ICAC v Kissoonah (third) Ruling

2024 INT 27

1FCD CN: FR/L83/2020

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

ICAC

V

Sunil Dutt KISSOONAH

RULING

A. BACKGROUND

1. Accused is being prosecuted for Money Laundering offences (27 Counts) in breach of sections 3(1)(a), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 (the 'FIAMLA'). He has pleaded not guilty and is represented by Counsels, Mr. G. Glover, SC, appearing together with Mr. G. Gillot.

2. Miss S. Ramsooroop conducted the case for the Prosecution on behalf of the ICAC.

3. At the very start of the examination in chief of Mr. Mohamed Reeaz Bahadoor (witness no.10), Mr. G. Glover, SC, objected to the prosecution proceeding with his deposition on the following ground:

> *"…this was never put to accused that during the period 2004-2005, this witness was a colleague of accused. The witness is being called to certain facts in the information. The facts and particulars of those counts were never put to accused during the investigation"*

4. Miss S. Ramsooroop insisted that Mr. Mohamed Reeaz Bahadoor (witness no.10) be allowed to proceed with his testimony and the case was fixed for arguments on the objection raised by Mr. G. Glover, SC.

5. For the purposes of the arguments, CI Aleear (witness no.1) was called by the prosecution. He explained that as per **Doc HH** and **Doc JJ**, accused was informed of the nature of the charge against him, i.e., money laundering offences. Accused was also informed that he had made several cash and cheque transactions and was showed 25 documents in that respect. As per **Doc AA**, accused stated that he will neither give any statement nor answer any question in connection with the present case. As such, accused was not confronted with the version of Mr. Mohamed Reeaz Bahadoor (witness no.10). Upon clarification sought by the Court as to the nature of the statement given by Mr. Mohamed Reeaz Bahadoor (witness no.10), CI Aleear (witness no.1) stated the following:

> *"Witness no.10 has explained he was working at the DBM Flacq. He also explained his relationship with accused. He also explained that he sought financial help from accused which accused gave him in relation to count 2 and count 3 he obtained Rs. 10,000/- and Rs. 1,500/- respectively from accused which was deposited in his DBM account ..."* (Underlining is mine)

B. THE SUBMISSIONS

6. Miss S. Ramsooroop submitted that since accused was made aware of the nature of the charge against him, i.e., money laundering offences and that he was aware of the facts and circumstances of the present case in terms of the cash and cheque deposits that were showed to him, it was not necessary to confront him with the version of Mr. Mohamed Reeaz Bahadoor (witness no.10). She further submitted that since accused will have the opportunity to cross examine that witness, the probative value in allowing him deposing outweighs its prejudicial effect.

7. Mr. G. Glover, SC, on the other hand, filed written submissions which he supplemented by oral submissions in Court. He submitted that the evidence that Mr. Mohamed Reeaz Bahadoor (witness no.10) intends to give is incriminating in nature and should have been confronted to accused at enquiry stage. He further submitted that the prosecution should be precluded from eliciting any evidence from that witness.

C. THE LAW

8. In **Jhootoo v The State (2013) SCJ 373**, it was held that:

> *"Trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance."* (Underlining is mine)

9. In **Seetahul v The State (2015) SCJ 328**, it was held:

> *"There is no provision in our law which imposes a duty on the police to actually put the charge to the accused at the enquiry stage ... It was not incumbent at the stage of the enquiry to put each and every element of the offence to the appellant. It suffices that the version of the complainant was put to him so that he was made aware of the case against him and the evidence on which it is based so as to enable him to prepare his defence."* (Underlining is mine)

10. In **The State v Marie Francois Bernard Maigrot [2020] CS 6/12**, it was held that:

> *"The principles may be summarized as under:*
>
> *(i) at common law, a Court has, in the exercise of its inherent and overriding duty to ensure that the accused has a fair trial, the discretion to exclude evidence of facts even if such evidence is otherwise admissible, to which the accused was never confronted with at enquiry stage in order to give him an opportunity to say whatever he has to say; and*
>
> *(ii) the failure to confront the accused with the evidence or case against him at enquiry stage constitutes a breach of his constitutional rights to*

be informed of the case against him and to be given an opportunity to respond to what lies against him."

