

ICAC v Peerbux Ruling

2022 INT 109

ICAC v Issoop PEERBUX

FCD CN: FR/L122/2020

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

ICAC

V

ISSOOP PEERBUX

RULING

Accused is being prosecuted for the offence of Bribery of Public Official (Counts 1 and 2) in breach of Sections 5(1) (a) (2) of the Prevention of Corruption Act. He pleaded not guilty to all the charges against him and is represented by Counsel, Mr. N. Dulloo. The case for the prosecution is being conducted by Miss P.Bissoonauthsing, Counsel for the ICAC.

The case came for trial whereby Mr. N. Dulloo raised a point in law as follows:

“S.49 of the POCA 2002 deals with issue of protection of witnesses. Given the legal provisions of S.49(2) of POCA 2002 and given the circumstances of the present case, there can be no criminal proceedings instituted against the Accused. Hence, by virtue of the legal provisions of S.49(2), 49(5) and 49(7), instituting crim proceedings will amount to acts of victimization, intimidation, harassment and discrimination, the reasons being that Acc is at a disadvantage position for the Disclosure he has made to ICAC and by instituting crim proceedings against him, he is being inflicted with an adverse treatment all that because he had the courage to disclose acts of fraud and malpractices against public officials. Given the circumstances of the present case, the are indeed valid legal grounds to halt the present crim proceedings against the accused.”

The prosecution having objected to the above-mentioned point of law, the matter was fixed for arguments.

For the purposes of the arguments, the prosecution called Investigator Jayekurrin (Witness No.12) who is posted at the Complaint Section Unit of the ICAC. He stated that one Farouk Khodabaccus, foreman at Mecatronics Ltd, came to the ICAC on 06 April 2012 to report a case of bribery against one Mr. Tirbhowan, an engineer working for the MPI. At the time he made the complaint, he was not accompanied by anyone and that the gist of the complaint was that Mr. Tirbhowan asked for a bribe from Mecatronics Ltd of which one Issoop Peerbux (Accused in the present case) was the director. Mr. Farouk Khodabaccus told ICAC that it was accused who instructed him to make that complaint and that Accused gave him money to remit to the said Mr. Tirbhowan. During cross examination, he maintained that Mr. Farouk Khodabaccus came alone and that accused never approached officials of the ICAC to disclose the present case nor attended the ICAC on several occasions in order to know how to proceed in relation to Mr. Tirbhowan.

Chief Investigator Ghoorah (Witness No.13) who is posted at the ICAC was also called by the prosecution. He stated that from 2009 to 2014, he was the officer in charge of the Complaints and Advice Processing Unit (CAPU) of the ICAC and that on 06 April 2012, Mr. Farouk Khodabaccus called at the ICAC alone to make a complaint of bribery. He further stated that accused never came to the ICAC nor was there any meeting or phone conversation with accused. During cross examination, he stated that Mr. Farouk Khodabaccus came to report the matter upon the instructions of accused who was his employer at that time. He maintained that accused never accompanied Mr. Farouk Khodabaccus and that accused did not communicate at all with the ICAC prior to Mr. Farouk Khodabaccus making the complaint.

The prosecution also called Chief Investigator Sawmy (Witness No.14) who is posted at the ICAC. As chief investigator, he has, as duty, the supervision of investigations. He stated that three statements were recorded, under warning, from accused, since latter was treated as a suspect for having given a bribe to a public official and that there was no arrangement between the accused and the ICAC. During cross examination, he stated that it was accused who gave instructions to Mr. Farouk Khodabaccus to make the complaint at the ICAC but maintained that at no point in time did accused accompanied Mr. Farouk Khodabaccus to the ICAC.

Accused deposed under oath for the purposes of the argument. He stated that he told Mr. Farouk Khodabaccus that they had to report the act of bribery to the ICAC and that they even met with an officer of the ICAC who recommended them to report the matter to the ICAC. He also stated that he always accompanied Mr. Farouk Khodabaccus to the ICAC whereby he was informed that a statement will have to be taken from Mr. Farouk Khodabaccus before they record a statement from him. During cross examination he stated that Mr. Farouk Khodabaccus made the complaint under

his instructions but denied that he or Mr. Farouk Khodabaccus was treated as a suspect during the course of the enquiry.

