

ICAC VS RAKATOO KOKILA & ORS

2020 INT 69

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Cause Number: 441/15

THE INTERMEDIATE COURT OF MAURITIUS

(Criminal Division)

In the matter of:-

ICAC

VS

- (I) RAKATOO KOKILA**
- (II) DOWLUT MOHAMMAD MALECK**
- (III) GOKHOOL HEMRAJ**

RULING

The Accused No.1 stands charged under Counts 1 to 4 with an offence of money laundering in breach of sections 3(1)(b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002. The Accused No.2 stands charged under Count 5 with an offence of money laundering in breach of sections 3(1)(b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002. The Accused No.3 stands charged under Count 6 with an offence of money laundering in breach of sections 3(1)(b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002. All 3 Accused pleaded not guilty to the charges against them and they were assisted by Counsel.

Since the year 2016, the defence moved that proceedings be stayed on the grounds of abuse of process on the ground of delay because the charges date back to 2004 and the case was lodged against the 3 Accused in the year 2015. Subsequently, the motion was dropped but on the 23rd September 2019, the defence renewed the motion for abuse of process on the ground of delay. The Prosecution objected to the motion raised by Learned Counsel for the defence and arguments have been heard.

During the course of the argument, Investigator Peerbocus produced an affidavit explaining the course of the enquiry. He explained that on the 27th August 2010, the Prosecuting authority received an anonymous complaint letter alleging several malpractices at the Ministry of Health Employees Multipurpose Co-operative Society Ltd (MOHEMCS), where it was alleged that several cheques of Rs 74,900 were drawn in the names of persons and were suspected to be fictitious loans.

Further to the complaint, on the 1st September 2010, the Prosecuting authority decided that a preliminary investigation ought to be carried out. On the 20th September 2010, a first preliminary investigation report was submitted and an extension of time was granted up to the end of October 2010 to complete same.

On the 29th October 2010, the Preliminary Investigation Report was submitted to the Commission which decided to put the matter on further investigation on the 11th November 2010. In the course of the preliminary investigation, statements were recorded from Mr Monvoisin on the 14th and 17th September 2010 and 19th October 2010. Moreover, various documents were secured from the Registrar of Co-operative Societies and MOHEMCS and they were analysed.

In the course of further investigation, statements were recorded from 20 people from the years 2011 to 2013. In addition, statements under caution were recorded from 11 people from the years 2013 to 2014.

The investigation also involved securing and analysis of various documents as from June 2011 following application for Disclosure order. Intelligence was also gathered at the Intermediate Court of Mauritius in relation to the police case bearing CN 728/08 involving the Accused No.2. The Prosecution authority also solicited the expertise of a handwriting expert on the 26th September 2013 and a report was received in December 2013.

The enquiry was completed on the 24th July 2014 and the Commission recommended Prosecution against the Accused parties and for the matter to be referred to the office of the Director of Public Prosecutions (DPP). However, prior to the file being sent, certain further investigation had to be carried out until the case was referred to the office of the DPP on the 28th November 2014. On the 29th November 2014, the office of the DPP advised prosecution against the 3 Accused.

The Prosecuting authority informed the office of the DPP about the police cases against the Accused No. 2 and Mr Bhugul. On the 22nd February 2015, the Accused No.1 was arrested under a provisional charge which was subsequently struck out on the 30th July 2015. On the 23rd March 2015, the Accused No.2 was arrested under a provisional charge

which was struck out on the 20th May 2015. On the 18th February 2015, the Accused No.3 was arrested under a provisional charge which was subsequently struck out on the 20th May 2015. On the 16th April 2015, a formal Information was lodged before the Intermediate Court of Mauritius against the 3 Accused in case bearing Cause Number 441/15.

I have considered all the points raised for the purposes of the Argument and the submissions of Counsel. I shall consider whether proceedings ought to be stayed on the ground of delay.

Delay

Section 10(1) of our Constitution guarantees that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. In line with the protection afforded by the Constitution, his Lordship Mr Justice Caunhye had this to say in the case of **STATE VS WASSON S J & ORS (2008) SCJ 209**:

“The Courts have a duty to protect the integrity of the criminal process and to secure fair treatment to any person charged with a criminal offence in conformity with the norms prescribed under the Constitution. In exercising its power to ensure that there should be a fair trial in accordance with these norms, a criminal Court has a general and inherent power to stay proceedings not only to protect its process from abuse but also to secure a fair trial to those persons who are charged with a criminal offence”.

