IN THE INTERMEDIATE COURT (FINANCIAL CRIMES DIVISION)

CN 17/20

In the matter of:

INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC)

V

1. RAJCOOMAR RAM

2. SATYANAND BHOYROO

JUDGMENT

The Offences

1. Accused 1 and 2 stand charged in the information under five counts for the offence of bribery by public official in breach of **Section 4 (1) (b) (2)** of the **Prevention of Corruption Act** (**POCA**).

Counts 1 to 4: Accused 1

2. Under Counts 1 to 4 it is mentioned that accused 1 being a public official has obtained a personal gratification from Bhardoiaj Maunthrooa Rs 25,000 on the 15th February 2003 for tender 50/2002-2003 (count 1), on the 15th April 2003 Rs 35,000 for tender 51/2002-2003 (count 2), on the 15th June 2005 Rs 10,000 for tender 44/2004-2005 (count 3), on the 20th December 2006 Rs 25,000 for tender 34/2006-2007.

Count 5: Accused 2

3. Under Count 5 the information states that on the 18th December 2006 accused 2 being a public official has solicited a personal gratification from Bhardoiaj Maunthrooa namely a 20% commission in respect of tender 34/2006-2007.

4. Accused 1 and 2 have pleaded not guilty to the respective counts and retained the services of counsel.

5. This court has carefully considered the applicable law and assessed the evidence on record.

The Applicable Law

6. **Section 4 (1) (b) (2)** of the **POCA** provides:

Bribery by public official

(1) Any public official who solicits, accepts or obtains from another person, for himself or for any other person, a gratification for –

(a) doing or abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties;

(b) doing or abstaining from doing, or having done or abstained from doing, an act which is facilitated by his functions or duties;

(c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties;

(d) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official, in the execution of the latter's functions or duties;

(e) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, another person in the transaction of a business with a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence, it is proved that the public official solicited, accepted or obtained a gratification, it shall be presumed, until the contrary is proved, that the gratification was solicited, accepted or obtained for any of the purposes set out in subsection (1)(a) to (e).

7. In **Gowry v ICAC 2016 SCJ 499** the Supreme Court held that:

As rightly pointed out by the learned Magistrate in her judgment, the elements of the offence which the prosecution had to prove to her satisfaction under section 4(1)(b), were that the appellant was a public official; that he had accepted from another person for himself a gratification for doing an act which is facilitated by his duties.

8. In **Mahadeo v ICAC 2017 SCJ 295** upon an appeal against conviction for the offence of bribery by public official in breach of **section 4(1)(b)** of the **Prevention of Corruption Act** under 2 counts of an information lodged before the Intermediate Court, the Supreme Court gave the benefit of doubt to the appellant based on the fact that:

It is common ground that the present case was not one where corroboration was required as a matter of law or practice. But in view of the disturbing features in Mr. Desai's evidence, as pointed out in strong terms by the learned Magistrate herself, she unsurprisingly and properly looked for evidence which she herself termed as being "corroboration". In this respect, she unfortunately seriously misdirected herself both in law and on the facts, as can be seen from the above. She wrongly found corroborative evidence when there was none. In these circumstances, we can only surmise as to what would have been the conclusions of the learned Magistrate if she had not misdirected herself. Would she still have proceeded to convict on the basis of Mr. Desai's testimony or would she have regarded it unsafe to convict? It is not possible for us to answer this question. But any doubt must be resolved in the appellant's favour. As rightly submitted by learned Counsel for the

appellant, one misdirection on its own would not have rendered the conviction unsafe. But when there is a series of misdirections in law and on the facts, then it would be unsafe to convict especially when the learned Magistrate heavily relied on what she wrongly believed to be corroborative evidence. For the reasons given above, we grant the appellant the benefit of the doubt. We find that the appellant's conviction by the learned Magistrate was unsafe and cannot be allowed to stand. We, accordingly, quash the conviction and sentence of the appellant under both counts.

9. In **Mahadeo v ICAC 2017 SCJ 295** the particulars of the offences were that the appellant, whilst being a public official, solicited from Mr. Desai, Director of Kripcen Agro Chemicals Ltd, (i) a 10% commission on 18 July 2005; and (ii) a 20% commission in September 2005, on further purchases of herbicides for the said company to continue supplying herbicides to Rose Belle Sugar Estate ("RBSE").