Mr. N.Dulloo submitted that since accused disclosed the offence to the ICAC, albeit through Mr. Farouk Khodabaccus, he should be protected under Section 49 of the Prevention of Corruption Act (the "Act"). According to his submissions, there should be no criminal proceedings against accused because as being the person who disclosed the act of bribery, the present criminal proceedings amount to acts of victimization, intimidation, harassment and discrimination. He further submitted that if this situation is not remedied, no citizen will go to disclose corruption offences because of the fear of being put in the accused box.

Miss P. Bissoonauthsing submitted that accused, has all throughout, been treated as a suspect and that the officers who deposed clearly stated that accused never accompanied Mr. Farouk Khodabaccus to the ICAC. She further submitted that Section 49 of the Act does not apply to a self-confessed person who comes to the ICAC to disclose an act of corruption. According to her, it would defeat the purpose of the Act if every person who comes to the ICAC and who reveals being a party to an act of corruption would, by operation of the law, be immune from criminal proceedings for his own acts and doings in the commission of the corruption offence.

The Court has considered all the evidence on record and the respective submissions of both Counsels. Now, Section 49 of the Act makes provision for the protection of witnesses who disclose an act of corruption. It provides that:

"(1) Subject to subsection (6), where a person-(a) discloses to a member of the Board or an officer that a person, public official, body corporate or public body is or has been involved in an act of corruption; and (b) at the time he makes the disclosure, believes on reasonable grounds that the information he discloses may be true and is of such a nature as to warrant an investigation under this Act, he shall incur no civil or criminal liability as a result of such disclosure.

(2) Subject to subsection (6), where a public official-

(a) discloses to his responsible officer or to the Director-General that an act of corruption may have occurred within the public body in which he is employed; and

(b) believes on reasonable grounds that the information is true, he shall incur no civil or criminal liability as a result of such disclosure and no disciplinary action shall be started against him by reason only of such disclosure.

(3) A person who makes a disclosure under subsection (1) or (2) shall assist the Commission in any investigation which the Commission may make in relation to the matters disclosed by him.

(4) A person to whom a disclosure is made under subsection (1) or (2) shall not, without the consent of the person making the disclosure, divulge the identity of that person except where it is necessary to ensure that the matters to which the information relates are properly investigated.

(5) A person who commits an act of victimisation against a person who has made a disclosure under subsection (1) or (2) shall be guilty of an offence and shall, on conviction, be liable to pay a fine not exceeding 50,000 rupees and to imprisonment not exceeding one year.

(6) A person who makes a false disclosure under subsection (1) or (2) knowing it to be false shall be guilty of an offence and shall, on conviction, be liable to pay a fine not exceeding 50,000 rupees and to imprisonment not exceeding one year.

(7) In this section, "victimisation" means an act -(a) which causes injury, damage or loss; (b) of intimidation or harassment; (c) of discrimination, disadvantage or adverse treatment in relation to a person's employment; or (d) amounting to threats of reprisals."

Section 49 of the Act, in fact, encourages the disclosure of corruption offences with the legislator itself affording a protection, in the Act, since the person making the disclosure will not incur any civil or criminal liability as a result of such a disclosure. The protection afforded here is neither given by the ICAC nor the prosecution; it is a statutory protection which becomes operative when certain conditions are fulfilled.

For the statutory protection to become operative under Section 49 of the Act:

- a. the person must necessarily make the disclosure to a member of the Board or to an officer of the ICAC.

There is no restriction as to the type of person who can make such a disclosure and the expression "Where a person..." in Section 49 (1) would encompass both an individual or a body corporate. However, does that section provide a statutory immunity against prosecution for all offences, i.e., is the person's making the disclosure, own acts in the commission of the corruption offence, immune from prosecution?