11. It is further held in **Maigrot (supra)** that:

> *"As a direct consequence of the application of the principle stated above, it is incumbent on an investigative authority to formally put to a suspect any evidence gathered and intended to be used against him in order to allow him to respond to the case against him and to prepare his defence at the trial eventually. Failure to do so, would render the admissibility of the evidence in question objectionable and likely to be excluded at the trial. Therefore, there can be no dispute about the meaning of the principle on which the present motion is based, its effect and the ultimate sanction if it is not adhered to."* (Underlining is mine)

12. In **The DPP v Lagesse & Ors [2018] SCJ 257** it was held that:

> *"Where there is a complaint, it would de facto imply that the suspect has to be confronted with that complaint; and if there were additional incriminating evidence gathered during the course of the enquiry those should be put to the suspect. Obviously, if the police as part of their enquiry do have incriminating evidence, the suspect has to be cautioned and informed of his right to be legally represented…"* (Underlining is mine)

13. Recently, in **DPP v Ducasse [2023] SCJ 20**, where the respondent's contention was that he would not benefit from a fair trial since he was not confronted with an alleged injection of diclofenac which had led to the involuntary homicide of the victim, the Appellate Court, after reviewing several authorities, held that:

> *"This is, in our view, incorrect because we do not believe that this omission by the police could really have had an incidence on the defence of the respondent. This contention appears to us to be clearly over simplistic. The respondent has denied having administered any injection at all to the deceased. Although the police are expected to put the correct version to a suspect at the investigative stage, in the present case, it cannot be said that this omission has prejudiced the respondent in his defence because the respondent has stated in his statement "… mo pas fine faire aucaine injection avec quiqaine d'ailleur mo pas gagne droit faire sa".*

Moreover, in the case of Lagesse (supra), the court made it clear that "the baseline is therefore that the accused must be made aware of the case against him. What effectively does that imply? Quite clearly this will depend on the particular circumstances of each case…".
It is, therefore, clear that all imperfections during the enquiry by the police will not necessarily be fatal to the prosecution's case unless it is of such a nature as to result in irreparable prejudice being caused to an accused."
(Underlining is mine)

14. From a review of the authorities cited above, the following principles can be deduced:

a. there is no duty on an investigative authority to actually put the charge to an accused at enquiry stage;

b. an accused must only be informed of the nature of the case against him and the evidence on which it is based (i.e., the incriminating evidence against him);

c. failure to inform an accused as per b. above may potentially amount to a breach of his constitutional rights. Here, a stay of proceedings or exclusion of the incriminating evidence which had not been confronted are remedies available to such an accused;

d. though different considerations are applicable for a stay of proceedings compared to the exclusion of incriminating evidence simpliciter, the element of prejudice will be of utmost importance for both, be it to varying degrees;

e. where a stay of proceedings is being sought as a remedy for incriminating evidence not having been confronted, the test of irreparable prejudice would apply – See **Ducasse (supra)** and **State v Maigrot (2019) SCJ 141**; and

f. where the exclusion of the incriminating evidence is being sought, the ultimate test for its admission or exclusion remains that of its probative value and prejudicial effect – See **Veerapen v The State (2015) SCJ 439**.

D. ANALYSIS

15. As per diary book entry dated 14 July 2012 (**Doc HH refers**), accused was informed that during the period 2004-2005:

a. funds had been embezzled to the prejudice of the Development Bank of Mauritius (the 'DBM');

b. he made several cash and cheque deposits in different savings accounts held at the DBM;
c. he made a cash deposit of Rs. 10,000/- in the account of Mr. Mohamed Reeaz Bahadoor (witness no.10) bearing account number 21010 on 19 July 2004;
d. he made a cash deposit of Rs. 1,500/- in the account of Mr. Mohamed Reeaz Bahadoor (witness no.10) bearing account number 21010 on 20 September 2004; and

e. the money deposited in the different savings accounts, including that of Mr. Mohamed Reeaz Bahadoor (witness no.10), were proceeds of crime and that he has committed the offence of money laundering.

16. The same diary book entry shows that accused chose not to not give any statement on that day but undertook to come back later with his counsel. As per a statement dated 16th August 2012, accused thereafter stated that he will retain his right to silence and will not answer to any question (**Doc AA refers**).

17. As per **Doc HH** and **Doc AA**, it is undisputed that the version of Mr. Mohamed Reeaz Bahadoor (witness no.10) was not confronted to accused during the course of the enquiry.

