

ICAC v Swaley Jowaheer (5th Ruling)

2024 INT 1

FCD CN: 98/2020

CN: 47/2019

**IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)**

In the matter of:

Independent Commission Against Corruption

v/s

Swaley JOWAHEER

RULING

The accused has been prosecuted for the offence of Traffic D'Influence in breach of section 10(5) of the Prevention of Corruption Act. He pleaded not guilty to the Information and was represented by Mr G. Glover SC together with Mr E. Colimalay. Prosecution was represented by Mr T. Naga of ICAC.

As part of the prosecution's case, the witness no.3, Mrs Shalini Beedassy Banerji, Human Resource Business Partner at Air Mauritius was called to give evidence under oath. During the course of her examination-in-chief, she stated that she was acquainted with the accused. There was an interaction between her and the latter regarding the arrival of one Mr Feroz Alamlari into Mauritius. She looked into the matter and reverted to the accused through phone, at which point objection was raised by the defence as to the admissibility of the content of the conversation which might have ensued between them. The ground was that the content of the said conversation was not confronted to the accused at enquiry stage, causing the accused party to waive his right of silence and rebut the evidence in Court.

The relevant documents are the defence statements of the accused produced as **Docs A, A1, A2, A3 and A4**. The prosecution does not dispute the fact that the exact content of the said conversation was not explicitly confronted to the accused in writing, in the five defence statements. The proposition is that, in the generic caution which usually forms part of the first paragraph of an accused's defence statement, as it is the case here, the phrase 'he was explained the facts and circumstances of the case' has been written down. As submitted, the accused was therefore aware of all facts and circumstances of the case, and such would absolve the prosecution from confronting the former, in writing, each and every piece of evidence which could be used against him. The prosecution did submit, in the alternative, that such evidence namely the content of the conversation between the accused and the witness no.5, would not alter his defence, and would not therefore be prejudicial.

I shall first address the defence altering argument which the prosecution derives from the contention that the accused had elected to remain silent and any confrontation of evidence would not have changed that alleged fact. At the outset such proposition is flawed since pre-empting the accused's response in the face of incriminating evidence would be venturing on risky grounds.

However, the more concerning aspect of such proposition lies in the fact that the accused had exercised his right of silence pending his confrontation with the IT Report. In the accused's words at **Doc A2**, he stated 'I have been legally advised to be confronted to Police IT Unit Report prior to answer to additional questions.' The said IT Report, itself subject to two rulings from this Court, had never been shown to the accused. As stated by the accused in clear words, he would answer questions only when he is confronted with the said report. There is no indication from the defence statements, of a sweeping or unconditional exercise of the accused's right of silence.

Furthermore, if any credence is to be attributed to the submission of the prosecution that as soon as the right of silence is exercised, the investigative officer is absolved from making a reasonably detailed confrontation of its case to the suspect, the body of evolutionary caselaw attaching risks to the suspect remaining silent would be rendered nugatory.

The following extract is cited from **State v Bundhun 2006 SCJ 254**: *The right of an accused party to silence is enshrined in section 10(7) of our Constitution and is certainly to be respected but one must be careful not to read too much into it, as indicated in some pronouncements of our courts where it has been made clear that (a) it does not carry with it a right not to have reasonable inferences drawn from such silence (See **Ramdeen v R**[1985 MR 125], **Fullee v R**[1992 SCJ*

77], Jannoo v The State [2003 SCJ 30]; and (b) it is exercised at the accused's risk and peril when, at the close of the case for the prosecution, a prima facie case has been clearly established (see Andoo v R [1989 MR 241]; D.P.P v Bhaugerutty [2006 SCJ 158].

As per **Bundhun (supra)** reasonable inferences can only be drawn from the suspect's choice to remain silent if all relevant circumstances and incriminating evidence are confronted to him. The exercise of the right of silence can only be assessed by the Court in response to each confronted piece of evidence.

The alternative submission from the prosecution is that the phrase "the facts and circumstances of the case have been informed to the accused" has been employed by the recording officer. It therefore means that the accused was orally made aware of all relevant evidence gathered against him and likely to be used at trial. The point has already been addressed in my two previous rulings dated 25.05.22 and 23.02.23 (as rectified) and the same reasoning is applied. To buttress the point, the following extract from **DPP v Lagesse & Ors 2018 SCJ 257** is reproduced:

Where there is a complaint, it would de facto imply that the suspect has to be confronted with that complaint; and if there were additional incriminating evidence gathered during the course of the enquiry those should be put to the suspect.

Confronting the suspect with any additional incriminating evidence invariably means that it has to be properly recorded in a way that gives him the opportunity to respond to each and every piece of evidence. The accused might deny, admit, give an explanation, or decide to remain silent in the face of each piece of evidence. Such would be rendered impossible if the whole case of the prosecution is read to him in monolithic style. All the defence statements have been recorded comprehensively regarding the examination of the accused's mobile phone. Barely no other fact or circumstance has been recorded in writing.

I find that the accused's constitutional right of silence is likely to be breached if the evidence in question is adduced. Since such breach is equally likely to compromise the fairness of trial in this case, the prejudicial effect of the evidence outweighs its probative value. I thus hold that the conversation which took place between the accused and the witness no.3 is inadmissible.

P K Rangasamy
Magistrate of the Intermediate Court
18.01.24