The Court in the case of **ICAC v Chaundee (2012) INT 88** was of the view that:

“This is not a case where the investigating or prosecuting authority give a certain promise to a witness and then fail to comply with its promise. This is rather a case where the law itself, and not an authority or a person in authority, guarantees a person with a specific civil or criminal immunity under section 49(1) of the Act as well as limited liability under section 49(6) of the Act so that rule of law must prevail and the law must be complied with. Where a situation then arises as contemplated and provided for by our Legislature under section 49(6) of the Act, the Court finds that it has to be complied with and rule of law should prevail to give effect to the clear and unambiguous intention of the Legislature. The Court finds it most unfair to prosecute a person under any other section of the act when he has disclosed an act in accordance with section 49 of the Act.”

The Court, in that case, seems to have interpreted Section 49 of the Act as giving a complete immunity to the person who made a disclosure even if that person was a *particeps criminis* in the commission of the act of corruption. In other words, that person would see his own acts, in the commission of the corruption offence, immune from prosecution.

In **Police v Balram Tooree [2013] Intermediate Court (Criminal Division)**, the Court seems to have adopted a different view of Section 49 since it held that:

“It would be most preposterous to say that this section of the law would apply to self-confessed criminal as it would open a floodgate of reports to be made by all criminals who find themselves cornered in their unlawful enterprise. Clearly, this section of the law does not apply to “participles criminis”.”

The reasoning in **Tooree (supra)** was followed in the case of **ICAC v Jeetun (2018) INT 208** and the Court in that case further held that:

“If all the criminals being convened by the ICAC to give their version of events would claim to be protected by virtue of Section 49 of the POCA, this situation would verge on the farcial.”

However, in the case of **Jeetun (supra)**, the Court also made a distinction between a person who makes the disclosure on his own, at the earliest available opportunity, in

contradistinction to one who makes the disclosure upon being convened by the ICAC. In that respect, the Court seems to adopt the view that if the person was convened by the ICAC, he could not benefit from the statutory protection of Section 49 of the Act. But the contrary being true, if that person made the disclosure on his own, the Court seems to be of the view that Section 49 would provide a complete immunity to that person.

An analogous situation arose in the case of **ICAC v Distrip Ltd (2019) SCJ 250** in which the Supreme Court interpreted Section 16(2)(a) of the Financial Intelligence and Anti-Money Laundering Act and the extent of the immunity it provided. The Court held:

“Section 16(2)(a) of FIAMLA reads as follows –

“No proceedings shall lie against any person for having –

(a) reported in good faith under this Part any suspicion he may have had, whether or not the suspicion proves to be well-founded following investigation or prosecution or any other judicial action”

(the underlining is ours).

While the learned Magistrate was right that this provision is meant to encourage the reporting of suspicious transactions, section 16(2)(a) can hardly be interpreted as bestowing a “sort of” immunity on any person reporting a suspicious transaction from being prosecuted for any offence, including an offence under section 5 of FIAMLA. All that this provision does is to provide that a person who has reported in good faith any suspicious transaction is not to be prosecuted, nor sued, with respect to the reporting of the suspicion; he cannot be prosecuted for effecting public mischief, if the suspicion proves to be ill founded, nor for breaching statutory confidentiality provisions, whether or not the suspicion is well founded, nor can he be sued for defamation in relation to the report he has made.

...

It is interesting to note that, in the Prevention of Corruption Act, a sister Act to FIAMLA, this “limited immunity” is made even clearer in section 49(1)(2) by the use of the words “as a result of such disclosure” or “by reason only of such disclosure.”

In the present case, the Court is of the view that a reading of Section 49 (1) of the Act shows that the protection from civil or criminal liability is only in relation to the disclosure made against another person and does not extend to disclosure of act (s) of corruption against his own person, i.e., if the person making the disclosure is or has been particeps criminis in the commission of the act of corruption. To construe it as providing a complete immunity will lead to criminals using Section 49 (1) of the Act as a refuge for their own illegal acts whilst making a disclosure against another person. This could not have been the intention of the Legislator in enacting Section 49 (1) of the Act specially considering the powers of the DPP under Section 72 of the Constitution whereby prosecutorial powers and questions relating to immunity from prosecution rest upon the DPP. The Court is further of the view that irrespective whether the person had, on his own or after being convened by the ICAC, made the disclosure, Section 49 (1) does not provide immunity for act (s) of corruption he disclosed against his own person. This question, of course, will have all its relevance when considering the limited immunity provided by that Section.

