

2019 INT 15

IN THE INTERMEDIATE COURT OF MAURITIUS
(CRIMINAL SIDE)

In the matter of :-

C.No. 503/2014

Independent Commission against Corruption v Nicolas Jean Alain LOUISE

J U D G M E N T

Accused, who was a 33 year old public official at the time of the offence on 7 May 2013 is charged with having made use of his position for a gratification for himself in breach of section 7(1) Prevention of Corruption Act [hereinafter referred to as 'POCA'] .

The particulars of the amended charge are reproduced below :-

"... [Accused] whilst being a police constable posted at Traffic Unit South enquiring into case files OB 20061/12 and OB 20062/12 of the above area [hereinafter referred to as 'the contravention files/cases'- and produced as Exhibit 2] and involving Witness Nuur-Uddin Khan Gooskhan [hereinafter referred to as "Witness NG"] solicited from the latter the sum of Rs.6,000.- to cause the said contravention cases to be filed.

Accused pleaded **Not Guilty** and is assisted in his defence by Mr.R.Valayden and the Prosecution was initially conducted by Ms Bissoonauthsingh and concluded by Ms S.Potayya.

The gist of the Prosecution's case, which rests mainly on the testimony of Witness NG is as follows :-

It is not disputed that at the material time Accused was a police constable posted to Metropolitan (South) Division and that Witness NG's two impending contravention cases [*for worn out tire and motor vehicle licence not affixed*] were entrusted to Accused - see Exhibit II. It is also on record that police officers working on those files were not permitted to take same outside office and that Accused was on leave on 9 and 10 May 2013 - see Doc A and testimony of former-WCI Mootoo at pgs 2-9 of transcript 23 November 2017.

See testimony of Witness NG at pg 34 & 35 of handwritten court record and pg 2-9 of transcript of 4 May 2018 - Witness NG deposed that he was a hawker and in 2011 he was booked for two road traffic offences/ worn out tire and motor vehicle licence not affixed. In 2013, Accused contacted him by mobile phone, identified himself as a police officer posted at Line Barracks, explained the purpose of his call and a meeting was set up at the University of Mauritius [*hereinafter referred to as 'UOM'*].

There, on 7 May 2013 he/Witness NG called Accused on his mobile phone and Accused explained where he was parked. During a 15-20 mins meeting in Accused's car the latter showed him his/Witness NG's files and told him there were 3 impending road traffic contraventions against him (as opposed to two) and explained to him the consequences of being sentenced for driving without motor vehicle licence - for which his/Witness NG's driving licence could be suspended - which would have been detrimental to him in view of the nature of his work.

Witness NG made it clear that he did not ask Accused to help him out of the problem but it was Accused who put the proposition to him that there was a way out and the three contraventions could be filed upon him/Witness NG handing over Rs. 6,000.- to him/Accused.

Witness NG conceded that he had given defence statements as an Accused party before and had even been an Accused party in a charge of conspiracy. Thereafter Witness NG called ICAC and reported the matter which led to the Surveillance/Controlled Remittance Operation.

In cross-examination, Witness NG denied that Accused had ever asked him to put up defence statements in respect of the contravention cases and/or that he had declined to do so, that he had left (Accused's car after receiving a telephone call or that he had levelled a false charge against Accused because the latter had declined to help him out.

SI Chen Tse King deposed that on 10 May 2013 he was detailed to witness a controlled remittance involving Witness Mr NG and Accused at Champ-de-Mars. However, he did not see anything of consequence but after having been informed by his team supervisor that the remittance had already been effected, he and his colleague intervened and saw Accused and Witness NG - who identified Accused as being the person whom he met at Reduit on 7 May 2013 and who had solicited the sum of Rs.6,000.- from him to file the contravention cases. Witness NG had, as part of the operation, handed over to Accused the sum of Rs.200.- in an envelope - which was seen and secured from Accused's right hand and identified by Witness NG as being the very banknote he had put in an envelope and handed over to Accused - **Exhibit 1**.