10. The prosecution's case in **Mahadeo v ICAC 2017 SCJ 295** rested essentially on the testimony of the main witness one Mr Desai. And the conviction was quashed mainly because Mr Desai's testimony was found to be unsafe.

11. This court has applied **Gowry v ICAC 2016 SCJ 499** and taken into account **Mahadeo v ICAC 2017 SCJ 295.**

Assessment of the evidence on record

12. First of all, it is trite law that as highlighted in **Blackstone's Criminal Practice 2024 PART F EVIDENCE Section F1 General Principles of Evidence in Criminal Cases Facts in Issue** that:

F1.1

The facts in issue comprise: (a) the facts which the prosecution bear the burden of proving or disproving (in order to establish the guilt of the accused) and (b) the facts

which, in exceptional cases, the accused bears the burden of proving (in order to succeed in the defence); see ***F3.6*** *to* ***F3.36****. '[W]henever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent' (Sims [1946] KB 531, per Lord Goddard CJ at p. 539). Thus the nature of the facts in issue in any given case is determinable by reference to the legal ingredients of the offence charged and any defence raised. Concerning the proof of facts in issue, the law operates a binary system. If the required standard of proof is met, the fact is taken to have happened. If it is not met, it is taken not to have happened. There is no room for a finding that it might have happened (Re B (children) (sexual abuse: standard of proof) [2008] UKHL 35, at [2] and [32]).*

13. In light of the principles highlighted in **Blackstone's Criminal Practice 2024** it is imperative that the prosecution prove the facts in issue in order to secure a conviction.

14. In the present matter, the case brought by the prosecution against Accused 1 and 2 is that as public officials, accused 1 and 2 had obtained bribe money and solicited a 20 % commission respectively from Bhardoiaj Maunthrooa (witness 3). The bribe money and 20 % commission according to the prosecution relates to the approval of the tender submitted by Bhardoiaj Maunthrooa and the subsequent contract obtained by the latter regarding uniforms for the Fire Services.

15. At the outset, it can be observed that the defence did not dispute the prosecution's version that at the material time when the alleged offences occurred, accused 1 and 2 were public officials and employed with the Mauritius Fire Rescue Service (MFRS). Accused 1 was the Chief Fire Officer and accused 2 was the Principal Purchasing and Supply Officer. According to **DOC D** and **DOC D1** produced by witness 8 accused 1 joined the MFRS as fireman on the 1st February 1972 and accused 1 joined the MFRS as Trainee Stores Officer on the

14th February 1978. The defence also does not dispute that the tenders under the respective counts had been launched by the MFRS.

16. In fact, when this court considers the evidence on record and the written submissions which were filed, it is obvious that quite alike to **Mahadeo v ICAC 2017 SCJ 295** the bone of contention concerns whether the testimony of the main prosecution witness can be relied upon as being credible, trustworthy and coherent in order to reach the conclusion that the prosecution had proved its case beyond reasonable doubt. That is, in the present case whether witness 3 Bhardoiaj Maunthrooa's can be believed and on that basis find that both accused have breached **Section 4 (1) (b) (2)** of the **Prevention of Corruption Act** (**POCA**).

17. It is apposite to note apart from Bhardoiaj Maunthrooa witness 3, the other prosecution witnesses who were called did not testify on the act of bribery itself.

18. Those witnesses were mainly called to produce documents and the out of court statements of the accused. For example: Witness 7 Priya Persand IT Supervisor from Mauritius Telecom and Witness 6 Prithviraj Hossany Manager of procurement were called only to produce documentary evidence.

19. Witness 7 identified and produced a letter dated 30th September 2008 from Mauritius Telecom to the Commissioner of Police. The weight to attach to this letter is only to show phone calls were made as stated by the prosecution during the proceedings.

20. Witness 6 on his part identified and produced four quotation forms, government fire services tender No 34 of 2006/2007, four copies of an extract of quotation register.

