IN THE INTERMEDIATE COURT OF MAURITIUS
Financial Crimes Division

CN : FR/L5/2024

In the matter of:

The Independent Commission Against Corruption

V

Girdharry KHURUN

RULING

The accused stands charged in respect of 2 counts with wilfully, unlawfully and criminally, whilst being a public official, making use of his position for a gratification for himself, in breach of sections 7 and 83 of the Prevention of Corruption Act.

He pleaded not guilty to the charges and he is represented by Mr R. Samputh.

Mr Ponen, appearing for the prosecution is moving that the statement of witness 6, Mr Backus, be produced in his absence, pursuant to **Section 188C (2) (b) of the Courts Act** as he is "*unfit to be a witness because of his ...mental condition*". He laid down the basis with regard to the relevance of the evidence of witness 6. It can be gathered from the record that after the completion of the enquiry, the Director of Public Prosecutions gave immunity to witness 6 to give evidence in the present matter in relation to Count 1. The statement in question was recorded from him on the 13th of May 2016.

The matter was argued for the purpose of determining whether the conditions in section 188C are met with, that is, whether witness 6 is unfit to be a witness due to his mental condition. Witness 6 was examined by a medical board on the 17th of June 2025, which board consisted of a neurosurgeon and two psychiatrists and the report thereof has been made part of the record.

According to the prosecution, the Court is here concerned with the first stage of the process which relates to the admissibility of the statement (as opposed to the weight) and to so determine, we have to look at whether the conditions subsection 1 and 2 are satisfied. The safeguards in subsections 3 and 4 come into operation after the close of the prosecution case. In light of the evidence of the doctors who deposed, the prosecution submits that the two conditions are met with and prays for an order accordingly. In support of his submission, Mr Ponen referred to the case of **Simon Price v The United Kingdom 2017 ECHRR 17.**

The defence submitted that the issue of admissibility is at the Court's discretion. Their concern was that at no point in time the prosecution has convinced the Court that witness 6 was fit and proper at the time he gave his statement. It is their contention that the law does not mention whether it is at the time when the statement was recorded or whether when he was deposing in

court. They are therefore objecting to the statement being produced since there is no confirmation that at the time he gave his statement, witness 6 had the appropriate mental condition.

Section 188C of the Courts Act reads as follows:

(1) In any criminal proceedings, a statement made out of Court shall be admissible as evidence, with leave of the Court, of any matter stated when –

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;
(b) the person who made the statement is identified to the Court's satisfaction; and
(c)one of the 5 conditions specified in subsection (2) is satisfied.

(2) The conditions referred to in subsection (1)(c) are that the person who made the statement –

(a)is dead;
*(b) **is unfit to be a witness because of his** bodily or **mental condition**;*
(c) is outside Mauritius and it is not reasonably practicable to secure his attendance;
(d) cannot be found although such steps as is reasonably practicable to take to find him have been undertaken; or
(e) through fear, does not give or does not continue to give oral evidence in the proceedings, either at all or in connection with the subject matter of the statement.

(3) Where a state-ment is admitted in evidence under subsection (1) any evidence which, if that person had been called as a witness, could have been admissible for the purpose of impeaching or supporting his credibility, shall be admissible for that purpose.

(4) In assessing the weight, if any, to be attached to a statement admitted in evidence under subsection (1), the Court shall have regard to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

This section comes as an exception to the hearsay rule. It was initially provided for criminal proceedings under the Piracy and Maritime Violence Act and for a financial crime offence, but later the Parliament extended its scope to all cases. But this is no blanket authority given to the prosecution to produce the statement of any witness who cannot attend court. The conditions mentioned in subsections (1) and (2) have to be first met with. The safeguards are provided in subsection (3) and (4) pertaining to admissibility of evidence in respect of the credibility of the witness and the weight to be attached to such statement admitted in evidence before drawing any inference as its accuracy.

The principles to be applied when a witness does not attend a trial were clarified in the case of **Simon Price v The United Kingdom** (Supra) at page 24, referring to **Al-Khawaja and Tahery v The United Kingdom 54 EHRR 23** in the following:

i. *The Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance.*

ii. *Typical reasons for non-attendance are, as in the case of Al-Khawaja and Tahery (cited above), the death of the witness or the fear of retaliation. There are, however, other legitimate reasons why a witness may not attend trial.*

iii. *When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort.*

iv. *The admission as evidence of statements of absent witnesses results in a potential disadvantage for the defendant, who, in principle, in a criminal trial should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings.*

v. *According to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted.*

vi. *In this context, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other incriminating evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive.*

vii. *However, as Article 6 § 3 of the Convention should be interpreted in the context of an overall examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner.*

viii. *In particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.*

However, although it remained a very important factor weighing in the balance when assessing the overall fairness, the absence of good reason for the non-attendance of a witness could not on its own, be conclusive of the lack of fairness if a trial: **Schatschaschwili v. Germany [GC], no. 9154/10, 15 December 2015.**

Bearing in mind the above, I need to assess whether witness 6 can be called and if not, whether his out of court statement can be produced. There is undisputed evidence from Dr Krumtally, neurosurgeon and Dr Taukoor, psychiatrist, following their recent examination of the witness, that he is not fit to stand trial in Court. Witness 6 met with a road traffic accident in 2018 in which he sustained a traumatic brain injury resulting in mood disorder and dementia. He has significant cognitive deficits as evidenced by impairment in memory and poor orientation which make it difficult for the witness to be questioned.

It results that there is sufficient evidence relating to his inability to be called in Court as a witness given his mental condition. This mental condition is the result of a road accident which occurred in 2018, following which he has a history of forgetfulness. The issue raised by Learned Counsel for the defence with regard to state of health when the statement was recorded in 2016 cannot be entertained since the question was not raised with the officer who recorded his statement and no evidence is forthcoming to that effect. Dr Krumtally confirmed that witness 6 was not following any treatment prior to 2018 save for gastroenteritis. Furthermore, this is not an issue which was previously raised and no evidence to the contrary have been ushered, making the witness a competent one.

With regard to the second limb of the defence's submission, Section 188C which has as title "*Admissibility of out of Court statement in criminal proceedings where the maker is unavailable*" clearly comes into operation when a person cannot attend court to give oral evidence in proceedings as per his previous statement given to the police. The unfitness of the person relates to his attendance in Court to depose and not to the time when he gave his statement, in which case he would not have been qualified as a competent witness.

Bearing in mind that a witness should as a general rule give evidence during the trial, I need to consider whether his statement would be of such importance as to be likely to be determinative of the outcome of the case. Of course, the weight to be attached will depend on counter balancing factors and an exercise to be done at the end of the trial. The particulars as laid down in Count 1 is that as a public officer, he unlawfully made use of his position as a vehicle examiner to issue a favorable Vehicle Examination Report without undergoing any physical vehicle examination and obtained Rs 200 from witness 6. The statement of witness 6 properly relates to this payment.

The Accused has denied the charge but the weight to be attached to the statement will depend on the overall assessment of the evidence on record when determining the fairness of the proceedings. The Court will have to assess whether the untested evidence of witness 6 is supported by other incriminating evidence and the assessment of whether it is decisive depends on the strength of any supportive evidence. If the other incriminating evidence is strong, it is less likely that the evidence of witness 6 will be treated as decisive.

In view of the fact that the prosecution has been able to sustain that witness 6 is unfit to be a witness because of his mental condition and have satisfied all conditions in Section 188C (1) and (2), I find that the out of court statement of witness 6 is admissible.

B.R.Jannoo- Jaunbocus (Mrs.)
President
Intermediate Court (Financial Crimes Division)
This 11th September 2025.