FCD CN: 100/2020
CN: 960/18

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

1. **Mohammud Nizam Domah**
2. **Azur Medical Ltd**

RULING

1. Accused no.1 is being prosecuted for the offence of Receiving gift for a corrupt purpose in breach of section 15(a) of the Prevention of Corruption Act 2002 (POCA) under counts 1 and 2 of the Information. Accused no.2 is being prosecuted for the offence of Treating of Public Official in breach of section 14 of POCA. Accused no.2 is the only accused party concerned with the present argument.

2. At the close of the prosecution's case, the defence made the motion for 'no case to answer' on behalf of the accused no.2.

3. A reading of counts 3 and 4 of the Information shows that the accused no.2 has been charged under **section 14 of POCA**, where it has offered air tickets for South Africa and London, whilst having a dealing with the Ministry of Health and Quality of Life (MOHQL), to the accused no.1 who was employed by the MOHQL.

4. The above **section 14** is reproduced as follows: *Any person who, while having dealings with a public body, offers a gratification to a public official who is a member, director or employee of that public body shall commit an offence.*

5. Gratification has been defined at **section 2 of POCA**:

(a) means a gift, reward, discount, premium or other advantage, other than lawful remuneration; and

(b) includes—

(i) a loan, fee or commission consisting of money or of any valuable security or of other property or interest in property of any description;

(ii) the offer of an office, employment or other contract;

(iii) the payment, release or discharge of a loan, obligation or other liability; and

(iv) the payment of inadequate consideration for goods or services;

(c) the offer or promise, whether conditional or unconditional, of a gratification;

6. The air tickets were valued at Rs25,580 and Rs62,339 respectively. Their proprietary and commercial nature would qualify the air tickets as part of the above list at section 2. However, it is settled that gratification cannot be a mere innocuous act, vide **Jhurry v ICAC 2015 SCJ 258**. It has to be placed in the proper context and **Joomeer v The State 2013 SCJ 413** expatiated on the issue; *It is enough that he is abusing his office or position for the purpose of a gift, reward or other such advantages but also for an offer or promise, whether conditional or unconditional of such a gift, reward or other advantage. The opprobrium lies in the abuse or misuse of the office or the position as a public officer for a gratification.*

7. It is not disputed that the air tickets were offered by the accused no.2 to the accused no.1. The contention from the defence was that they were not offered as 'gratification', but as part of an educational training for the use of the equipment supplied by the accused no.2. The case for the prosecution was partly argued along the lines that the accused no.1 was a member of the Bid Evaluation Committee for the Ministry of Health and bids from the accused no.2 were submitted to the said committee. It can be inferred that the accused no.2 had the required knowledge that the accused no.1 was such a member.

8. At **Doc E**, the defence statement of the accused no.2, the relevant questions and answers on the above issue were recorded as follows:

Q4 – How are you aware that Dr M. Nizam Domah, consultant-in-charge at Victoria Hospital, used to sit as a member of the Bid Evaltuation Committee for the Ministry of Health?
A4 – There is only a few specialised interventional cardiologists and I presumed that these persons would be the one present in the Bid Evaluation Committee (BEC) and Dr Domah is one among these specialised persons.
Q5 – Since when are you aware that Dr Domah M. Nizam forms part of the BEC for Ministry of Health?
A5 – It is probable that since Dr Domah is consultant-in-charge for cardiology in Victoria Hospital and if there is a tender regarding cardiology items, the Ministry of Health may call Dr Domah to sit as a member of the BEC.

At Q6, a list of tenders was confronted to the accused no.2 and the latter confirmed that these tenders were awarded to Azur Medical Ltd from the Ministry of Health.

9. The argument was one of no case to answer and it is apposite to set out the law governing the motion. The extracts of **Archbold Criminal Pleading Evidence and Practice 2021 Ed. At para 4-364** on the case of **R v Galbraith** are relevant:

In Galbraith (1981) 73 Cr. App. R. 124, CA, the earlier authorities were reviewed and guidance given as to the proper approach:
"(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty—the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury" (per Lord Lane CJ at p. 127).

The Lord Chief Justice then observed that borderline cases could be left to the discretion of the judge. For an example of the approach of the Court of Appeal

to the exercise of this discretion, see Lesley [1996] 1 Cr. App. R. 39, CA; and Bush [2019] EWCA Crim 29; [2019] Lloyd's Rep. F.C. 210 (where evidence is capable of more than one reasonable interpretation, a trial judge is not obliged to proceed on the basis that every possible adverse inference must be drawn against a defendant, especially where he considers the totality of the evidence points in the opposite direction).