One of the ways in which an abuse of the Court process can result is through delay since any person must be tried within a reasonable time.

To determine whether there has been an abuse of the Court process and whether the Accused has been deprived of his Constitutional rights, I have considered the following elements:

1. *Length of delay;*
2. *The reasons given by the prosecution to justify the delay;*
3. *The responsibility of the accused for asserting his rights;*
4. *Prejudice to the accused.*

Length of delay

In relation to the present case, according to the Information against the 3 Accused, the dates of the commission of the alleged offences are in 2003 and 2004. The Accused Nos 1 and 3 have been arrested in February 2015 and the Accused No.2 has been arrested in March 2015. The formal Information against the 3 Accused was lodged in April 2015.

True it is that about 12 years have lapsed since the date of commission of the alleged offence and todate. However, for the purposes of the computation of time, delay starts as from the time the Accused is charged. It has been made clear in the case of **BOOLELL P VS THE STATE [2005 PRV 39]**, quoting in approval the case of **DYER VS WATSON (2004) 1 AC 379**, that:

“the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter.”

In the circumstances, delay for the purposes of the present case will run from the 16th April 2015 such that the computation of the delay amounts about 5 years.

The reasons given by the prosecution to justify the delay

In the affidavit produced by Investigator Peerbocus, the Prosecution extensively explained the different procedures adopted for the enquiry. The Prosecution authority precisely stated that the anonymous letter which triggered the enquiry started on the 27th August 2010, a preliminary investigation began on the 1st September 2010 and was extended up to October 2010. The preliminary investigation report was submitted on the 29th October 2010 and the matter was put to further investigation on the 11th November 2010. During this time, on the 14th and 17th September and 19th October 2010, statements were recorded from Mr Monvoisin and documents were received and analysed.

I therefore find that the Prosecution authority actively investigated the case since the enquiry was triggered by an anonymous letter on the 27th August 2010. Within 3 months, a preliminary investigation involving the recording of statements and collection of documents took place. In addition, more statements were recorded in the course of further investigation from 2011 to 2014. At the same time, the Prosecution authority had to apply for a disclosure order as well as handwriting expert advice. Given the complexity of the case, the delay between August 2010 when the enquiry was triggered and July 2014 when the enquiry was

completed, is fully explained through the extensive enquiry involving the details of the case which had to be investigated, the documents which had to be sought, the procedures adopted, the statements recorded from different parties and the expertise needed.

It is to be noted that following July 2014, a further investigation took place and was completed within a reasonable delay as the case was sent to the office of the DPP on the 28th November 2014.

The responsibility of the accused for asserting his rights

Having found that delay began to run since the 16th April 2015, I have borne in mind that the case was lodged against the Accused in 2015. From May 2015, the case in Court has been postponed on numerous occasions on account of motions raised, dropped and renewed by the defence. Hence, the delay post the lodging of the case cannot be laid at the door of the Prosecution.

Prejudice to the Accused

The defence has not adduced any evidence as to any prejudice sustained by the Accused as a result of the delay. In the case of **MUNGROO VS R (1991) 1 WLR 1351**, Lord Templeman stated as follows:

“The right to a trial “within a reasonable time” secures, first, that the accused is not prejudiced in his defence by delay and, secondly, that the period which an innocent person is under suspicion and any accused officers suffers from uncertainty and anxiety if kept to a minimum”.

In the present case, the prejudice, if any, resulting from the arrest of the Accused runs from April 2015 for the purposes of the present case.

Is the delay abusive?

I have borne in mind that the alleged offences have been committed in the year 2003 and 2004, and according to the evidence transpired in Court, the 3 Accused were subjected to a police case. They were arrested in the year 2005 and were provisionally charged. A formal information in relation to the police case was lodged against the Accused No.1 in 2019 and a formal information against the Accused No.2 was lodged in the year 2008 and dismissed in the year 2014. No formal charge has been lodged against the Accused No.3 as at yet.