SI Chen Tse King furthermore deposed that Accused was duly cautioned as regards the envelope and its contents and his reply was to the effect that Witness NG had left same with him and he knew nothing of the matter - *see testimony of SI Chen Tse King at pgs 6-10 of transcript dated 4 August 2016*.

The case was closed for the Prosecution and the defence called the Accused to depose under oath.

Accused swore as to the correctness of his defence statement - the salient facts of which are reproduced below for ease of reference, deposed as regards his personal and family circumstances and stated that Witness NG's testimony was untrue.

It is not disputed that on Friday 10 May 2013 Accused was on casual leave and was at Champ de Mars to place bets on horse racing - as is his weekly habit. He had called Witness NG as regards his contravention cases and it is part of his case that the latter/Witness NG had asked him/Accused for a meeting at Champ de Mars. At one point in time he/Accused called Witness NG and the latter requested him to come by a particular bookmaker.

They greeted each other, shook hands and whilst doing so, Witness NG passed over a folded envelope which had been in his hand to him. He was in the process of asking Witness NG what it was and the latter did not have time to answer when SI Chen Tse King intervened and he understood that he had been framed by Witness NG who had repeatedly asked him not to lodge his cases before Court.

He was asked to follow SI Chen Tse King who took the envelope from his hand and Witness NG identified same as being the same envelope he had given him/Accused and that he/Accused had asked him for money to file the contraventions and had met him/Accused at the University on 7 May 2013. SI Chen Tse King then opened the envelope in his /Accused's presence and that of Witness NG and the contents were seen to be a Rs.200.- banknote - which Witness NG confirmed as being the same note he had placed in the envelope and handed over to Accused. SI Chen Tse King informed him of his rights and he stated that Witness NG had slid same in his hand when they shook hands.

*He concedes that he had indeed asked for money to file the contravention cases but does not remember having mentioned the sum of Rs.6,000.- He also does not dispute that he had indeed met with Witness NG at UOM on 7 May 2013 but disputes that he had ever asked the latter for money on that day in order to file the contravention cases – cross refer with **defence statement Doc B – Folio 121730.***

Accused added that either on 29 April 2013 or on 2 May 2013 when he had contacted Witness NG on the mobile phone number noted on the case file in order to request him to come to the Traffic Unit South office to give his defence statement/s in respect to the contravention cases, the latter pleaded a heavy work schedule and asked for Accused's intervention in his favour – which he/Accused understood as being an attempt to bribe him and which he declined. He gave Witness NG his mobile phone number so that the latter could contact him as to when he would be coming to give his defence statements but the latter never did so and he had no other alternative but to call him/Witness NG anew.

Accused stated that since Witness NG had not contacted him by 6 May 2013, he/Accused called the latter who continued with his entreaties to do something for him as he did not wish to be involved in Court cases - to which Accused responded that if he/Witness NG did not wish to come to Port Louis to give his defence statement, he/Accused could come to the latter's residence to record same but that he would not be able to help him out otherwise.

They finally agreed to meet on 7 May 2013 after Accused's UOM lecture at 12.30 hrs by the auditorium where Accused picked up Witness NG and they drove to Mauricienne Clinic where he parked.

Accused explained that he showed Witness NG the case files to which the latter agreed and made a last attempt to bribe him - which he rejected. Witness NG then left on the pretext of his wife being ill – without giving the defence statements and undertook to come to Port Louis on Friday 10 May 2013 to do so – without any precise location being agreed upon.

Accused conceded that he did not put up a Diary Book Entry at his place of work to the effect that he had had a meeting with Witness NG on 7 May 2013.

