ICAC v Joelle Adam & Anor (2nd Ruling)

2024 INT 15

CN: 19/2022

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

1. **Joelle Nadine Adam**
2. **Dharamjay Luchmun**

RULING

Accused no.1 is being prosecuted for the offence of Treating of Public Official in breach of section 14 of the Prevention of Corruption Act 2002 (POCA), coupled with section 44(1)(b) of the Interpretation and General Clauses Act (IGCA) under count 1 of the Information. Accused no.2 is being prosecuted for the offence of Receiving Gift for a Corrupt Purpose under count 2 in breach of section 15(a) and 83 of POCA.

Accused no.1 was represented by Mrs A. Jhowry and accused no.2 by Mr G. Glover SC together with Mr Collimalay.

During the course of trial, documentary evidence was produced as part of the prosecution's case, namely **Docs A, B, B1, B2, C, D, E, F, F1, G, H** and **J**. Witness no.1, Investigator Bhatoo, the main enquiring officer, had produced the above documents. Whilst under examination in chief, he adduced evidence to explain the scope and purpose of the said documents. The objection raised on behalf of the accused no.1, was to the effect that the witness no.1 cannot be asked to comment on the above documents if it is for the purpose of eliciting evidence against the accused no.1. The

reason, as proposed by the defence, is that the documents were not confronted to the accused no.1 at enquiry stage, and will thus breach the accused's right to silence at trial. As submitted, the same principle would apply to any document yet to be produced by the prosecution.

The rebuttal from the prosecution is that the documents in question were not individually confronted to the accused no.1, as she exercised her right of silence and expressed her wish not to see the said documents. On the other hand, the bulk of the documents were laid on the table, in the open and in the presence of the accused no.1. Doc A is the defence statement of the accused no.1 and the relevant extract is as follows:

Q1: You are now being informed that there is a list of questions that has been prepared for this interrogation and you are now being shown the list of questions. What do you have to say?

A1: As I stated, I exercise my right of silence and I will not see the list of questions and nor be put to any questions or documents otherwise, I will exercise my right to leave the interview room.

It is clear and undisputed that the accused no.1 chose to exercise her right of silence, in presence of her legal representative, during the recording of the defence statement. However, the right to remain silent has to be confined to its well-defined ambit. It is the right for the suspect not to be compelled to answer questions during an interrogation by a person of authority. It does not extend to a right which permits the suspect to refuse to hear any question or be informed of any documentary evidence gathered during enquiry.

The right of silence, once viewed as sacrosanct, rides on the principle that the prosecution bears the burden of proof in criminal trials. It also acts as the umbrella, sheltering safeguards such as the right against self-incrimination. How important it may be, it cannot result to situations where the questioning, or the investigative process of informing the suspect of incriminating evidence, is effectively ended as soon as the right of silence is exercised.

The Supreme Court explicitly held the following in **State v Bundhun 2006 SCJ 254**:

In my view the right to silence, which is a natural corollary of the rule that the prosecution bears the burden of proof in a criminal trial, does not carry with it at investigation stage a subsidiary right to be completely spared from questioning once the decision to exercise that right has been communicated to

the police. A reasonable number of questions may still be put to the suspect, and his response –be it mere silence –noted. However, care must be taken by the police, once a suspect has indicated an intention to exercise his right to silence, not to indulge in an oppressive form of questioning –as opposed to simply putting questions and recording the response –as the suspect's right to silence would then be infringed.

The constitutional right of silence is neither absolute nor unqualified in terms of the effect it might carry if exercised improperly. Such effect or inference can only be drawn through the judicial process, not the investigative one.

If the investigative officer is absolved from making a reasonably detailed confrontation of its case to the suspect, as soon as the suspect exercises his or her right of silence, the Court will be unable to assess its effect in the face of incriminating evidence. Any adverse inference can only be drawn with regards to each piece of incriminating evidence, since each will differ in weight. For instance, an accused party may come up with a defence in Court for the first time when a particular piece evidence is adduced by the prosecution. No adverse inference can be made, unless the said accused was confronted at enquiry stage with such evidence and elected to remain silent.

The following extract is cited from **Bundhun (supra)**: *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 SCJ30]****; 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 Bhaugeerutty [2006 SCJ 158]****.*

I therefore find that, despite the exercise of the right of silence, the prosecution is not absolved from confronting the accused at enquiry stage with all incriminating evidence available, in a way which would enable the said accused to respond to each piece of evidence. This would normally entail the recording of the confrontation in writing after having been cautioned.

A failure to confront the accused with such evidence in an appropriate way may amount to a constitutional breach. However, such breach may not necessarily lead to the inadmissibility of such evidence, since the test of weighing the probative value of the evidence against its prejudicial effect will have to be carried out, vide **The State v Peter Wayne Roberts CS 16/15; The State v Rajcoomar Seegolam & Anor**

CS 4/17; Grandcourt v The State 2018 SCJ 56; DPP v Lagesse & Ors 2018 SCJ 257; The State v Marie Francois Bernard Maigrot CS 6/12.

Factual Assessment

The following documents have been commented upon by the witness no.1; **D, E, F, F1, G, H, J** and another document, not yet produced, which relates to a letter of award regarding a contract between the Ministry of Health and the accused no.1's company. It has been proposed by the prosecution that the above documents will be used against accused no.1 and are therefore sufficiently probative. The prejudicial effect as argued by the defence, is the fact that the accused no.1 was unaware of the said documents and she would be compelled to give evidence under oath to rebut same.

The starting point is the defence statement of the accused no.1, **Doc A**. The accused no.1 was informed that Chemtech *'in about the month of October 2014, offered and paid an air ticket for Dr Dharamjay Luchmun at Atom Travel Service for the sum of Rs40,100 to travel from Mauritius to Paris*'. **Doc E** shows the air ticket for the same amount from "Chemtech' to the accused no.2. Furthermore, '*1570 Euros was also paid as regards his registration at IRCAD Institute in France'*, as per the defence statement, which pertains to part of **Doc J**. The accused was also informed of the award of tender from the Ministry of Health and Quality of Life bearing the same reference as that found at **Doc D**. It is further stated at Doc A that the accused was shown documents obtained during the course of the investigation.

Pursuant to my findings above, the accused had to be confronted with the evidence in a way which would have permitted her to respond adequately to the incriminating element if she wished to do so. A general statement that documents were shown to her without qualifying which document, along with a corresponding description does not satisfy the above procedural requirements. On the other hand, a brief description of the content of **Docs D, E** and **J** was made aware to the accused at enquiry stage. It may be argued that the documents themselves were shown to the accused. However, the accused was informed of the nature of some pieces of evidence gathered against her. I am alive to the fact that those documents may contain additional information which was not confronted to the accused as recorded in her defence statement. Nevertheless, since she was aware of the tenor of those three documents even not to their full extent, the prejudicial effect does not outweigh the probative value of those documents.

I therefore hold that the documents marked as **D, E** and **J** are admissible against the accused no.1. Since the documents per se were not shown to the accused, such flaw

can only go to the weight of the said documents against accused no.1. By contrast, Docs **F, F1, G** and **H** are not admissible for the case against accused no.1. Similarly, the same principle applies to the document proposed to be produced by the prosecution. As its content or nature thereof has not been alluded to in the defence statement of accused no.1, the said document is equally inadmissible.

P K Rangasamy
Magistrate of the Intermediate Court
30.01.24