CN 25/2022

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

Noorhoosen RAMOLY

RULING

The accused stands charged with the offence of Bribery of Public Official in breach of sections 5(1)(b) & (2) of the Prevention of Corruption Act 2002. He pleaded not guilty to the Information and was represented by counsel, Mr R. Gulbul together with Mr D. Dodin throughout the proceedings. The prosecution was represented by Mr L. Nulliah for the ICAC.

Witness no.2, Mr Paul Olivier Stephane Justine was under examination in chief as part of the prosecution's case. He stated that he was a prison officer for a period covering the years 2015 to 2019. He was working at Melrose Prison during that time. He interacted with a detainee by the name of Siddick Islam. He had face-to-face conversations with him as per his function as prison officer. The detainee was in block 'Hibiscus' at the prison in 2015. The conversation was concerned with the hiring of a car and the said detainee allegedly provided the witness with a phone number. He was supposed to contact one 'Kaleel' through the phone number. Counsel for the prosecution asked the witness to state whether he sees the said 'Kaleel' in court, to which the defence objected as it would amount to dock identification.

It is not disputed by the prosecution that the issue is not one of recognition and that no identification exercise was carried out between the accused and the witness no.2 at enquiry stage.

The submission from the prosecution centres on the fact that dock identification is not automatically inadmissible, the court can give itself the proper direction. Furthermore, the prejudicial effect of such evidence against the accused will not outweigh its probative value. The issue of identification is not central to the case. The

court has to consider the whole evidence on record and it is only at the end of the trial that the court would be in a better position to attach weight to such evidence or not, if admitted at this stage of proceedings.

The defence submitted that identification of the accused by the witness no.2 is a significant issue for the defence case. The accused in his defence statement denies to have ever met the prison officer, Mr Justine, now witness no.2.

At **Doc A** (Folio 234846), defence statement of the accused, the following extract is of relevance:

Si enne missier qui appelle Paul Olivier Stephane Justine, enne ex prison officer dire qui dans l'année 2005 a 2016, en plusieurs l'occasions mo finne donne li l'auto pou rouler sans aukenne paiement pou banne facilité qui li finne donne Sidick Islam dans prison Melrose, non mo pa cone sa dimoune qui ou pe dire moi la...

Furthermore, as submitted by the defence and as written in Doc A, the accused was informed of the identification exercises that can be carried out and he agreed to take part in an identification parade.

Ou finne explique tous bane exercise de identification mo d'accord pou enne parade acote pou enna plusieurs dimoune.

It was further contended by the defence, which was not disputed by the prosecution, that as per Doc B, the witness no.2 was not posted at the 'Hibiscus' block whenever the detainee Siddick Islam received visits from the accused. This is confirmed by the evidence of witness no.3 under cross-examination.

There is evidence from witness no.1 for the prosecution, Mr Naiken who stated that the witness no.2 identified the garage where he was taking vehicle from Mr Ramoly. At this stage of proceedings, such evidence has not been confirmed by the witness no.2. The prosecution chose not to call witness no.2 for the purposes of the argument, or pursue examination-in-chief before asking for a dock identification from the witness. Nevertheless, such evidence would have been incidental to the issue that the accused denied having ever met the witness no.2, Mr Justine.

The prosecution has contended that the case is not one where identification is crucial. Comparisons have been made with situations where the witness would have had a fleeting glance of an individual and a dock identification would be the only opportunity for him to identify that individual as the accused party. However, there is no actionable evidence on record which would show that the witness had met the

accused multiple times before. At any rate, the prosecution has submitted that the issue is not one of recognition.

The law

The main principles governing the rules of dock identification have been settled by the Supreme Court in a number of cases. In **Phillipe v State 2013 SCJ 141**, the Supreme Court made reference to English and Privy Council cases namely; **R v Turnbull [1977] QB 224, Terrell Neilly v The Queen [2012] UKPC 12, Edwards v The Queen [2006] UKPC 23, Holland v HM Advocate [2005] UKPC D1**, and **Max Tido v The Queen [2011] UKPC 16.**

The underlying tenet of the body of caselaw regarding the matter of dock identification is that it is undesirable in principle due to the inherent dangers that such type of identification carries. It can only be exceptionally admitted. The failure on the part of the investigative authority to hold identification exercises has to be assessed. Good reasons should be provided as to why such exercise, which falls within the ambit of normal investigative practice, has not been carried out.