21. However, during his testimony witness 6 Mr Prithviraj Hossany who was deputed by the Chief Fire Officer stated under oath that he could only identify the documents and that he is not "conversant" with this case. Reason being that he joined the joined the Fire Services in 2017, that is, much later than when the tender exercise involving both accused took place.

22. Witness 1 SI Doman who is the main enquiring officer produced the out of court statements of the accused which were marked as **DOC AE**, **AE1** and **AE2** and explained in cross-examination that the ICAC did not verify the bank accounts of accused 1, the locus in quo where the alleged remittance of the gratification occurred namely the office of accused 1 and also the ICAC did not record a statement from Miss Beetun who was sharing the office of accused 2 at the material time when the alleged offence took place.

23. Furthermore, witness 5 Mr Aleem Dinally retired officer who was tendered for cross-examination was not very helpful to the prosecution's case as well because when the latter was tendered for cross-examination the weight to attach to his testimony is that witness 5 told the court that witness 3 had been sanctioned for not abiding with the prescribed time frame for the delivery of the uniforms in line with the contract given to him. Showing that witness 3 had therefore an axe to grind against accused 1 and 2.

The testimony of witness 3 Bhardoiaj Maunthrooa: the weight to attach.

24. In **Blackstone's Criminal Practice 2024 PART F EVIDENCE Section F8 Documentary Evidence and Real Evidence Real Evidence F8.47** it is underscored that:

In addition to material objects, the following may also be regarded as varieties of real evidence:

(a) a person's behaviour, e.g., misconduct in court for the purposes of contempt of court;

(b) a person's physical appearance, e.g., for the purposes of identification or on the question of the existence or causation of personal injuries;

(c) a person's demeanour or attitude which, in the case of a witness, may be relevant to his or her credit, the weight to be attached to the witness's evidence, or whether he or she is to be treated as hostile.

The relevance of demeanour, as described in (c), was approved in VJW [2022] EWCA Crim 164. The Court could see no basis for departing from this approach, given that judges will give juries appropriate directions as and when necessary.

25. This court had to opportunity to see witness 3 testify in court and to assess his testimony.

26. At the outset, this court must point out that whilst going through the court record, this court noted that very often witness 3 stated that he had difficulties to remember. On this aspect, this court is fully alive to the fact that the alleged offences occurred as far back in 2003. Thus, being given that a trial is not a "test of memory" for a witness, this court will not give too much importance in relation to minor inconsistencies or difficulty to remember by witness 3 because of the passage.

27. Consequently, in order to assess the testimony of witness 3 this court has paid more attention to the following aspects:
    (a) The responsiveness of witness 3 in examination and cross-examination.
    (b) The coherence of his version are there inconsistencies which cannot be reasonably explained.
    (c) The credibility to attach to the version of witness 3.
    (d) His demeanour.
    (e) Any motives for lying or axe to grind against the accused parties.

Substantial inconsistencies affecting the coherence and credibility of witness 3

28. Firstly this court has noted that according to witness 3, accused 1 told him that he could make sure that he (witness 3) could obtain the contract for uniforms with Fire Services of he (witness 3) were to pay him (accused 1) sums of money. Witness 3 stated that:

A. Comment mo dire ou ine fini arrive 19 ans, li assez difficile pou mo recall tousala, mais a 4 reprises mone donne li commission. Ene fois, c'était Rs 35,000, ene fois mone donne li Rs 25,000, one fois mone donne li Rs 15,000, ene fois mone donne li Rs 10,000, ceki mone dire dans mo statement[1].

29. According to witness 3 the sums of money were remitted to accused 1 at the latter's office which is situated at Deschartres Street and that when he (witness 3) had remitted to accused 1 an envelope:

Q. Lerla quand oune fini donne li cash li kine arriver ?

A : Be line en colere, parski li ti pe expect pou gagne cash plis ki ca montant la. Parski nous ti pe negocier, li ti pe dire moi donne li ene somme de Rs 50,000, Rs 40,000, gros montant, selon le Award, selon le montant de la Tender. Alors nous ti pe negocier. Alors mo ti propose li ene certaine somme, ki li pas ti trop d'accord, li ti ene ti peu chose, hesiter.