Accused stated that on Thursday 9 May 2013 he was on casual leave and at about 3.30-4.00, he called Witness NG to confirm the time when the latter would be in Port Louis and the meeting was scheduled for the next day at 11 hrs at Line Barracks Office

On Friday 10 May 2013 at 11 hrs, he was at Line Barracks and waited for Witness NG in his car - not far from his office. As the latter had not arrived by 11.10 hrs, he called Witness NG who asked him to pick him up from Champ de Mars and then bring him to the Traffic Unit Office to record his defence statement/s. Accused acquiesced and reached Champ de Mars by 11.30 hrs but the latter had not arrived by noon and upon calling him again a meeting was set up at a specific bookmaker and the events as related above occurred.

Accused denied that he had asked Witness NG whether he was aware of the consequences if his cases went through the Court process and/or if he was aware his driving licence could accordingly be suspended. It is also denied that that he had ever told the latter to meet him, that a way out of the consequences could be found and that Witness NG should be able to infer what same entailed - cross-refer with defence statement Doc B - Folio 121744 – Lines 3 to 6.

Accused also denied that he called Witness NG on 5 March 2013 at about 3.00 pm and told the latter that he/Accused was trying his best to help him/Witness NG out but that the later was not cooperating.

He conceded that he did however call Witness NG on Saturday 4 May 2013 and a meeting was set up on Tuesday 7 May 2013 but denied ever telling Witness NG (on his way to Mauricienne Clinic) to hand over Rs.6,000 to file the two contravention cases.

Accused explained that the reason for calling Witness NG was because his contravention case was one where there was a limitation of action.

In cross-examination Accused conceded that he was not authorized to remove the contravention files from the office and that he had indeed called Witness NG – clarifying that it was only to set up a meeting as regards his contravention cases - but

same could not be construed as him having solicited the sum of Rs.6,000.-. He added that it was in fact Witness NG who pestered him to get the cases filed and agreed that he did not report the matter and thus had no proof of same.

Written Submissions were exchanged amongst counsel before being filed in Court - same are on record and need not be reproduced *in toto*.

The gist of the **Prosecution's Written Submissions** is based on the central issue whether or not Accused *solicited* Rs.6,000.- from Witness NG to file the contravention cases. And it is submitted that –

- (a) Accused being a police officer in service at the time of the offence, it cannot be heard that he was anything other than a *public official*, as envisaged by section 2 POCA - as borne out by the testimony of the representative of the Commissioner of Police.
- (b) The element of *making use of his office or position as a public official* - has been amply proved through the testimony of Witness NG who stated that it was indeed Accused who made an abuse of his position by asking Witness NG for a *gratification* of Rs.6,000.- to file the contravention cases and this - to circumvent Witness NG's driving licence being suspended - and who stated that he had already talked to his superior.

This is buttressed by the fact that as per procedure, Accused did not put up a Diary Book Entry as regards his meeting/s with Witness NG. Refer to *State v Famber Mo 288.214 SW2d 40*

Reference was also made to the enactment and the case law that has evolved therefrom -

❖ THE LAW

Section 7 POCA reads as follows:

*“ (1) Subject to subsection (3), **any public official** who makes use of his office or position for a **gratification** for himself or another person shall commit an offence ...*

...

Section 7(1) POCA creates an offence which contains the following constitutive elements as laid down in **B Jhurry v ICAC and Anor [supra]**:

(1) The person charged is a public official;

(2) he made use of his office or position as a public official;

(3) in order to obtain a gratification either for himself or for another person.

❖ ***The meaning of gratification, as envisaged by POCA?***

In **B Jhurry v ICAC [supra]**, it was observed that the “definition and meaning of “gratification”, which has been inserted in section 2 POCA, further buttresses the point that an offence would **not lie in respect of any innocuous act**. A criminal offence is only committed under section 7(1) of the Act where the public official makes use of his office or position in order to obtain a “**gratification**” within the meaning of “gratification” as set out in section 2 of the Act”.

The case of **N.Joomer v The State [2013 SCJ 413]** defines *gratification* as follows:

“...In fact, under this section of the law, it is not material that someone who is using his office or position should have actually obtained the gratification he is looking for. It is enough that he is abusing his office or position for the purpose of a gift, reward or other such advantages but also for an offer or promise, whether conditional or unconditional of such a gift, reward or other advantage.