18. It is the contention of the prosecution that accused, as per **Doc HH**, was well aware of the nature of the case he has to meet. As such, it was not incumbent on the ICAC to confront accused with the version of Mr. Mohamed Reeaz Bahadoor (witness no.10) the more so when he chose to avail himself of his right to silence. True it is that, as per **Doc HH**, accused was made aware of the nature of the case against him in terms of the different cash and cheque deposits, that such deposits were proceeds of crime and that he has committed the offence of money laundering. However, there is more to it. The authorities cited above are beyond dispute that the evidence on which the case against an accused is based, i.e., the incriminating evidence, must also be confronted to him during the course of the enquiry. This is to enable an accused, during the enquiry, to provide an explanation, contradict or remain silent quoad such incriminating evidence. In that respect, an accused who had expressed his intention to exercise his right to silence does not automatically absolve an investigative authority from not having confronted incriminating evidence to him. This Court, in a previous ruling in the present case (**see ICAC v Kissoonah [2023] INT 148**), addressed this particular issue as follows:

> *"16. ... Firstly, a suspect at enquiry stage can only exercise his constitutional right to remain silent meaningfully if questions are asked and incriminating evidence confronted to him. In other words, he should be made aware of any such question or incriminating evidence so that, after having taken cognizance of same, he may make an informed choice*

to remain silent or not. Secondly, even when a suspect chooses to remain silent, "A reasonable number of questions may still be put to the suspect and his response – be it mere silence – noted" – See ***The State v Bundhun (2006) SCJ 254****. And thirdly, it would be over simplistic to argue that when a suspect has initially decided to remain silent, he would invariably have still remained silent irrespective of what question could have been asked or incriminating evidence confronted to him. As stated above, the exercise of one's right to silence would be meaningless unless exercised in relation to questions asked or incriminating evidence confronted. It cannot be excluded that a suspect who has initially decided to remain silent may well eventually choose to answer some questions or give an explanation to incriminating evidence confronted to him. That is his choice and the Court cannot preempt his action especially when incriminating evidence has not been confronted to him."*

19. CI Aleear's (witness no.1) testimony is revealing as to the fact that Mr. Mohamed Reeaz Bahadoor's (witness no.10) version will undoubtedly contain incriminating evidence against accused in terms of him having asked accused for financial help and having received money from accused in his DBM account. Such incriminating evidence is directly linked to counts 2 and 3 of the Information. Indeed, it can be deduced, from the testimony of CI Aleear (witness no.1), that the prosecution will seek to use the version of Mr. Mohamed Reeaz Bahadoor (witness no.10) to establish that it was none other than accused that must have transferred the sum of Rs. 10,000/- and Rs. 1,500/- respectively in account number 21010 belonging to the said Mr. Mohamed Reeaz Bahadoor (witness no.10). Such incriminating evidence, as per the authorities cited above, should have been confronted to accused during the course of the enquiry. Failure to do so has resulted in a breach of accused right to be informed of the incriminating evidence against him and has deprived him of an opportunity to respond, if he so wished, to such incriminating evidence during the course of the enquiry. This incriminating evidence would also have been important to accused, at enquiry stage, in the preparation of his defence the more so when such incriminating evidence is directly linked to counts 2 and 3 of the Information.

20. Undoubtedly, the evidence of Mr. Mohamed Reeaz Bahadoor (witness no.10) in respect of him having asked accused for financial help and having received money from accused in his DBM account is highly probative to the prosecution's case. However, it also carries with a substantial degree of prejudicial effect. True it is that accused has been communicated with a copy of the brief and will have the opportunity to cross examine Mr. Mohamed Reeaz Bahadoor (witness no.10). However, these would be insufficient safeguards to counterbalance the prejudice which has been caused to accused by not confronting him with such incriminating evidence that directly links him with counts 2 and 3 of the Information. Indeed, he has been deprived of an opportunity, at enquiry stage, to respond, if he so wished, to such incriminating evidence

against him. Admitting such incriminating evidence during the trial may very well lead to a situation whereby accused may find himself compelled to respond to such incriminating evidence thereby depriving him of a meaningful exercise of his right to silence.

E. CONCLUSION

21. For the reasons stated above, the prejudicial effect of the evidence in relation to any conversation which Mr. Mohamed Reeaz Bahadoor (witness no.10) allegedly had with accused in respect of any financial help and money transferred in his DBM account by accused in relation to counts 2 and 3 of the Information outweighs its probative value and is therefore not admissible. As such, the objection of Counsel for accused is upheld in so far as any question which might give rise to such evidence from Mr. Mohamed Reeaz Bahadoor (witness no.10) is not allowed.

A.R.TAJOODEEN
Ag Magistrate of the Intermediate Court (Financial Crimes Division)
09.02.2024