

**ICAC v Mohammud Nizam Domah & Anor**

**2022 INT 102**

**FCD CN: 100/2020**

**CN: 960/18**

**IN THE INTERMEDIATE COURT OF MAURITIUS  
(FINANCIAL CRIME DIVISION)**

**In the matter of:**

**Independent Commission Against Corruption**

**v/s**

- 1. Mohammud Nizam Domah**
- 2. Azur Medical Ltd**

**RULING**

Accused no.1 has been prosecuted for the offence of Receiving gift for a corrupt purpose in breach of section 15(a) of the Prevention of Corruption Act 2002 (POCA) under counts 1 and 2 of the Information. Accused no.2 has been prosecuted for the offence of Treating of Public Official in breach of section 14 of POCA. They both pleaded not guilty to the Information and were represented by counsel throughout the proceedings.

Four out-of-court statements were recorded from Mr Banydeen, the representative of the accused no.2. They were dated 19.06.17, 20.06.17, 25.07.17 and 01.08.18 respectively. There is objection from Mr Duval SC for accused no.2 as to the production of the first three statements on the ground that they cannot be considered as defence statements of the accused no.2. It is alleged that Mr Banydeen put up the statements, neither as representative of accused no.2 nor was he made aware that he was called upon in such capacity to give those statements. The prosecution was conducted by Mr Nulliah for the ICAC.

**CASE FOR THE PROSECUTION**

Witness no.15, CI Mungur, the Chief Investigator at the ICAC deponed to the effect that he conducted the enquiry with regards to the accused no.2, Azur Medical Ltd. During the recording of the fourth statement dated 01.08.18, the accused company was represented by Mr Bhoomesh Banydeen and legally represented by counsel Mr Rajabally. A copy of the defence statement was filed to court for the purposes of the argument. The relevant questions and the corresponding answers of the said statement can be read as follows:

*Q2: I, (Investigator Bhatoo) am showing you three statements which were given to the ICAC by Mr Bhoomesh Banydeen on 19.06.17 and 20.06.17, and on behalf of the company on 25.07.17. Do you confirm the content of the above mentioned statements?*

*A2: To the best of my knowledge, I confirm the content and I gave all the statements as representative of Azur Medical Ltd and I was authorised by Azur Medical Ltd to give all the statements to ICAC. ...*

*Q3: Have you read all three previous statements shown to you?*

*A3: Yes*

*Q4: Does Azur Medical Ltd confirm and maintain the contents of the abovementioned statements?*

*A4: Yes*

It is necessary to note that there is no challenge from the defence as to the fact that the fourth defence statement was voluntarily put up by accused no.2. Indeed there is no objection as to its production.

Under cross-examination, the initial point raised was the reason as to why, at Question 2 of the fourth statement, was there a difference made between the two statements dated 19.06.17 and 20.06.17 and the third dated 25.07.17. As it can be read above, it is stated that the first two statements were given by Mr Bhoomesh Banydeen and the third on behalf of the company. The witness under cross-examination, could not explain the difference but reiterated that all statements were given by Mr Bhoomesh Banydeen on behalf of the accused company as he was the sole director of the said company. Further cross-examination showed that it was during the recording of the third statement that specific questions were put to Mr Bhoomesh Banydeen as to whether he was representing the accused company, Azur Medical Ltd. Finally the issue was raised as to whether the witness had verified whether Mr Bhoomesh Banydeen was the sole director of the said company at the time the fourth statement (01.08.18) was being recorded. The answer was rather

clear that the witness did not verify same. He explained that at the time of offence Mr Banydeen was the sole director of the accused company.

## **CASE FOR DEFENCE**

No evidence was adduced on behalf of the defence.

## **ASSESSMENT OF THE COURT**

The contention of the defence is not the voluntariness of the three statements in question but rather the capacity in which Mr Bhoomesh Banydeen put up those statements. It is alleged that he was called by the ICAC in his personal name to be confronted with incriminating circumstances. The Information is now laid against Azur Medical Ltd as accused no.2 and represented by Mr Banydeen in court. It is noted that the court is not in possession of the three statements but a copy of the fourth statement which is not subject to challenge has been filed to court. The defence relied on issues raised throughout the cross-examination of the witness no.15 called by the prosecution. The main point put forward by the prosecution is the fact that the accused no.2 as represented by Mr Banydeen confirmed the contents of all three statements in the fourth and last statement, hence curing any alleged defect in the recording of the former statements. This led to the submission of the defence on the issue of whether Mr Banydeen was properly authorised to represent the accused company when he was no longer the sole director of the said company at the time of recording the fourth statement.

The issue of authorisation merits first consideration in this argument since the outcome will elucidate other points of contention. This is a two limbed discussion, where the first is with regards to the required form of authorisation and the second is whether there can be valid representation without an express authorisation from the company. In criminal matters, our law is silent on the type of evidence needed to prove such authorisation.

**Archbolds 2007 para 4-101** addresses the question of plea by a corporation. It involves section 33 Criminal Justice Act 1925, therefore not directly applicable to our jurisdiction. However in absence of our own common or statute law on the issue, some insight can be drawn from the English counterpart. The form of authorisation has been dealt with as follows:

*A representation for the purposes of this section need not be appointed under the seal of the corporation and a statement in writing purporting to be signed by a managing*

*director of the corporation, or by any person (by whatever name called) having, or being one of the person having, the management of the affairs of the corporation, to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section shall be admissible without further proof as prima facie evidence that that person has been so appointed.*

In the absence of a prescribed procedure, the evidence to prove authorisation from an accused company to depute a representative has to vary on a case to case basis. The above extract dealt with representation at trial to plead on behalf of a corporation. The same principles can naturally be extended to representation at enquiry stage when the corporation is considered as a suspect. A board resolution would probably be the best form of authorisation for representation on legal matters, but the absence of one cannot necessarily invalidate such representation. Similarly an alleged representative without any statement from a person in the management of the company may rarely amount to valid representation. The threshold lies somewhere between the two extremes in most cases.

