THE MAURITIUS COMMERCIAL BANK LTD v INDEPENDENT COMMISSION AGAINST CORRUPTION AND ANOR

2020 SCJ 338

THE SUPREME COURT OF MAURITIUS

SCR No. 9157

In the matter of:

The Mauritius Commercial Bank Ltd

Appellant

v

1. **Independent Commission against Corruption**
2. **The Director of Public Prosecutions**

Respondents

Interlocutory Judgment

The appellant (then accused) was prosecuted before the Intermediate Court for money laundering in breach of sections 3(2) and 8 of the Financial Intelligence and Anti-Money Laundering Act ("FIAMLA"). The particulars of the offence were that the appellant *"willfully, unlawfully and criminally failed to take measures as a necessary implementation of internal control systems and procedures to ensure that the services offered by it were not capable of being used by a person to facilitate the commission of a money laundering offence"*.

The learned Magistrates found the appellant guilty as charged and sentenced it to pay a fine of Rs 1,800,000 together with Rs 500 as costs. The appellant is appealing against the judgment of the learned Magistrates on 32 grounds of appeal. However, at this stage we are not concerned with the grounds of appeal, but are being called upon to rule on a preliminary objection raised by the appellant which is objecting that respondent No.1 files skeleton arguments and offers submissions in the present case since the Director of Public Prosecutions has taken over the proceedings and is conducting the prosecution.*"*

We must at the very outset state that –

1. it is undisputed that the case was lodged by respondent No. 1, the Independent Commission Against Corruption (the "ICAC"), before the Intermediate Court;
2. the proceedings were taken over by the Director of Public Prosecutions (the "DPP") before the trial proper started and was conducted by Counsel for the DPP;
3. all throughout the hearing of the case, the prosecutor from the ICAC (Senior Inspector Heerah) swore to, and sustained the charge before the trial court.

It was argued on behalf of the appellant that the prosecution in the present case was instituted under section 3(2) of the FIAMLA which is found under Part II of the FIAMLA. According to section 82 of the Prevention of Corruption Act ("POCA"), no prosecution under part II of the FIAMLA may be instituted except by, or with the consent of, the DPP. Pursuant to section 82(2) of the POCA, the Director-General of the ICAC or an officer designated by him may swear an information and conduct the prosecution of an offence under Part II of the FIAMLA. He further highlighted that-

1. after the hearing of the evidence before the trial court, written submissions were filed. The submissions of the prosecution bore the following heading-

"ICAC

Prosecution

v

MCB

Defence"

2. the heading of the judgment of the trial court was as follows-

"Independent Commission against Corruption

v/s

Mauritius Commercial Bank Ltd as represented by Mr. C. Allet"; and

3. the heading of the appeal was as follows-

"In the matter of :

CN 950/2009(Intermediate Criminal Case)

ICAC

Prosecution

v

MCB

Defence

And in the matter of:

SCR No. 9157-3/136/17 (Appeal case)

MCB

Appellant

v

1. *ICAC*
2. *DPP*

Respondents"

He argued that the DPP was joined as a party by the appellant in conformity with the requirements of the law and relied on the following extract from the cases of **Sicharam K v ICAC** [2011 SCJ 375] and **Bhatoo v Nellayah & Anor** [1982 MR 97] in support of his contention-

> *"The requirement of joinder or notification is important if the DPP is to be in a position to meaningfully exercise his powers under section 72 of the Constitution."*

He also submitted that the case of **Bhatoo (supra)** sets out the rationale for the principle as follows-

> *"The propriety of doing so is reinforced by section 72(3)(b) of the Constitution which gives power to the DPP to take over and continue any such criminal proceedings".*

It was argued by learned Senior Counsel for the appellant that section 72(3)(b) provides that once the DPP takes over proceedings, he has to continue the proceedings in his own name and no other prosecuting authority can therefore conduct the proceedings. Section 72(3)(b) of the Constitution is reproduced below –

> *"(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do to –*
>
> *(a) institute and undertake criminal proceedings before any Court of law (not being a Court*

established by a disciplinary law);

(b) take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

…"

