearing an argument on a point of law and giving a ruling thereon. E. Balancy J. in **Mutty & ors v Bhugbuth & ors 1994 SCJ 215**, observed that:

*“...if the principle in **Wong Ng** were to be viewed as an absolute principle so that in no circumstances should a case be partly heard by a differently constituted Court, an awkward situation would be reached whereby, by a different Judge or Magistrate actually hearing argument and giving a ruling thereon, the case would have been partly heard by a differently constituted Court and the principle accordingly broken.”*

In **Sevene v The State**, the sole ground of appeal avers that the sentence is “unreasonable, manifestly harsh and excessive and wrong in principle”. The Court on appeal decided that a nominal fine in relation to count IX and a suspended sentence with a community service order in relation to count VIII would best meet the interests of justice. The Court of Appeal quashed the sentences imposed under these counts and remitted the case back to the Intermediate Court for a suspended sentence coupled with a community service order, to be made in relation to count VIII.

Since the Magistrate who heard the case and inflicted the sentences had retired, the Supreme Court directed that another magistrate designated by the Presiding Magistrate shall proceed to suspend the sentence and make the community service order.

By virtue of **Section 72(4) of the DIC**, it is obvious that the Magistrate who heard the case and convict the accused shall be the one to pass the sentence. This is also in line with the principle of fair hearing. To that extent, I agree with Learned Senior Counsel for the defence.

But the circumstances of the present case differ in that:

1. There has already been a finding of guilt by the Appellate Court, so that recommencing the trial and recalling the witnesses to hear all the evidence and the submission made on behalf of the accused is pointless. This is not a situation where part of the evidence has been heard and that now there is need to replace the Magistrate.
2. The Magistrate who heard evidence on trial is no more in the judiciary.
3. We are now at sentencing stage. In that respect, the decision taken in **Sevene** that on a correct understanding of the scope of the principle in **Ng**, there is no impediment to another magistrate stepping in in relation to the sentencing process, does apply in view of the circumstances of the present case.

The court further bears in mind the right of the accused to a fair hearing at sentence stage and the duty upon the court to give an accused party the opportunity to be heard before sentence is passed upon him. As stated by the Judicial Committee in **Moss v The Queen 2013 UKPC 32**: *“An omission to hear a defendant before passing sentence is a serious breach of procedural fairness. That simple proposition does not need the citation of authority.”*

Coming back to the direction given by the Supreme Court in the present case, it is that of directing the Presiding Magistrate to designate another magistrate *“to hear evidence on the appropriate sentence to be passed and proceed to sentence”*.

In view of the above, therefore, the court concludes that there is no infringement of the principle laid down in **Ng** if it were to proceed with the hearing for the purpose of sentencing, in view of the circumstances as stated above.

The motion of the defence is set aside.

This court is to proceed with the hearing on sentencing.

**B.R.Jannoo- Jaunbocus (Mrs.)
Magistrate
Intermediate Court (Criminal Division)
This 17th January 2019.**