ICAC v Kissoonah Ruling

2023 INT 148

FCD 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. He has pleaded not guilty and is represented by Counsel, Mr. G. Glover, SC, appearing together with Mr. L. Balancy. Mr. L. Balancy conducted the case for the Accused.

2. The case for the Prosecution is being conducted by Mr. Roopchand for the ICAC.

3. Mr. Danirow Bhiwajee (witness No.6), now Acting Manager at the DBM, was called by the prosecution. Whilst deposing in chief, he explained that in 2010 he was working in the internal audit department of the DBM. During that period, his department was tasked to carry out an internal investigation following a fraud discovered at the Rodrigues branch and later at the Flacq branch by using backdated transactions. At the Flacq branch, the transactions were posted on either a cyclone date, weekends or public holiday, which are days on which the bank is closed. As a result, the money involved in such backdated transactions would be considered as surplus on the bank accounting system and could be taken out. In order to backdate such transactions, a person must have access to the computer system of the bank by using a username and password attributed to him by the bank. The internal investigation revealed that usernames: Ksunil, flbackup and flcash and password: 121 have been used to backdate certain transactions on the bank computer system. Mr. Danirow Bhiwajee (witness no.6) was then

asked a question about the identity of the person to whom these usernames and password were attributed to and Mr. L. Balancy objected to this question on the following ground:

> *"...objects to the question as to whom the username and password mentioned by the witness was attributed to at the DBM since this was never put to the accused at enquiry stage. I am also objecting that the question be put in the context of the witness giving evidence the internal investigation which was carried out as the result of this internal investigation was not put and therefore any evidence with regards to that including the identity of the person to who the username and user code were attributed and the internal investigation conducted by the witness was never confronted to accused."*

4. Following the objection of Mr. L. Balancy, the matter was then fixed for arguments since the prosecution insisted on the question.

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 JJ, accused was informed of the allegations and charges against him. As per Doc AA, accused stated that he will neither give any statement nor answer any question in connection with the present case. CI Aleear (witness no.1) then explained that since accused chose not to answer any question, he did not confront him with any incriminating evidence. He disagreed that he should still have put questions to accused and confront him with incriminating evidence despite latter having chosen to remain silent. According to him, incriminating evidence was confronted to accused as per Doc HH. He however conceded that the outcome of the internal investigation carried out by the DBM was not confronted to accused. In relation to the usernames and password, CI Aleear (witness no.1) opined that since those were assigned to accused and were thus within his personal knowledge, it was not necessary to confront him with the identity of the person to whom they were assigned to.

B. THE SUBMISSIONS

6. Mr. L. Balancy submitted that as per Doc HH, accused was only informed of some allegations and that no further incriminating evidence was confronted to him. He also submitted that despite the accused having chosen to remain silent and not answer any question, he should still have been confronted with incriminating evidence. Now, if such evidence is adduced, accused will be compelled to give evidence in Court since he had no opportunity to provide an explanation during the enquiry.

7. Mr. Roopchand, on the other hand, submitted that as per Doc HH, the charge of money laundering was put to accused. As such, he knew what case he had to meet. Having opted to

remain silent all throughout, there can be no effect on the defence of accused despite the identity of the person to whom the usernames and password was attributed to and the outcome of the internal audit enquiry were not confronted to accused.

C. THE LAW

8. 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*
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> *(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."*

9. On the effect of the failure to confront accused with the evidence against him, the Supreme Court in **Maigrot (supra)** further held 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)

10. The evidence which has to be confronted to an accused during the enquiry should be of an incriminating nature. As such, not each and every piece of evidence gathered by an investigative authority during the enquiry would have to be confronted to the accused. To that effect, the Court of Appeal in **The DPP v Lagesse & Ors [2018] SCJ 257** 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)

11. In **DPP v Ducasse [2023] SCJ 20**, the respondent's contention was that he could not have 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…".*
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> *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)

12. The case of **Ducasse (supra)** was in relation to a stay of proceedings acceded to by the trial Court as a remedy to incriminating evidence not having been confronted to accused during the enquiry. According to the Appellate Court, the test of irreparable prejudice would apply when a stay of proceedings is being sought when incriminating evidence was not confronted to an accused during the enquiry. By its very nature, a stay of proceedings is a more drastic remedy compared to the exclusion of the incriminating evidence simpliciter although in both situations, the element of prejudice will be of utmost importance, be it to varying degrees.