It was the contention of learned Senior Counsel for the appellant that once the DPP decides to take over proceedings and does so, it is only the DPP who may continue the said proceedings. He argued that since it is only the DPP who is conducting the appeal he should, as a result, be the only party to be heard by the appellate Court. It was his contention that if the ICAC is allowed to offer submissions in the present case, the appellant will be subject to two prosecuting authorities and both authorities will have their own submissions. As a result, this may lead to contradictory submissions which will be unfair and inequitable. The thrust of his submissions was that if the Court were to allow the ICAC to offer submissions in the appeal, this will be in breach of the principle of equality of arms which is part of the right to a fair trial. Counsel referred to the paragraph 60 of the case of **Rowe Davies v UK GC 28901/95** which reads as follows-

60. "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence."

He also relied on the following extract from the case of **Arthur J.S Hall and Co. Simons and Barratt v Ansell and Others v Scholfield Roberts and Hill UKHL 38** *"the prosecuting advocate has a duty to see that the prosecution case is, on behalf of the Crown, presented effectively and fairly."*

In effect the submissions of learned Senior Counsel for the appellant boils down to the following –

there should not be two parties submitting against one party.

Learned Counsel for respondent No. 1 argued that it was the appellant that had the carriage of proceedings and had chosen to join the ICAC as a party to the present appeal. She argued that the issue of unfairness would indeed arise if parties were to be joined but were not given the right to make their own submissions. In

addition, she argued that joining a party and serving it with a notice of appeal and with the skeleton arguments but yet preventing it from offering any submissions would go against the very principle of any form of equality.

She argued that in the case of **Sicharam** (supra) it was stated that the appellant has to join the DPP as a party to the appeal but here the appellant has joined the ICAC and cannot claim that this was done on the basis of what was held in the case of **Sicharam**. She further submitted that it would be pointless joining the ICAC as well as the DPP and yet not expect any submission from the ICAC. She argued that the case of **Foondun M.J v The State and Ors** [2018 SCJ 298] proves that there have been cases before the Supreme Court where both the ICAC and the DPP took different stands at the level of appeal but it was never argued that this breaches the equality of arms principle.

In a nutshell, learned Counsel for respondent No. 2 argued that it was mandatory to in fact lodge the appeal against the State or the DPP as respondent. In ***Suneechara O v The State*** [2007 SCJ 131], where the appellant lodged its case against the State only and decided not to include the ICAC as a party, the Supreme Court stated that not joining the ICAC was not fatal. It was his submission that, as a matter of fact, in the present case, the appellant itself chose to bring the ICAC before this Court, and thus cannot argue that the ICAC should not file written submissions or make oral submissions. Consequently, it was his contention that the appellant cannot claim that allowing the ICAC to offer submissions can amount to a breach of the equality of arms principle.

He further argued that it is clear that the ICAC is an interested party in the present appeal because it was the ICAC which investigated the case. He also argued that the appellation of the parties to the case remained ICAC and the MCB, hence he argued that the ICAC should be allowed to make submissions, written or otherwise, before the Court.

In the present case, the proceedings which were taken over by the DPP before the Intermediate Court were conducted by the DPP and are still being conducted by the DPP. The appellant himself chose to join the ICAC as a party to the present appeal. It cannot be argued that by the mere fact of offering submissions before this Court the ICAC would be taking over the proceedings from the DPP. The

question which lies at the heart of the issue raised by learned Senior Counsel for the appellant therefore is whether, if the ICAC is allowed to offer submissions before this Court, this will result in a breach of the equality of arms principle.