In **Fokeerbux v The State 2014 SCJ 225**, the Supreme Court quashed the conviction on the grounds that the court of first instance misdirected itself on the identification evidence and relied on hearsay evidence to buttress the dock identification. The same principles in the above Privy Council cases were followed and the emphasis was laid on the need for an identification exercise at enquiry stage and equally the need for an explanation if there was none.

The Supreme Court in **Ramsurrun v The State 2017 SCJ 328** upheld the above principles in the following terms:

At the end of the day, what matters is the circumstances in which the witness saw the accused at the time of the incident and later identifies him at the trial in the dock in court. If the circumstances are such that the identification at the time of the incident carries some inherent dangers of a mistake, then it would 'give rise to significant requirements as to the directions that should be given to the jury to deal with all the inherent difficulties and dangers associated with such evidence' (see Phillipe supra). On the other hand, it goes without saying that if the circumstances are such that the identification of the accused by the witness at the time of the incident is quite safe and reliable, then the dock identification that subsequently follows in court may be acted upon by the trial Magistrate or Judge.

No light has been shed by the prosecution as to whether it would be safe to rely on the out of court, face-to-face interaction of the witness no.2 and the accused. There is no clear evidence from the said witness as to the circumstances he met with the one named 'Kaleel'. Counsel for the prosecution chose to raise the issue of identification in court without laying the foundation on which a dock identification can stand. It is worth reproducing the extract of examination-in-chief where the issue of a meeting between the witness and the said 'Kaleel' was addressed (page 27 of transcript dated 24.11.22):

A. Mo pa rappel numero la et sa dimoune la pou donne moi loto pou mo rouler.

Q. Okay, nu compran ou pa rappel le numero mais ou kone le nom de la personne avec ki oune ale pran loto.

A. Oui, oui

Q. Kouman li appeler

A. Kaleel

It is troubling that on such an important issue, the prosecution decided to lead the witness by suggesting that he met with the person from whom he took a car. The witness did not say that he met with a person to take a car in his previous answer. Nevertheless, there were no follow up questions as to where and how he met with the one 'Kaleel'.

The argument might have been on a question of law, but the application of law should always be rooted in a set of facts. The only other evidence which may allude to the fact that the witness had met the accused at the time of the incident is the one adduced by witness no.1, the enquiring officer. He gave evidence as to the statements relayed to him by the witness no.2 during enquiry, without the latter witness confirming same. At this stage of proceedings, such statements cannot be used to prove the truth of their content or else they may tantamount to hearsay evidence.

From Doc B and evidence of witness no.3, it is shown that during the visiting times of the accused to the detainee Siddick Islam, the witness no.2, then prison officer, was not posted at the same prison block 'Hibiscus'. It is construed that the witness no.2 could not have been in the physical proximity of the accused when the accused was present at the prison visiting the one Siddick Islam. There is no evidence from the prosecution that the accused was at 'Hibiscus' block or any other part of the prison, at any other time when the witness no.2 was posted there.

The accused in his defence statement denied having ever met the witness no.2, Mr Justine, nor that he knew anything about one Mr Justine. It is therefore clear that identification was made a crucial issue in the defence case. Additionally the accused was given the options of choosing the type of identification exercise he would wish to participate in. He responded affirmatively for an identification parade.

The identification parade was ultimately not carried out. The prosecution had the opportunity to explain the failure for the investigative authority to do so. No good reason was provided to the court which could have absolved the prosecution from departing from normal and reasonable practice. Such explanation is an important factor for consideration by the court and the lack of one can only benefit the defence case.

CONCLUSION

The prosecution has relied on the general admissibility test of whether the probative value of the dock identification will outweigh its prejudicial effect. The contention therefore is that the court will have to hear the whole evidence from the prosecution before being in a position to decide on the probative value or prejudicial effect of the dock identification and ultimately rule on its weight. Such proposition in this instance, is misconceived, if not to say, careless. If the piece of evidence in question is crucial to the defence, its admissibility at this stage, could alter the way the defence would conduct its case. The prosecution should have adduced enough evidence before or at the stage of the argument to show its probative value as opposed to its prejudicial effect, not at the close of trial.

For these reasons, I find that the evidence pertaining to dock identification of the accused by the witness no.2 is inadmissible, at this stage of proceedings.

P K Rangasamy
Magistrate of the Intermediate Court
08.03.23