

SBM BANK (MAURITIUS) LTD v THE DIRECTOR OF PUBLIC PROSECUTIONS

2022 SCJ 384

Record No. 123518

THE SUPREME COURT OF MAURITIUS

In the matter of:-

SBM Bank (Mauritius) Ltd

Applicant

v

The Director of Public Prosecutions

Respondent

In the presence of:

Independent Commission Against Corruption

Co-Respondent

RULING

The applicant was found guilty of an offence under Sections 5(1) and (8) of the Financial Intelligence and Anti Money Laundering and on 15th April 2022 it was sentenced to pay a fine of Rs 60,000 and costs.

The applicant has appealed against its conviction and sentence. The appeal was lodged within the mandatory delay and directed against the Independent Commission Against Corruption (ICAC) as the sole respondent. The present application dated 24th August 2022 is by way of motion and affidavit for leave to join the Director of Public Prosecutions (DPP) as a party to the appeal bearing Cause Number 3/20/22 outside the mandatory delay.

The ICAC, unlike the DPP, is resisting the present motion.

Learned Counsel for ICAC has submitted that it is well settled that the DPP should be put into cause in a criminal appeal involving a conviction of the appellant. She relied mostly on the cases of **Ameerally N. v The Municipal Council of Beau Bassin-Rose-Hill** [\[2016 SCJ 373\]](#) and **Sicharam K v Independent Commission Against Corruption** [\[2011 SCJ 375\]](#) to argue that such joinder can only be made within the prescribed delay and the failure to do so is fatal. She also submitted that the non-joinder of the DPP within the statutory delay is not a mere procedural defect which the court can cure by exercising its discretion either in the interest of justice or because no prejudice will be caused to ICAC.

Learned Counsel for ICAC also stressed on the fact that in the cases cited the Supreme Court never stated that it was refusing the joinder outside delay because the DPP had objected but rather because the failure to put into cause the DPP within the requisite delay is akin to no proper appeal and not a mere procedural defect.

Learned Counsel for the applicant submitted that the court can allow such joinder outside the prescribed delay. He submitted that the present matter should be distinguished from all the other decided cases on that specific point in that, here, the DPP is agreeable to the joinder. He also argued that since the DPP holds constitutional prosecutorial powers, the ICAC cannot object to the present motion. He submitted that we should exercise our discretion and allow the joinder at this stage and he has relied on the case of **S Ramtohol v The State** [\[1996 SCJ 356\]](#) in support of his arguments.

In a nutshell, learned Counsel for the DPP submitted that ICAC has no legal right to object to the present motion as the DPP has no objection to the joinder outside delay.

We have considered the motion paper and affidavit as well as the submissions and authorities filed.

At the very outset, we need to place on record that it is well settled that the DPP needs to be put as a party in an appeal against conviction (*vide* **Sicharam (supra)** and **Soodhoo D. v The Independent Commission Against Corruption** [\[2016 SCJ 57\]](#)). As such the averment of the applicant in paragraph 8 of the affidavit that since ICAC had conducted the case against the appellant, it "*is deemed to have subrogated itself into the legal rights of the Respondent*" is untenable. Suffice it to quote the court in **Natam Limited v Ministry of Ocean Economy, Marine Resources, Fisheries and Shipping** [\[2019 SCJ 205\]](#) on the matter namely:

*“Criminal proceedings brought by various Government departments ...are so brought by these bodies acting under the delegated powers and control of the DPP under section 72(4) of the Constitution (vide **Bismillah Garments Ltd. v The State** [1995 SCJ 216] and **Rubendranath Holding Ltd v The State** [2009 SCJ 289]). It cannot, however, be argued that because of this delegation of powers, ... the requirement of joining the DPP either by himself or through the State as a party to the appeal need not be fulfilled.”*

As far as the arguments of the DPP are concerned, it is a fact that the ICAC has been made as a party in this application and as such it is fully entitled to take the stand it deems fit. It would be unreasonable for us to endorse the submissions of the DPP and hold that ICAC is acting *ultra vires* in objecting to the present motion. In this respect, it is noteworthy that in the case of **Foondun M.J. v The State and Ors** [2018 SCJ 298], ICAC and the DPP took different stands at the level of appeal.

