ICAC v Sheik Aktar Jaufuraully

2021 INT 147

FCD CN: 85/20
CN:1108/15

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

Sheik Aktar JAUFURAULLY

RULING

The accused has been prosecuted for the offence of Bribery by Public Official in breach of sections 4(1)(a) & (2) and 83 of the Prevention of Corruption Act 2002. He pleaded not guilty to the Information and was represented by counsel throughout the proceedings.

During the course of trial and the examination-in-chief of witness no.4 PC Guckool, objection was raised by the defence to the effect that the said witness cannot adduce evidence which was allegedly obtained from witness no.12. The evidence would have entailed allegations made by witness no.12 addressed to witness no.4 on the material day. The subject of contention is not the fact that allegations were made but rather the detailed content of those allegations.

The objection from the defence was two-fold. First, the hearsay rule would apply since witness no.12 is not in Mauritius and the prosecution could not provide an undertaking that the said witness would attend court when required. There is therefore a doubt as to whether the description of those allegations would ever be confirmed by the maker's testimony in court. Second, such evidence if admissible at

this stage of proceedings would have such prejudicial effect to the accused that it would outweigh its probative value.

As counter-argument, the prosecution stated that the evidence proposed to be elicited by witness no.4 would be for the purpose of proving the reasons behind the setting up of a police operation on the material day. It would not be for the purpose of proving the truth of the content of the allegations, thereby circumventing the hearsay rule. Furthermore, the probative value of the evidence would be to show the genuineness of the operation and the reason behind its instigation.

The court is not privy to a complete account of what was said to witness no.4 by witness no.12. However a broad picture can be established from the submissions of both parties and from the defence statements of the accused (Doc B).

Both counsels relied on the case **Subramaniam v Public Prosecutor (1956) 1 WLR 965**, where it was held that an out-of-court statement made by a person who is not a witness may not fall foul of the hearsay rule if it is proposed to establish not the truth of the statement but the fact that it was made.

This settled principle does not necessarily mean that evidence can be automatically rendered admissible by attaching a purpose other than as evidence of a matter stated. The general principle of relevance has to come into play. The evidence has to be relevant to a fact in issue.

In Subramaniam (supra), the fact in issue was the state of mind of the accused who raised the defence of duress at the time of committing the alleged offence. Hence statements made to him by a person, not called as a witness were deemed non-hearsay as the purpose was only to prove his distressed mind at the material time.

In **Woodhouse v Hall (1980) 72 Cr App R 39**, evidence of police officers having had offers of 'hand relief' was held to be admissible as the purpose was solely to prove that offers were made, not the truth of their contents. The fact that offers were made, could per se show that the accused was managing a brothel, which was a relevant fact in issue.

However in **R v Blastland (1986) AC 41**, on a charge of murder, the accused sought to adduce evidence from witnesses who had heard a third party say 'a young boy had been murdered' before the body was discovered. The purpose of the evidence was to prove that the statement was made so as to indicate the state of knowledge of the maker. The House of Lords held that the third party's state of

mind evidenced by the statement was not directly in issue at the trial, nor of direct or immediate relevance to an issue in the trial. The following extracts of Lord Bridge's speech, unanimously followed by the court are of relevance.

Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination.

It is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind either of the maker of the statement or of the person to whom it was made. What a person said or heard said may well be the best and most direct evidence of that person's state of mind. This principle can only apply, however, when the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial.

The purpose contended by the prosecution in the present matter was to show that the police operation carried out on the material day was borne out of the allegations made by witness no.12. Had the purport stayed there, no argument would have ensued. The prosecution further contested that facts revealed to witness no.4 by witness no.12 on the day would give a better understanding as to why the operation was conducted in a certain way. There is no doubt that the more detailed the account of witness no.12 is, the clearer the picture would be of the reasoning behind the operation. The question is whether the reason which prompted the operation is a fact in issue. Neither the prosecution nor the defence has made it as such. There is no dispute that a police operation was carried out in the light of allegations made by witness no.12. The manner in which the operation was carried out can be shown by direct evidence from witness no.4 or any other witness who might have been involved in the operation. On the other hand the validity or the reasoning behind the operation is not in issue, unless it is so made by the defence.

The purpose to adduce the proposed statements may not be to prove the truth of their content, but the said purpose does not relate to a fact in issue at the current stage of proceedings. I find that the statements made to the witness no.4 by the witness no.12 are considered as hearsay and are therefore inadmissible. I further

note that the witness no.12 has not been removed from the list of witnesses and thus he may be called at any point in time during the prosecution's case to adduce the evidence which pertains to his narration to witness no.4.

P K Rangasamy
Magistrate of the Intermediate Court
23.09.21