It is true that in relation to the charges giving rise to a police case, about 15 years have lapsed. However, the present case does not concern the police case. Investigator Peerbocus explained that the matter in relation to the present case was referred only in the year 2010. He maintained that the Prosecuting Authority, that is, the **ICAC** carried out an independent and separate investigation from the police and the determination of the police case had no material importance for the present case.

Learned Defence Counsel has submitted that the delay in the present case is due to the fact that the Prosecuting Authority awaited the decision of the police case to lodge the present case. However, this has been strongly denied by Investigator Peerbocus who explained that the delay was due to the verification of information, the application of orders and expert advice, the ground work, the gathering of information and intelligence.

In relation to the above, I find that there is no evidence to suggest that the Prosecuting authority in this case relied on the termination of the police case against any of the 3 Accused to lodge the present case. Indeed, the present case was triggered through an anonymous letter. The Prosecution has explained in detail all the procedures adopted by them since the time of receipt of the letter on the 27th August 2010 until the completion of the enquiry and the lodging of the case in the year 2015. Investigator Peerbocus also clarified that it did not take the same amount of time to record statements from all witnesses since there is no specific chronology for the enquiry. His point was that he had to do a thorough investigation, look at each aspect of the enquiry and gather all information. Even if some witnesses have left Mauritius, he testified that he had enough evidence to lodge the present case.

It is true that Investigator Peerbocus confirmed that he informed the office of the DPP about the police case against the Accused No.2 and he also gathered intelligence from the police case, but he explained that he did so in the midst of his duty to secure all information and data prior to the lodging of the present case.

At any rate, it is clearly laid down under section 6 of the **FINANCIAL INTELLIGENCE AND ANTI-MONEY LAUNDERING ACT** that:

“A person may be convicted of a money laundering offence notwithstanding the absence of a conviction in respect of a crime which generated the proceeds alleged to have been laundered”.

In the circumstances, I find credence in the Prosecution case that the present case has no bearing or dependence on the police case. For all intents and purposes, the present case runs from the year 2015 when it was lodged.

In light of the above and bearing in mind all the elements constitutive of abusive delay, I find that a lapse of about 5 years, in the face of the complexity of the present case involving different parties and documents and the lack of any evidence of prejudice sustained by any of the Accused, is not oppressive or abusive. This is even more so that much delay after the case was lodged has been instigated by motions from the defence.

Having said that, I find it apt to refer to the case of **AUDIT Y v THE STATE & ANOR (2016) SCJ 282** where the Court laid down as follows:

*“In the case of **Boolell v The State** [2005 PRV 39], the information was lodged in 1991 and the trial ended in 2003. Their Lordships consider the following propositions should be regarded as correct in the law of Mauritius:*

- (i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10 (1) of the constitution, whether or not the defendant has been prejudiced by the delay.*
- (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all”.*

In the present case, I have not found that the time run in the present case is not reasonable. I find that a delay of about 5 years to be reasonable given the complexity of the case and the procedures which had to be adopted during the course of the investigation, such that it cannot be said that it would be unfair to try any of the Accused. The Court must exercise its duty to :

“balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions”. **(RE: BELL VS DPP (1985) 2 ALL ER 585)**”.

In the present case, the 3 Accused were arrested in the year 2015 and the delay runs from 2015 up to now. The 3 Accused will be tried within a reasonable time. At enquiry stage, the present case required extensive investigation for many documents and from many parties. After having performed a balancing exercise, I find that it would not be unfair to try the 3 Accused or to deviate from the general rule that a stay of proceedings can only be granted in exceptional circumstances. **(RE: ATTORNEY GENERAL’S REFERENCE (NO 2 OF 2001) [2003] UKHL 68, [2004] 2 AC 72)**. There is no exceptional circumstances in the case to warrant a stay of proceedings.

CONCLUSION

In light of the above, I reject the point raised by the defence and I set aside the motion of the defence for proceedings to be stayed on the grounds of abuse of process based on delay.

Ruling delivered by: M.GAYAN-JAULIMSING, Magistrate, Intermediate Court

Ruling delivered on: 15th June 2020