However, it is clear that in the current matter, there was no express authorisation provided by Mr Bhoomesh Banydeen or obtained by the enquiring officer. This leads to the second limb of the discussion, that is, whether Mr Banydeen's appointment was nevertheless valid for the last statement recorded on 01.08.18.

A number of cases were referred to me but none really covers this point. On the other hand, the English case from the Queen's Bench Division, **Edwards v. Brookes (Milk) Ltd [1963] 1 W.L.R 795; [1963] 3 All E.R. 62**, offers a similar factual scenario and the legal reasoning, although only persuasive, can be of particular interest.

A brief summary of the facts were that an inspector of weights and measures bought a number of pints of milk from a machine and took the cartons to the accused company's depot. He spoke to a man, Norman Jones (NJ) who said he was the depot manager. He confronted the milk, which was underweight as per specifications on the carton, to NJ. The inspector prepared a schedule and gave a copy to NJ. Four days later, a person called at the inspector's office and claimed he was the representative of the company. The company was charged with an offence under sections 7 and 11 of the Sale of Food (Weights and Measures) Act, 1926. While the inspector was giving evidence, objections were made to evidence of his conversations with NJ and the representative on the ground that, unless the prosecution proved that those persons were agents of the company who had been

authorised by the company to make statements on its behalf, their statements were not admissible in evidence against the company.

In answering the question of authority to represent the company, the following extract from the speech of Lord Parker C.J. is of relevance:

*So far as the second question is concerned, whether either of these agents were authorised to make statements or admissions on behalf of the company, that must depend on all the circumstances and the status of the person concerned. I am quite satisfied the depot manager in charge of the depot is of that status. In so far as the second interview is concerned, the representative who on this basis is the agent of the company, was coming along having had the schedule and the clear inference is that he was authorised by the company to discuss the matter.*

*In my judgment, the justices have been quite innocently misled into thinking they could not receive further evidence and I would send the case back to them with a direction that they should continue to hear the case. I would only add this, that if the man who said he was Norman Jones was not Norman Jones, not the depôt manager, it was open to the company to call evidence to that fact and the same is true of the representative who came on July 9, 1962.*

In summary the decision was held as follows:

*(1) In the circumstances, there was prima facie evidence from which the justices could infer that both N. J. and the representative were what they had said they were, and that it was for the company to disprove, and not for the prosecution to prove, that they were its agents.*

*(2) That the status of a depot manager was such that his authority to speak on behalf of the company could be presumed unless there was evidence to the contrary and the circumstances surrounding the visit of the representative to the inspector's office were such that his authority could be implied and, therefore, the justices were wrong in excluding the evidence of the inspector's conversations with them.*

I see no reason to adopt a different approach as to the one expounded above. The legal burden of proving beyond reasonable doubt that the statements were given voluntarily by an accused party rests on the prosecution. However, the burden of proving the correct representation or agency of an accused company rests on the company itself if there is an established prima facie case of agency.

Mr Bhoomesh Banydeen was the sole director of the accused company at the time of the alleged offence and has remained as such for the recording of the first three

statements. At the time of recording of the fourth statement, it is understood that other directors had been appointed to the board of the accused company. It is noted here that there is no clear evidence on record whether this was the case or not. Be that as it may, there was already prima facie evidence from the first three statements that Mr Banydeen was the agent or representative of the company. Upon recording the fourth statement, Mr Banydeen affirmed that he was the representative of the company which implies that he had the authority from the company. Any change in circumstance with regard to the authority of his representation should have been made aware to the enquiring officer at that time. This is even more relevant as the accused company was legally represented by counsel at the time of recording the said statement. Learned Senior Counsel for the accused no.2 submitted to the fact that it would be in the best interests of his client for legal counsel to remain silent when the enquiring officer has erred in procedure. That would be true if it was not the accused itself misleading the enquiring officer on its representation, on the assumption that there was indeed no authority. The prosecution cannot be reasonably required to enquire from the Registrar of Companies every time a statement is to be put up by the representative of a company. If there is prima facie evidence of valid agency due to Mr Banydeen's status in the company and therefore the implication of proper authorisation, it is for the accused company to show a change in circumstance with regard to its representation, vide **Edwards (supra)**.

Furthermore the accused company is represented by the same Mr Bhoomesh Banydeen at trial. The accused company has therefore appointed Mr Banydeen to plead on its behalf, on the charges laid in the Information and thus having been communicated with the brief including the four statements put up by Mr Banydeen.

I therefore find that Mr Bhoomesh Banydeen was properly authorised to represent the accused company at the time of recording the fourth statement dated 01.08.18.

This shortens the discussion on the admissibility of the first three statements. I have reproduced the questions two to four of the fourth statement. They show clearly that the accused company has confirmed the contents of the first three statements. The capacity in which Mr Banydeen put up those statements is thus irrelevant since any alleged defect has been cured by the fourth statement.

The motion on behalf of accused no.2 is set aside.

**P K Rangasamy**

