The Independent Commission against Corruption v Ochatoya S - Ruling

2025 INT 89

IN THE INTERMEDIATE COURT OF MAURITIUS
Financial Crimes Division

CN : FR/L127/2020

In the matter of:

The Independent Commission Against Corruption

V

Swaley OCHATOYA

RULING

The accused stands charged in respect of 15 counts for conflict of interests in breach of Section 13(1) and (3) of the then Prevention of Corruption Act (The POCA)[1].

He pleaded not guilty to the charges and was represented by Mr S. Mohamed and now Mr Modhekhan. The prosecution is represented by Mrs Rangasamy.

For certain administrative reason, the case had to be restarted anew before the present bench, following which the defence moved that the proceedings be stayed against the Accused for abuse of process on the following grounds, which should be read comprehensively:

1. Delay, since the offences date back to 2011;
2. The accused is prejudiced in that the defence has been divulged when the matter started before another bench in 2021 and in an adversarial system, starting a case anew nullifies the principle of criminal proceedings;
3. It gives an undue advantage to the prosecution, a second bite at the cherry; since 2021 during the trial, fundamental flaws and procurement process which has a direct bearing on the mens rea required, can now be addressed by witnesses for the prosecution, thus causing immense prejudice to the defence to conduct its case.
4. The judicial administration of the court cannot have priority over the constitutional rights of the accused to a fair trial and the method of moving magistrates at the end of trial cannot and should not happen.

[1] This Act has been repealed by the Financial Crimes Commission Act 2023 on 29th March 2024 and by virtue of the same Act, the Financial Crimes Commission has now replaced the ICAC.

The prosecution objected to the motion and the matter was argued. Both learned counsels submitted in law.

The defence laid emphasis on grounds 2 and 3 above (which are interlinked), without addressing grounds 1 and 4. They went on to submit that if the prosecution is going to have an unfair advantage, eventually the accused will not benefit from a fair trial prescribed in Section 10 of the Constitution. Since few witnesses have already deposed, the defence strategy has been revealed, enabling the prosecution to adjust its case accordingly. The accused is placed in a disadvantaged position as the prosecution has now a foreknowledge of the defence line of questioning and the areas of attack. Therefore, the retrial tilts the balance in favour of the prosecution, violating the principle of adversarial fairness.

Learned counsel for the defence referred to the case of **R v Maxwell 2010 UKCS 48** where it was held that retrials must not be used as a tactical advantage for the prosecution to strengthen the case unfairly and when the Court is deciding whether the interest of justice require a retrial, the gravity of the alleged offence must be a relevant factor.

On the third ground, he added that the witnesses may modify and refine their testimony, making it harder for the defence to expose inconsistencies. The prosecution can address evidential weaknesses identified during the first trial, unfairly strengthening their case. This unfair advantage contravenes the principle of finality in litigation.

He concluded by saying that the accused's ability to secure a fair hearing has been severely prejudiced due to, firstly, the possibility of fading memories of the witnesses, secondly unavailability of witnesses, preventing key defence challenges leading to the prosecution's ability to strengthen its case unfairly.

Learned Counsel for the prosecution addressed me on the issue of whether the prosecution will be able to cure its case if the matter is restarted and submitted that the trial process is equipped to ensure the defence is not actually prejudiced, referring to **The State v L S Potage 2022 SCJ 220**. She went on to say that the prejudice mentioned by the defence is presumed prejudice and not actual one.

Further considerations that the court should bear in mind before allowing a motion for abuse of process includes whether the delay is justifiable, whether any fault can be attributed to the prosecution or the defence, and whether any serious prejudice to the defence has occurred so that so fair trial can be held.

I have considered the submissions offered by both Learned counsel and authorities filed in support. The record shows that the case had to be started anew following the transfer of the Learned Magistrate, who has already started the case, to the Office of the Director of Public Prosecutions. It is undisputed that certain witnesses for the prosecution have deponed and were subject to cross-examination before the previous bench.

The circumstances where a court can stay proceedings for abuse of process were laid down by Lord Roger Ormrod in **R V Derby Crown Court ex p. Brooks (1984) 80 Cr. App. R. 164**, as follows:

1. *If the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or*

2. *On the balance of probability, the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable…The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution.*

He also stated that: "*Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust.*"

The burden which rests on the defence when invoking an abuse of process is one of balance of probabilities.