[43] The opprobrium lies in the abuse or misuse of the office or the position as a public officer for a gratification. Whether the gratification is received or accepted is not part of the elements of the offence even if the reception or the acceptance adds further evidential weight to prove that the abuse of office was “for gratification.”

It is furthermore submitted that Accused was (after the Controlled Delivery Exercise) found in possession of Rs.200.- which was handed over to him by Witness NG and which adds consequential evidential weight to the Prosecution's case, and that the Prosecution has accordingly in the light of the entirety of the evidence adduced proved its case.

The **Defence's Written Submissions** are based on the fact that since a file is considered as completed only when it is forwarded to WPI Mootoo, then in turn forwarded to the Prosecution Office for final decision, Accused had no power to 'file ' cases and thus could not solicit any "gratification".

It is also the contention of the defence that Accused denied the charge under oath, that Witness NG deposed only as regards the conversation that took place in the car near UOM and that it was in fact the evasive Witness NG who had been harassing Accused to file the cases. The fact that contravention files were with Accused was to be considered merely as an "*administrative mishap*", that he showed those files to Accused, his conceded telephone contact with Witness NG and the omission of not putting up a Diary Book Entry as regards his meeting with Witness NG were not to be construed adversely against Accused and the mental element could not be inferred from same.

And It is furthermore the case for the Defence that Witness NG's credibility was poor, that the defence's version why the latter left the car when pressed to give a defence statement is plausible – all the more so as he did not wish his driving licence to be suspended, that he had been prosecuted for conspiracy and had not been examined in chief as regards the Controlled Remittance Exercise.

It is accordingly the case for the Defence that the benefit of doubt should apply.

After due consideration of all the evidence on record including the explanations given by Accused under oath, the conclusions of the Court are that the case has been

proved *vis a vis* Accused and this for the following reasons which are to be read comprehensively.

❖ ***Elements of the charge to be proved by the Prosecution in order to secure a conviction***

The elements of the offence highlighted above at pages 6-7 are elements to be proved beyond all reasonable doubt by the Prosecution and it is observed that the Prosecution has successfully discharged this burden as borne out by its written submissions break-down and the Court is entirely satisfied with same.

The Court is satisfied that Accused made use of his position as a police officer (and allegedly told Witness NG that he had intervened with his superior) to solicit Witness NG for a gratification of Rs.6,000.- to cause the latter's contraventions cases to be filed.

❖ ***Weight to be attached to the testimonies on record***

The Court has carefully and with caution assessed Witness NG's testimony and demeanour. He was not seen as being evasive and the Court comes to the conclusion that he is not lying or inventing anything, nor distorting the truth and that whatever he has had to say as regards Accused is the truth.

Witness Chen Tse King who has no reason to lie is also considered as a witness of truth.

The fact that Witness NG was not made to depose as regards the Controlled Remittance Exercise or that he was prosecuted for conspiracy does not in the least taint his testimony as regards **the charge** in the present case.

True it is that Accused deposed under oath. But his admissions as regards his handling of the contravention cases - his frequent, over zealous calls to Witness NG –

who was not someone known to Accused before this incident - Accused's meetings with the latter outside office hours and during days off at places other than the office, surreptitious meeting of a police officer at Champ de Mars to give a lift to a potential Accused party to Line Barracks office *on a day off to record a defence statement – all this untoward behaviour tilts the balance in favour of the Prosecution's case.*

And the Court is not in the least persuaded that there is any inkling of the truth in whatever Accused has said.

For all the reasons set forth above, the Prosecution has proved its case against the Accused beyond all reasonable doubt and he is accordingly found guilty as charged, as per amended information.

Dated this 30th day of January 2019.

N.Ramsoondar,

President, Intermediate Court (Criminal)