10. It is trite law that at the stage of a submission of no case to answer, there need only be a prima facie case, vide **DPP v Dawoonarain 1994 SCJ 316.** The prosecution is not required to prove beyond reasonable doubt all the elements of the offence, but only prima facie evidence that the accused has committed the offence, vide **DPP v Ebrahim 2017 SCJ 334.**

11. The submission of the defence centred on the premise that the accused no.2 had no knowledge that the accused no.1 was a member of the BEC for the dealing linked with the two air tickets offered to him. The contention is that the defence of good faith has been borne out of the defence statements of the accused no.2 and the prosecution has adduced no evidence to rebut same. The defence statements of the accused no.2 will be considered further down. I propose to first deal with the applicability of the defence of good faith in relation to a corruption offence, namely section 14 of POCA. The case of **Jugnauth v ICAC & Ors 2016 SCJ 187** was referred to the court. Extracts were quoted during the argument and one of the successful grounds of appeal for the appellant was the finding that mens rea was an essential element of the offence under section 13 of POCA. There is no dispute here that mens rea is an element to be proved by the prosecution for the charge laid in the Information. In **Jugnauth (supra)**, the Supreme Court held that the court of first instance failed to consider the defence of good faith when it found that the offence contained an absolute prohibition to vote or take part. The Supreme Court relied on the Hong Kong court of final appeal decision **Hin Lin Yee and Another v HKSR [2010] HKCHA 11**, which itself concerned a strict liability offence and the following extract is of relevance:

46. Thus, if the only possible consequence of displacing the presumption is that liability must be held to be absolute, such an outcome might be considered unacceptable in a particular case, resulting in a construction which leaves the presumption intact. But in a jurisdiction which allows the alternative of a halfway house between requiring proof of full mens rea on the one hand, and absolute liability on the other, for instance, by recognizing a defence of honest and reasonable belief, the court may much more readily conclude that the

presumption is displaced, holding that the middle position accords with the legislative intent whereas absolute liability does not.

12. The defence of good faith therefore applies whenever the presumption of mens rea has been displaced. This is supported by the cited decisions from other commonwealth jurisdictions. The Supreme Court in **Jugnauth (supra)**, indeed concluded the point as follows:
The presumption of mens rea is, thus, accepted across various Commonwealth jurisdictions and, unless displaced, it is accepted that the prosecution must prove mens rea beyond reasonable doubt. The half-way house issue would arise particularly in case of any displacement of the presumption.

13. On appeal at the Privy Council, the court in **DPP v Jugnauth & Anor 2018 PRV 30**, reached a similar finding as spelt out below:

26. This point may be dealt with briefly. The Supreme Court held and the prosecution concedes that in the case of the offence created by section 13(2) the presumption that mens rea is required is not rebutted and, accordingly, the appropriate mens rea must be proved in relation to each element of the offence. In these circumstances there is no scope for resort to a half-way house principle. As the extracts from the authorities cited by the Supreme Court demonstrate, it is only if the presumption of mens rea is displaced that the question of a possible defence of honest and reasonable mistake of fact can arise. If the prosecution is required to prove mens rea, no purpose is served by such a defence.

14. The presumption of mens rea has not been displaced by the wording of section 14 of POCA, as concurred by the prosecution, and thus a half-way house defence has no reason to exist for such an offence. The prosecution has the burden of proving the full mens rea for the offence charged.

15. A summary of the evidence of the prosecution when taken at its highest is as follows:

a. The accused no.2 had multiple dealings with the Ministry of Health and Quality of Life (MOHQL), vide **Doc E**, **Doc K** and **Doc N**.
b. It is not disputed that the two air tickets were offered to the accused no.1 by the accused no.2.
c. The flights were scheduled for August 2015, **Docs R1** and **R2**.

d. Following bids over a period ranging from 2013 to 2016, the accused no.2 was awarded 11 contracts by the Bid Evaluation Committee (BEC) of the MOHQL, vide **Doc E**.
e. For the above period, the accused no.2 had knowledge that the accused no.1 was a member of the BEC, vide **Doc E**, paragraph 8 above.

16. There is no direct evidence to show that the accused no.2 had the kind of knowledge that the air tickets were offered so that it would be awarded a specific bid or contract. However, the sum total of the evidence on record may infer the required mens rea for the accused no.2 to the incumbent standard at this stage. It is not my finding that mens rea has been proved beyond reasonable doubt, but the evidence is not of so tenuous character that no reasonable court could convict. Furthermore, no proper submission has been offered on the issue of whether a link between the gratification and a specific dealing is required to be proved under section 14 of POCA. The said section has been worded in broad terms which might give rise to more than one interpretation.

17. The accused no.2 is a corporate body. The identification and attribution principles will consequently apply. The representative of the company in court is the one who had put up defence statements on behalf of the accused company. He answered questions during the enquiry as the directing mind and will of the company. He was aware that air tickets were given by the company to the accused no.1. Whether the above principles have been satisfied to the required standard for conviction can only be decided at the close of trial. The circumstances are sufficient to create prima facie evidence on the issue.

18. For these reasons, the prosecution has adduced enough evidence to establish a prima facie case. I hold that the case is to proceed to trial.

P K Rangasamy
Magistrate of the Intermediate Court
16.06.25