

**HA YEUNG CHIN YING T S v THE INDEPENDENT COMMISSION AGAINST
CORRUPTION & ANOR**

**2003 SCJ 64
2003 MR 36**

Record No. 80757

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Chin Ying T. S. Ha Yeung

Petitioner

v.

- 1. The Independent Commission Against Corruption**
- 2. The Commissioner of Police**

Respondents

In the presence of:

Ah Sien Ha Yeung, also known as Donald Ha Yeung

Co-Respondent

JUDGMENT

Upon a complaint being made to me by the petitioner that her husband, the co-respondent, was being illegally detained by the second respondent (the Commissioner of Police) following an unlawful arrest by the first respondent (The Independent Commission against Corruption), I ordered that a writ of *habeas corpus* be issued upon the second respondent enjoining him to bring the co-respondent to this Court and I also ordered each of the two respondents to depute a representative to enlighten the Court in connection with the arrest and detention, respectively, of the co-respondent.

After conducting an examination, in accordance with section 188 of the Criminal Procedure Act, in view of determining whether the cause of the detention is just or not, I have found the following essential facts to be well established:

- (1) The co-respondent was arrested by S.P. Hurrychurn with the assistance of other police officers who, like S.P. Hurrychurn himself, are officers designated by the second respondent, under section 24(5)(b) of The Prevention of Corruption Act 2002 (“the Act”) to lend their services to the first respondent.
- (2) S.P. Hurrychurn has, moreover, been appointed by the Commission under section 29 of the Act to perform the functions of the Director of the Corruption Investigation division.
- (3) The arrest was effected upon the co-respondent being charged with an offence of money laundering under section 3 of the Money Laundering Act, an offence which was being investigated by the first respondent by virtue of its function under section 20(1) (o) of the Act upon a referral by the Financial Intelligence Unit.

Mrs. G. Manna, the Chief Legal Adviser of the first respondent, who appeared for the latter, has conceded that the first respondent does not have, by itself, any other powers of arrest than those provided in section 53 of the Act by virtue of which the Commissioner of the first respondent may direct one of its officers in writing to arrest a person where he is satisfied that the latter, who may assist him in his investigation, is about to leave Mauritius, has interfered with a potential witness or intends to destroy

documentary evidence which is in his possession and which he has refused to give to the Commission. Whilst Mrs. Manna further concedes that the arrest of the co-respondent was not effected in virtue of the powers under section 53 of the Act, she has however submitted that the arrest was lawfully effected by virtue of the powers of arrest of S.P. Hurrichurn and the other police officers who assisted him inasmuch as they had retained their powers of arrest as police officers whilst working for the first respondent and the latter could avail itself of those powers. She referred, in support of her argument, to the judgment of this Court in *Deerpalsing v The Director of the Economic Crime Office* [\[2001 SCJ 225\]](#).

Mr. I. Maghooa, who appeared as Counsel for the second respondent and indicated that the latter would abide by the decision of the Court, expressed a similar view to that of Mrs. Manna and similarly relied on the judgment of *Deerpalsing (supra)*.

Mr. A. Domingue, Counsel for the petitioner and the co-respondent, submitted for his part that the arrest was illegal. In his contention, S.P. Hurrichurn and the other police officers who effected the arrest were acting as officers of the first respondent upon whom the legislator had conferred no other powers of arrest than those set out in section 53 of the Act. He referred to the relevant provisions of the Act relating to the officers of the Commission and laid emphasis on the requirement that an officer of the first respondent must disclose his assets under section 25 of the Act, and make an oath of secrecy under section 81 of the Act. He also pointed out that the salaries and conditions of employment of an officer of the first respondent are, under section 24(3) of the Act,

established by the first respondent with the approval of the Parliamentary Committee set up under section 59 of the Act.

Although evidence received in the course of the examination conducted by this Court in the present case would tend to indicate that all police officers whose services are used by the first respondent are in practice treated as “officers” within the meaning of the Act - this being the reason why, for instance, they are required to take the oath of secrecy required to be taken by every “officer” by section 81 of the Act – I find it doubtful whether all officers whose services are lent to the first respondent under section 24(5)(b) of the Act actually become “officers” of the first respondent within the meaning of the Act. The word “officer” as used in the Act, means, by virtue of sect. 2 of the Act, “*an officer appointed under section 24*” (the underlining is mine) and “*includes the Director of the Corruption Investigation Division, the Director of the Corruption Prevention and Education Division and the Chief Legal Adviser.*” While S.P. Hurrychurn is no doubt an “officer” within the meaning of the Act, it is questionable, in my view, whether any other police officers whose services are, by virtue of section 24(5)(b) of the Act, used by the first respondent upon designation by the second respondent can be said to have been “appointed” under that section. Arguably, only the officers who are employed under subsection (1) of section 24 may be said to have been “appointed” as such under that section. It is to be noted that the Commission may, by way of exception to the rule that it will normally discharge its functions by employing officers, (i.e. without the mechanism of employing an officer as such), make use of the services of a police officer or other public officer designated for that purpose.