It is of interest to note that the equality of arms principle has been enunciated by the European Court of Human Rights as part of the right to a fair trial under Article 6 of the European Convention for the Protection of Human Rights (the "Convention"). Article 6 of the Convention stipulates –

> ***"Article 6***
>
> ***Right to a fair trial***
>
> 1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
> 2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
> 3. *Everyone charged with a criminal offence has the following minimum rights:*
>
> > *a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> >
> > *b) to have adequate time and the facilities for the preparation of his defence;*
> >
> > *c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
> >
> > *d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
> >
> > *e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

It is clear that subsections (1) and (2) of section 10 of our Constitution,

entitled “Provisions to secure protection of the law”, which we have reproduced below are drafted in terms very similar to those of Article 6 of the Convention-

> ***“10. Provisions to secure protection of law***
>
> *(1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.*
>
> *(2) Every person who is charged with a criminal offence—*
>
> *(a) shall be presumed to be innocent until he is proved or has pleaded guilty;*
>
> *(b) shall be informed as soon as reasonably practicable, in a language that he understands and, in detail, of the nature of the offence;*
>
> *(c) shall be given adequate time and facilities for the preparation of his defence;*
>
> *(d) shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense;*
>
> *(e) shall be afforded facilities to examine, in person or by his legal representative, the witnesses called by the prosecution before any Court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before that Court on the same conditions as those applying to witnesses called by the prosecution; and*
>
> *(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence,*
>
> *and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the Court has ordered him to be removed and the trial to proceed in his absence.”*

We find it pertinent to refer to the following extract from **Halsbury’s Laws of England/Rights and Freedoms (Volume 88A [2018])**:

> *“The principle of equality of arms, which entails that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent, has frequently been endorsed in relation to both civil and criminal proceedings. To this end, fairness under Article 6 requires that proceedings are truly adversarial, such that parties are entitled to make known evidence needed for their claims to succeed and to have knowledge of, and comment effectively on, all evidence adduced before or submissions filed with the court.”*

We find it apposite, at this juncture, to refer to the following extract from the **Guide on Article 6 of the Convention – Right to a fair trial (criminal limb)** of the European Court of Human Rights -

> ***"2. Equality of arms and adversarial proceedings***
>
> *142. Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent (Öcalan v. Turkey [GC], § 140; Foucher v. France, § 34; Bulut v. Austria; Faig Mammadov v. Azerbaijan, § 19). Equality of arms requires that a fair balance be struck between the parties, and applies to criminal and civil cases.*
>
> *143. The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (Brandstetter v. Austria, § 67). The right to an adversarial trial is closely related to equality of arms and indeed in some cases the Court finds a violation of Article 6 § 1 looking at the two concepts together.*
>
> *144. There has been a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice (Borgers v. Belgium, § 24).*
>
> *145. In criminal cases Article 6 § 1 overlaps with the specific guarantees of Article 6 § 3, although it is not confined to the minimum rights set out therein. Indeed, the guarantees contained in Article 6 § 3 are constituent elements, amongst others, of the concept of a fair trial set forth in Article 6 § 1 (Ibrahim and Others v. the United Kingdom [GC], § 251). The Court has dealt with the issues of equality of arms and adversarial trial in a variety of situations, very often overlapping with the defence rights under Article 6 § 3 of the Convention."*

Although we are in the present case concerned with criminal proceedings, we also find it of interest to refer to the following excerpt from the **Guide on Article 6 of the Convention – Right to a fair trial (civil limb)** of the European Court of Human Rights –

> "222. *The principle of "equality of arms"* is inherent in the broader concept of a fair trial. The requirement of "*equality of arms*", in the sense of a "*fair balance*" between the parties, applies in principle to civil as well as to criminal cases (*Feldbrugge v. the Netherlands*, § 44).
>
> 223. Content: maintaining a "fair balance" between the parties. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party: Dombo Beheer B.V. v. the Netherlands, § 33.

> - It is inadmissible for one party to make submissions to a court without the knowledge of the other and on which the latter has no opportunity to comment. It is a matter for the parties alone to assess whether a submission deserves a reaction (*APEH Üldözötteinek Szövetsége and Others v. Hungary*, § 42);
> ……."