Q. D'accord, lerla quand oune fini paye li la somme d'argent, kine arriver ?
A. Line en colere, line en colere line demande moi combien ena dans ca l'enveloppe la, mo ti mette ca dans ene l'enveloppe mo ti donne li. Mo ti alle depose ca dans so bureau personnel. Ler mone alle depose ca dans so bureau personnel, line demande moi ki ca montant la.

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Q. Oui, lerla ?

A. Lerla line prend ca line jette ca, ti ena ene panier derriere, cot li assizer derriere li, line envoye ca, line chose ca. Line en colere line chose ca, line vexer, line jette ca l'enveloppe la derriere li, et li dire moi aller.

30. However, when counsel for accused 1 tested this version, witness 3 could not clarify whether he mentioned that "bin" incident in his out of court statement.

31. In fact, this court realises that because witness 3 has not mentioned this in his out of court statement explains why the main enquiring officer was unaware about this incident and never had the opportunity to verify all these matters at the office of accused 1. The enquiring officer could therefore not respond to these issues in cross-examination.

32. In effect, this "bin" incident is a matter which this court does not believe any reasonable witness who was been a victim of a "solicitation of bribery by a public official" would have omitted to mention.

33. Furthermore, in cross-examination Witness 3 told the court that whenever accused 1 comes to his workshop:

A. *Oui, lere li vini li look partout. Li alle jusqu'à par derriere tension ki nous pe rode piege li. Ki pena kikaine dans l'atelier, lere la li capav coze ar moi aisement. Li ti meme guet en bas comptoir, derriere magasin. Partout li ti pe have a look pou rassure li ki pena personne..*

Q. Mais tout ca la ou pan met dans ou l'enquete Monsieur ?

A. Oui, mo pan metter.

34. This is a further inconsistency which again this court cannot accept that witness 3 could reasonably have omitted to mention in his out of court statement.

35. These are facts which any reasonable witness would have mentioned in an out of court statement.

36. It is not twenty years later, that witness 3 could come up with this version which he never mentioned at enquiry stage.

37. The same observations have been made by this court about the testimony of witness 3 against accused 2.

38. A flagrant example is that at one point in cross-examination witness 3 explained that when he went to meet accused 2 (Mr Bhoyroo). At that time the latter's assistant was present. According to witness 3 the assistant was told by accused 2 to go away, so that he (witness 3) could discuss the commission. Again, when this version was challenged by counsel for accused 2 as being untrue and a pure fabrication, witness 3 replied that:

Q: Be dans ou l'enquete 'fresh in your mind la' na pas exister sa zistoire la. Ca veut dire kan tou fresh in your mind oune raconte ene zistoire ki vrai. Et aujourd'hui ou pe raconte ene zistoire ki fausse ?

A. *Bane officier l'ICAC jamais ine demande mo meme sa bane questions la. Si nancroire mo ti pou dire zot. La cause sa nous pan met dans l'enquete.*

Q. Dans ou lettre ki oune envoy l'ICAC en novembre 2007, la aussi li pas ladans. Ki ou ena pou dire ?

A. Mone enumere juste ban cas principal. Mo pas fine raconte ban zistoire ki sa ti capav vine 10 pages.

39. Again, this court finds that there is no plausible explanation on the part of witness 3 to justify such an omission on his part at enquiry stage.

Conclusion

40. From the above assessment of the testimony of witness 3, this court has come to the conclusion that witness 3 does not come to proof as a credible, coherent, trustworthy witness. The general impression that this court had about witness 3 is that he is someone who cannot be safely relied upon in order to convict accused 1 and 2. In fact, his demeanour in the witness box was poor. In addition, in view of the major inconsistencies and the serious "omissions" in his out of court statement renders the possibility that witness 3 may have an axe to grind against the accused parties. Latter had at a certain point time decided to stop the payment to witness 3 by the Fire Service on the ground of breach of certain terms and conditions by witness 3. The uniforms improperly confectioned and had to be stitched.

41. For these reasons, this court finds that it would be unsafe to convict accused 1 and 2. Accused 1 and 2 are therefore given the benefit of doubt under Counts 1 to 5.

A.Joypaul

Intermediate Court Magistrate

Date: 19.1.24.