Even if delay was raised as a ground, it was obviously with regard to the fact that the matter is being restarted some 14 years after the commission of the alleged offences. The parties did not rely on any affidavit, so that the court cannot adjudge firstly whether the delay was pre-trial (the case was lodged in 2019) or trial related and secondly that the delay can be laid on the prosecution, as opposed to the defence.

The reason behind the case being restarted anew is the transfer of magistrate to a new posting. This was an administrative decision taken by the Judicial and Legal Service Commission within its lawful powers.

The fundamental requirement of justice that the Magistrate delivering the verdict must be the same who heard all evidence was laid down in **Sip Heng Wong Ng and Anor v R 1985 MR 142**. The court also held that "*If, after part of the evidence has been heard in a trial in which the accused pleads not guilty, it becomes necessary to replace a Magistrate, there is no alternative but to recommence the trial and recall the evidence so that all the Magistrates hear all the evidence and the submissions made on behalf of the accused*."

Now, when a case is being restarted, there is obviously bound to be some delay and some inconvenience, but delay must be considered in the context of the prevailing system of legal administration. As stated in **R v Horseferry Road Magistrates'Court, Ex p Bennett [1994] 1 A.C. 42**, "*the discretion to stay is not a disciplinary jurisdiction and ought not be exercised in order to express the court's disapproval of official conduct*".

With regard to grounds 2 and 3 put forward for the abuse of process (which echoed the principles laid in **Derby** (Supra)), I need to consider whether the accused will suffer serious prejudice to the extent that no fair trial can be secured. The standard of proof is on a balance of probabilities.

Having considered the evidence on record before me, I find that the threshold of balance of probabilities has not been met with. As stated in **The State v Potage 2022 SCJ 220**: "*Prejudice is not to be presumed; there must be serious and actual prejudice*". Clearly Learned Counsel for the defence only has a presumption that the memories of witnesses will fade and that they might be unavailable. There is absolutely no evidence to that effect.

The principle which underlines the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions: **The State v R. Velvindron 2003 SCJ 319**, where the court (Caunhye J) referred to **DPP v Humphrys [1977] A.C. 1** in the following words:

"…a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene."

He went on to state that *"…the trial process itself is equipped to deal with the bulk of complaints on which applications for stay of proceedings are founded*.", with the result that the issue can be dealt with in the trial itself and the court has the duty to ensure during its process that the defence is not actually prejudiced.

In that respect, even if the prosecution have found out the line of defence of the accused, witnesses who have deposed, are bound by their previous testimony and they can be confronted with any inconsistency or departure and the court shall then assess their credibility accordingly: see **Potage** (Supra).

The threshold of prejudice is high and the Accused must show that his defence would be impaired if the case is restarted. In **State v Bissessur and others 2001 SCJ 50,** the Supreme Court pronounced on the issue of prejudice: *"…any accused party who has the shadow of a criminal case hanging over his head will inevitably suffer some sort of prejudice and the longer the delay the greater would be the prejudice. However, it is not just any prejudice, which will avail an accused party. The court must be satisfied that the accused has suffered trial-related prejudice."*

Even if there is some sort of delay, the court cannot for this reason solely grant a stay of proceedings. The court has to decide whether the defence of the accused has been impaired for that reason or that any appropriate remedy is available for the breach of the reasonable time requirement. Furthermore, the accused has not shown that there is something so unfair and wrong that the court should not allow the prosecutor to proceed with what is in all other respects a regular proceeding: (**R v Crown Court of Norwich, ex p. Belsham**), the more so that the Court is equipped to ensure that the right of the Accused to a fair trial is upheld. On the issue of remedy, the court notes that 12 witnesses are assigned on the list of witnesses and will take the necessary steps to expedite the hearing to the greatest extent practicable. The Court is not of the opinion therefore that the case falls within the category where the accused can no longer be afforded a fair hearing or it would otherwise be unfair to try him.

The Court also needs to consider the public interest issue with regard to the disposition of charges against those who are charged with criminal offences. The concept of public confidence and the need to ensure that justice is delivered on individual cases have to be weighed in the balance. In the present case the court finds that the public interest that the accused should stand trial outweighs any prejudice which might have been caused.

The Court, accordingly, finds that a stay of proceedings is not justified in the present case and sets aside the motion made by Learned Counsel for the defence. The case is to proceed on the merits.

B.R.Jannoo- Jaunbocus (Mrs.)
President
Intermediate Court (Financial Crimes Division)
This 21st March 2025.