13. In the present case, the remedy being sought by Counsel for accused is not to allow the prosecution asking questions in relation to (i) the identity of the person to whom the usernames: Ksunil, flbackup and flcash and password: 121 were attributed to by the DBM and (ii) the internal investigation carried out by the DBM since neither the identity of such person nor the outcome of the internal investigation was confronted to accused during the enquiry. Now, the Court must first decide whether these two pieces of evidence do amount to incriminating evidence and secondly, whether given the particular circumstances of the present case, such evidence would be admissible. The failure to confront accused with incriminating evidence at enquiry stage, though constituting a breach of his constitutional right, would not necessarily lead to its automatic exclusion, the ultimate test for the admission or exclusion of an otherwise admissible piece of evidence remains that of its probative value and prejudicial effect – **see (i) The State v Bacha (1996) SCJ 218, (ii) The State v Nunkoo (2001) SCJ 77, (iii) The State v Islam (2007) SCJ 43, (iv) The State v Koonjul and anor (2007) SCJ 179 and (v) Veerapen v The State (2015) SCJ 439**. Each case will have to assessed according to its own facts and circumstances. The nature of the evidence sought to be admitted, the defence, if any, of accused and the importance of such evidence in the preparation of accused defence would, amongst others, be relevant factors to be borne in mind.

D. ANALYSIS

14. Doc HH is a diary book entry of the ICAC dated 14th August 2012. Herein, accused was informed that during the period 2004/2005, funds had been embezzled to the prejudice of the DBM and that he made several cash and cheque deposits on different dates during that same period. Accused was also informed that the money deposited represented proceeds of crime. It can be seen from that diary book entry that accused chose not to give any statement on that day but undertook to come afterwards for the enquiry. Thereafter, in a statement dated 16th August 2012, accused stated that he will not give any statement, that he will retain his right to silence and will not answer to any question – Doc AA refers. Both in Doc HH and AA, it is undisputed that no question was asked to accused. The identity of the person to whom the usernames and password were attributed to and the outcome of the internal investigation were also not confronted to accused.

15. Now, the identity of the person to whom the usernames and password were attributed to by the DBM does not, in itself, amount to incriminating evidence against the accused. It would only indicate that the usernames and password were attributed to that particular person and nothing more. Moreover, the identity of that person is an information which is independently available to the DBM irrespective of the outcome of the internal investigation and the DBM would be expected to know the identity of any person to whom usernames and passwords have been attributed to access its computer system. Furthermore, Counsel for accused will have the opportunity to cross examine Mr. Danirow Bhiwajee (witness No.6) and other witnesses for

the prosecution thereby rendering any risk of prejudice to accused negligible. Therefore, the objection of Counsel for accused in relation to questions as to the identity of that person is set aside.

16. On the other hand, the outcome of the internal investigation is incriminating evidence on which the prosecution is relying to show the stratagem used by the accused to commit the alleged fraud at the Flacq branch of the DBM. In that respect, the explanation of CI Aleear (witness no.1) and the submission of the prosecution as to why there was no need to confront accused with such incriminating evidence should fail for the following reasons. 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 been confronted to him.

17. Although probative to the prosecution's case, the evidence relating to the outcome of the internal investigation carries with it a substantial degree of prejudicial effect. Doc HH shows that accused was informed that he made cash and cheque transactions and that same were proceeds of crime. The outcome of the internal investigation would in fact reveal the stratagem employed by accused and would explain how such cash and cheque transactions amount to proceeds of crime. It is most likely that such incriminating evidence would have been important to the accused in the preparation of his defence the more so when it concerns the stratagem he allegedly employed to commit the present offences. As rightly submitted by Counsel for accused, admitting such incriminating evidence would indeed lead to a situation where accused may well be compelled to give evidence to challenge the outcome of that internal investigating since he was not given that opportunity during the enquiry.

18. For the reasons above, the prejudicial effect of the evidence relating to the outcome of the internal investigation outweighs its probative value and questions in the context of that internal investigation are not allowed, the outcome of the internal investigation being incriminating evidence which was not confronted to accused during the enquiry.

A.R.TAJOODEEN
Ag Magistrate of the Intermediate Court (Financial Crimes Division)
05.06.2023