The Court is further comforted by what was stated by the Court of Criminal Appeal in the Malaysian case of **Teo Chee Kong v PP 883 [2021] 6 CLJ** in which a somewhat similar provision in the Malaysian Anti-Corruption Commission Act was considered:

“(7) Where a person discloses any information or produces any book, document record, account or computerized data or article pursuant to subsections (1), (3) and (5), neither the first-mentioned person, nor any other person on whose behalf or direction or as agent or employee the first mentioned person may be acting, shall, on account of such disclosure or production, be liable to any prosecution, except a prosecution for an offence under section 27, for any offence under or by virtue of any written law, or to proceeding or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement or arrangement, or otherwise.

[35] After going through the repealed s.30(7), it is clear to us that s.30(7) merely provides no prosecution (except for giving false or inconsistent statement) shall be brought on account of disclosing information to the investigating officer. It does not in any way give immunity to the person disclosing the information from prosecution for any offences he might have committed.” (emphasis and underlying are mine)

- b. the disclosure can be in relation to an ongoing act of corruption or an already committed act of corruption;
- c. the person making the disclosure must, on reasonable grounds, believe that the information he is disclosing may be true and is of such a nature to warrant an investigation under the Act; and
- d. the person making the disclosure must necessarily assist in any investigation made by the ICAC in relation to information disclosed by him. Indeed, one cannot expect that a mere disclosure under Section 49 (1) of the Act will automatically trigger the statutory protection. Section 49 (1) should be read together with subsection (3) whereby such a person will and should be expected to assist in relation to any investigation made in order to benefit from that statutory protection.

If the above conditions are satisfied, the person making the disclosure, should benefit, to the extent discussed above, from the statutory protection under Section 49 of the Act. The legislator has further reinforced the protection afforded to such person in Section 49 (5) of the Act whereby acts of victimization is a criminal offence. On the other hand, if for example, after investigation, it is found that the disclosure is false and the person knew it was false at the time he made the disclosure, that person may be prosecuted for having made a false disclosure under Subsection (6).

In the present case, accused is being prosecuted for having offered money to Sachin Tirbhowan, through Mr. Farouk Khodabaccus, so as not to report any defects observed during site visits in respect of works done at Jawaharlall Nehru Hospital by Mecatronics Ltd. From the testimony of the witnesses who deposed on behalf of the prosecution, it is undisputed that the investigation, in the present case, was triggered by the complaint made by Mr. Farouk Khodabaccus, under the instructions of accused, at the ICAC, against Sachin Tirbhowan. What is even more important is that Mr. Farouk Khodabaccus further revealed, to the ICAC, that accused gave him money to remit to the said Sachin Tirbhowan. This is why from thereon, accused has been treated as a suspect and several statements have been recorded, under warning, from him during the course of the investigation by the ICAC.

As such, accused has, all throughout, been a *participes criminis* in the commission of the act of bribery since, according to the prosecution witnesses who deposed, Mr. Farouk Khodabaccus stated to the ICAC that accused gave him money to be remitted to Sachin Tirbhowan. Therefore, irrespective of whether accused gave instructions to Mr. Farouk Khodabaccus to report the present case, the present proceedings cannot be stayed since Section 49 (1) of the Act does not provide immunity for the act of corruption that was disclosed against his own person.

However, it is always open for accused to use the fact that he encouraged and triggered the disclosure of the act of corruption as a mitigating factor in due course during the trial.

The motion of counsel for accused is accordingly set aside.

A.R.TAJOODEEN
Ag Magistrate of the Intermediate Court (Financial Crime Division)
09.05.2022