In Mauritius, in the case of **MANRAJ D D & ORS V ICAC** *[2003 SCJ 75]*, the learned Judge referred to the equality of arms principle and, inter alia, quoted the case of **Migon v Poland 13 HRCD 2002** where the equality of arms principle was applied. We find it apposite to quote the following extract from the case of **Manraj (supra)**-

> *"The applicant, Wiltold Migon, a Polish national, was detained on remand during criminal proceedings brought against him on suspicion of aggravated fraud, falsification of documents and issuing bad cheques. The case was lodged with the European Commission of Human Rights and transmitted to the Court for its hearing. The applicant alleged, in particular, that the proceedings to review this detention on remand had not been adversarial and that the equality of the parties in these proceedings had not been observed since neither he nor his counsel had been allowed to attend hearings before the Krakow Court of Appeal concerning the prolongation of his detention on remand, whereas the prosecutor had been able to do so. The applicant also complained that in the proceedings concerning the review of the lawfulness of his detention, neither he nor his counsel had been granted adequate access to the case-file of the investigation. He relied on Article 5, Section 4 (right to liberty and security) of the European Convention on Human Rights.*
>
> *The Court commented on the fact that equality of arms between the parties ran throughout the whole process, from the beginning of an investigation, through trial stage and appeal stage right up to the bitter end…."*

The following principles may be culled from the above-

1. The requirement of "*equality of arms*", in the sense of a "*fair balance*" between the parties, applies to civil as well as to criminal cases.
2. To achieve equality of arms, proceedings have to be truly adversarial.
3. Each party must be given the opportunity of "*presenting his case in conditions which do not place him at a disadvantage vis-à-vis his opponent*".
4. Parties to a case should be given *"the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision".*

5. It is inadmissible for one party to make submissions to a court without the knowledge of the other.
6. It is inadmissible for a party not to have an opportunity to comment on the submissions of another.
7. It is a matter for the parties alone to assess whether a submission deserves a reaction.
8. Equality of arms between the parties runs throughout the whole process, from the beginning of an investigation, through trial stage and appeal stage right up to the end.

Bearing in mind the above principles, we shall now consider the point raised by learned Senior Counsel for the appellant. As stated earlier, the issue to be determined is whether there will be an infringement of the equality of arms principle if the ICAC is allowed to offer submissions against the judgment of the Intermediate Court in the present appeal.

Whatever be the reason for joining the ICAC as a party to the present proceedings, the incontrovertible fact is that the ICAC is a party before us. It is clearly an interested party as it was the one which conducted the investigation in this case and also lodged the prosecution before the Court. Moreover, although the proceedings were taken over by the DPP, it remained as a party throughout the case. Learned Senior Counsel for the appellant simply contented and limited himself with stating that if the ICAC were allowed to offer submissions in the present case, the appellant would be facing two prosecuting authorities and that this would be in breach of the equality of arms principle.

We must straightaway observe that while the contention of learned Senior Counsel for the appellant is that if ICAC is allowed to submit before the appellate Court this will breach the equality of arms principle, the extracts referred to above in fact show that, on the contrary, not allowing a party to offer submissions will result in a breach of the equality of arms principle.

We therefore find the argument of learned Senior Counsel for the appellant to be untenable. The hearing of the case is over, evidence has been adduced and the trial court has already given its judgment. We are at a stage of the proceedings where the appellant is challenging the judgment and its aim is to have it quashed on the basis of submissions offered on the grounds of appeal which have been lodged

by it. The DPP is resisting the appeal and will, through submissions during the hearing of the appeal, endeavour to establish that the judgment should be maintained. During the hearing of the appeal, both parties will have the opportunity to comment on all the evidence adduced and will offer submissions with a view to convince the Court either to maintain or to quash the judgment of the trial court.

The appellant has failed to establish how it will be at a disadvantage vis à vis the respondents if the ICAC is allowed to offer submissions before the appellate Court. No doubt, if the ICAC is allowed to offer submissions before the appellate Court, it will, in accordance with the Supreme Court Rules, file its skeleton arguments prior to the hearing of the appeal and serve the skeleton arguments on the appellant and respondent No. 2, who will each have the opportunity of reacting thereto by making submissions in reply, if they so wish. In addition, both the appellant and respondent No. 2 will also have the opportunity of addressing the Court on any issue raised during oral submissions by the ICAC. We are unable to see how, in the circumstances, the equality of arms principle which is simply an emanation of the right to a fair hearing, will be breached.