Be that as it may, inasmuch as the arrest of the co-respondent was effected by S.P. Hurrychurn, an officer of the first respondent within the meaning of the Act, the crucial question is whether he has retained his powers of arrest as a police officer despite being appointed as an officer of the first respondent.

In *Deerpalsing v The Director of the Economic Crime Office (supra)* this Court, on the occasion of an application for Judicial Review, considered a similar question which had arisen as to whether a police officer designated under the Economic Crime and Anti Money Laundering Act (now repealed) to conduct investigations for the then Director of the Economic Crime Office retained his duties and powers as a member of the police force empowering him, *inter alia*, to cause a provisional information to be lodged, a power conferred by section 9(1)(j) of the Police Act. The learned Judges of this Court in that case replied to that question in the affirmative. Mr. Domingue has submitted that this case is no appropriate authority in relation to the question to be decided in the present case inasmuch as it dealt with the situation under a different Act, now repealed, and was concerned with the power to lodge a provisional information, not the power of arrest. After anxious consideration I am unable to agree with him on that point as this distinction appears to me to be without a difference. It matters not that the judgment in *Deerpalsing (supra)* relates to another Act, nor does it matter that it relates to the power to lodge a provisional information. What matters is that faced with a legal situation analogous to that in the present case, the reasoning of the learned Judges of this Court in that case was to the effect that the police officer designated to conduct investigations for the Director of the Economic Crime Office was empowered to lodge a provisional

information **because he retained his powers and duties as a member of the police force.**

In my view, although S.P. Hurrychurn has been appointed by the first respondent to be the director of one of its specific divisions and has been required to take the oath of secrecy and to make a declaration of his assets he still retains his powers and duties as a police officer, including powers of arrest inasmuch as he is still a member of the police force, whence the title "S.P." before his name.

However, I tend to agree with Mr. Domingue that the legislator appears to have intended to restrict the powers of arrest of the first respondent to those specified in section 53 of the Act, in other words to those necessary for the performance of its investigatory duties under the Act. It is indeed significant that the select committee on Fraud and Corruption, under the Chairmanship of Mr. Ivan Collendavelloo, wrote, at paragraph 730 of its report containing its recommendations which were generally implemented in the provisions of the Act:

"We do not believe that it is necessary for ICAC to have any power of arrest. However, in cases of extreme urgency (such as a suspect being about to abscond from Mauritius), such power of arrest shall be exercised only under the authority of a Judge and after full disclosure of all the facts that make it necessary to effect the arrest."

Besides, it appears to me that if the legislator had intended to give to the first respondent any further powers of arrest than those provided for in section 53 of the Act, it would have explicitly done so. However, it appears to have escaped the legislator's mind that the provision in section 24(5) of the Act would provide to the first respondent a means of availing itself, through the backdoor, as it were, of certain powers of arrest by using the borrowed services of police officers. The first respondent may well be viewed as wishing to take advantage of a loophole in the law but its use of the powers of arrest of police officers who have been designated to lend their services is not, in my view, in breach of the law as it presently stands. Parliament may well wish to consider whether this state of affairs should continue, whether legislation should be introduced to curtail the powers of arrest of the first respondent or whether legislation should in fact be introduced to provide more explicitly for the powers of arrest of the first respondent. But so long as the law remains as it is, I am of the view that arrests effected by police officers attached to the first respondent cannot be held to be unlawful as such.

I accordingly hold that neither the arrest nor the detention of the co-respondent is unlawful. The co-respondent shall accordingly remain in the custody of the second respondent and any application to be released, on bail or otherwise, should be made before the District Court of Port Louis where, it would appear, a provisional charge has been lodged or is about to be lodged.

**E. Balancy
Judge**

5 March 2003

**For Petitioner : Mr. Attorney P.A. Nathoo
Mr. A. Domingue, of Counsel**

For 1st Respondent : Mrs. G. Manna, of Counsel

**For 2nd Respondent : Principal State Attorney
Mr. I. Maghooa, Principal State Counsel**

**For Co-Respondent: Mr. Attorney V.R. Luchmaya
Mr. A. Domingue, of Counsel**