We are alive to the cases referred to in **Ameerally (supra)** where it was consistently held that failure to put the DPP as a party in an appeal such as the present one, is fatal to the appeal. In **Sicharam (supra)** the court held the following:

“In the present case, the appellant has not joined the Director of Public Prosecutions either by himself or through the State as a respondent to the appeal against his conviction. In any event such joinder can only be done within the mandatory timeframe provided under section 92 of the Intermediate and District Courts (Criminal Jurisdiction) Act. This the appellant has failed to do...”; and

in **Soodhooa (supra)** the court held:

“...We are further unable to agree with learned Counsel for the appellant who argued that the failure to join the DPP was a mere procedural defect and the appeal should be heard in the interest of justice...”.

Having said so, we need to place on record that in all these cases, it was at the stage of the hearing of the appeal that preliminary objections were taken that the DPP should have been joined as a party and the courts held that the non-joinder of the DPP is fatal to the appeals.

It is only in **Ameerally(supra)** that there was an application by way of motion and affidavit for leave to join the Director of Public Prosecutions (DPP) as a party to the appeal and to effect service of the amended Notice of Appeal and the grounds of appeal outside the

mandatory delay like in our case. In that case, however, the DPP objected to the motion and submitted that the non-joinder of the DPP in an appeal against conviction within the prescribed delay is not a mere procedural defect but goes to the very root of the appeal. The court endorsed the principle in **Sicharam (supra)** and set aside the motion.

We are of the view that the present application should be distinguished from that of **Ameerally (supra)** in that here the DPP is not objecting to the joinder outside the prescribed delay. As such, we are not adopting the reasoning of the court in **Ameerally (supra)**. Instead, we need to decide this application on its own merits.

In this respect, we find that the reasoning adopted by the learned Judges in **Ramtohul (supra)** is most pertinent. The issue in that case was whether the court retained a discretion to grant leave to allow an appeal to proceed outside the prescribed delay. The court held *inter alia*:

(.....)

- “(3) *there are, however, no closed categories of cases for the exercise of the Court’s discretion, and the Court may exceptionally allow an applicant who has appealed outside delay due to his own laches or that of his attorney where there is, in the Court’s view, sufficient justification for such exercise of discretion. We totally endorse, in this connection, the wise words of the learned Judges (Glover ACJ and Espitalier Noel J.) in Carpenen v Lakhabhay [1986 MR 176] that “Time limits prescribed in procedural matters are not always mandatory to the point of thwarting the course of justice”*
- (4) *the Court, in its discretion, may consider where appropriate the circumstances giving rise to the proposed grounds of appeal and consider whether, having regard to their arguability, it should allow the appeal to be entertained out of time, whilst guarding itself, of course, from making any pronouncements, in advance, on any ground of appeals.” (sic)*

It is our considered opinion that the same reasoning should be adopted in the present matter. The court in **Ramtohul (supra)** made it clear that “...delays are to be strictly observed, such that the Courts would exercise their discretion only in exceptional cases, the categories of which are not however really closed” (Underlining is ours). As such there is nothing preventing us to exercise our discretion in the present circumstances to allow the joinder of the DPP outside delay.

In our case, it is undeniable that the applicant has not even attempted to explain in its affidavit why the DPP was not put as a party at the initial stage. It was an omission on the part of the applicant’s legal advisers, whose laches, will not held against the applicant. We

have carefully considered the grounds of appeal annexed to the affidavit and we find that they raise serious issues which need to be considered by the court of appeal. Furthermore, the DPP has indicated that he has no objection to the application and to be joined as respondent in the appeal proceedings.

In these circumstances, we hold that this is a fit and proper case for us to exercise our discretion and to grant the application in the interests of justice, bearing in mind that no prejudice will be caused to the ICAC.

We accordingly grant the applicant leave to:

- (a) amend the Notice of Appeal by adding the respondent in the present case as a party in the appeal proceedings, as respondent No. 1; and
- (b) serve the amended Notice of Appeal together with the grounds of appeal on the respondent in the present case, within a delay to be fixed by the court.

S.B.A. Hamuth-Laulloo
Judge

C. Green-Jokhoo
Judge

16 November 2022

Ruling delivered by Hon. S.B.A. Hamuth-Laulloo, Judge

For Applicant:

Mr A. Robert, SA

Mr M. King Fat, of Counsel together with Mrs C. Desvaux de Marigny, Ms J. Boodram and Mr S. Dookhee, of Counsel

For Respondent:

Mr J. Muneesamy, Principal State Counsel together with Mr I. Deeljore, Temporary State Counsel

For Co-Respondent: Ms B.M. Chatoo, Attorney-at-Law
Mrs A. Rangasamy-Parsooramen, of Counsel