Although the principle that there must be equality of arms on both sides requires that there be a fair balance between the parties, section 10(1) and (2) of our Constitution does not require the matters with which it deals to be resolved with mathematical accuracy. **[Vide Lord Hope of Craighead in McLean and Another v Buchanan (Procurator Fiscal, Fort William) and Another [2001] 5 LRC 497].** Thus, it cannot be argued for example that simply by allowing Counsel on one side to submit for longer than Counsel on the other side, there will be a breach of the principle of equality of arms. It is apposite to note that, in cases where one of the parties challenges the constitutionality of a section of the law, the cursus is for the Court to require that the Attorney General be joined as a party. In such a case, Counsel for the Attorney General offers submissions on the issue of constitutionality which inevitably is in favour of one or the other party. Clearly, it cannot be argued that there is a breach of the equality of arms principle in such a case. We must also observe that it is not uncommon for the number of parties in a civil case to be faced with an unequal number of opposing parties, for example, in a civil case a plaintiff may often be opposed to several defendants who are each represented by a different legal adviser. It cannot be argued that by the mere fact that a greater number of legal advisers submit in favour or against an issue there is a breach of the equality of arms principle. At the risk of stating the obvious, we must also observe that the

Court, of course, considers the legal arguments and submissions made before it by the parties. However, at the end of the day, it has to make its own assessment regarding the issues raised before it. It is not simply because there are more parties supporting a judgment, for example, that the court will maintain the judgment, or because there are more parties appealing against a judgment that the Court will quash it: the Court does not operate on the basis of the ayes have it.

Before proceeding any further, we must emphasize that this is not the first time that the ICAC has been joined as a respondent together with the State or the DPPin an appeal against a judgment of a lower court; there are numerous cases where the ICAC has been joined as a party and in all those cases the ICAC was allowed to make submissions before the Supreme Court **[Vide Parayag R. K. v The Independent Commission Against Corruption** [2011 SCJ 309]**; Burhoo K. K. v. The Independent Commission Against Corruption & Anor** [2012 SCJ 211]**; Curpen M v Independent Commission Against Corruption & Anor** [2015 SCJ 66]**; Udhin P. B v. The Independent Commission Against Corruption & Anor** [2015 SCJ 229]**; Audit Y v The State & Anor** [2016 SCJ 282]**; Gowry S v The Independent Commission Against Corruption (ICAC) & Anor** [2016 SCJ 499]**; Seetohul R.M. v The State & Ors** [2018 SCJ 160]**; Sooklaul R. v The State of Mauritius & Anor** [2018 SCJ 168]**; Foondun M.J v The State and Ors** [2018 SCJ 298]**.** It is also noteworthy that it is not in all cases that the stand of the ICAC is the same as that of the State. In this regard, we also find it important to note that even before the Judicial Committee of the Privy Council the ("JCPC") in the case of **DPP v Jugnauth & Anor 2018 PRV 30**, where the prosecution appealed against the judgment of the Supreme Court quashing the conviction and sentence of respondent No. 1, the ICAC which was the second respondent in the case was allowed to make written submissions before the JCPC.

For the reasons given above we set aside the preliminary objection to the ICAC filing skeleton arguments and offering submissions in the present case. The case will be fixed for merits by circular.

K.D. Gunesh-Balaghee
Judge

M.J. Lau Yuk Poon
Judge

23 December, 2020

Judgment delivered by Hon. K.D. Gunesh-Balaghee, Judge

For Appellant	**:**	**Mr E. Ribot, Senior Counsel, together with Mr Maxime Sauzier, Senior Counsel, Mr E. Ribot,(Jr) of Counsel, Mrs N. Behary Paray, of Counsel**
		Mr T. Koenig, Senior Attorney
For Respondent No. 1:		**Mrs P. Bisssoonauthsingh, of Counsel together Mrs S. Rangasamy-Parsooramen, of Counsel, Mr H. Jeeha, of Counsel**
		Mr S. Sohawon, Attorney-at-Law
For Respondent No. 2:		**Mr A.R Ahmine, Deputy Director of Public Prosecutions together with Mrs S. Mohung-Dawreeawoo, State Counsel and Mr Y. Ramsohok, State Counsel, Mrs D. Dabeesing-Ramlugon, Principal Sate Attorney**