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

2003 SCJ 273
2003 MR 228

RECORD NO. 700

IN THE SUPREME COURT OF MAURITIUS
(COURT OF CIVIL APPEAL)

In the matter of:

Chin Ying T.S. Ha Yeung

Appellant

versus

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

Respondents

In the presence of:-

Ah Sien Ha Yeung

Co-Respondent

JUDGMENT

This is an appeal against a decision of the trial Court which found that the arrest and detention of the co-respondent by Superintendent of Police Hurrychurn who was posted to the first respondent was not unlawful.

The appellant, the co-respondent's wife, is challenging this decision on the facts and in law on no fewer than the following 13 grounds –

1. The judgment of the learned Judge is erroneous in point of law as the arresting officer, i.e the Ag. Director of the Corruption and

Investigation Division of the Independent Commission Against Corruption (ICAC) is admittedly an *"officer"* of ICAC and as such does not hold any powers of arrest beyond those conferred upon ICAC under section 53 of the Prevention of Corruption Act 2002 (the *"Act"*).

2. Further the learned Judge has misdirected himself both in law and on the facts when he held that S.P. Hurrychurn was an officer designated by the Commissioner of Police under section 24(5) of the Act as there was no evidence to that effect and he could not, in law, wear two hats and he could not at the same time be an officer of ICAC and an officer designated by the Commissioner of Police to render services to ICAC and or retaining powers of arrest under the Police Act.

3. The learned Judge was wrong to hold that an arrest is permissible and lawful although effected *"through the back door as it were",* by taking advantage of a loophole in the law.

4. The learned Judge having come to the conclusion that the Legislator appears to have intended to restrict the powers of arrest of ICAC under section 53 of the Act, should have held that the provisions of the Act relating to such powers of arrest should have been restrictively construed against ICAC and in favour of the liberty of the citizen.

5. The learned Judge was wrong to have come to the conclusion that the restricted powers of arrest of ICAC under section 53 of the Act have not been explicitly provided for.

6. The learned Judge was wrong to conclude that ICAC could administratively arrogate to itself powers of arrest beyond those expressly conferred by section 53 of the Act.

7. The construction of the Act in the judgment of the Court below is not in accord with the recognised canons of interpretation and/or contrary to section 5 of the Constitution, especially as freedom is the rule and detention is the exception. In view of the *"loophole"* and *"backdoor"* as detected by the learned Judge himself he was wrong to have held that a *"backdoor"* or *"loophole"* empowered a servant of the Commission to deprive a citizen of this country of his personal liberty when such power was admittedly not expressly authorised by law.

8. The construction placed upon section 24(5)(b) of the Act is erroneous in point of law: it is only *for the purpose of the Act* that the Commission may make use of the services of a police officer *designated for that purpose* by the Commissioner of Police, and for no other purpose.

9. Whatever be the designation given to Mr Hurrychurn, be it SP, or PC, or CP; once he is recruited, appointed and employed by the Commission as Acting Director of the Corruption and Investigation Division, his employment is not deemed to be employment in a public office and he cannot, therefore, retain or exercise the powers of arrest conferred under the Police Act when he is bound to report to the Commission on any investigation referred to him and comply with all directives of the Commission in relation to his functions.

10. On the whole of the evidence on record the learned Judge should have held that the Ag. Director of the Corruption Investigation Division has been recruited by the Commission under section 24(5)(a) of the Act; but certainly not a police officer designated by the Commissioner of Police to render services to the Commission for the purposes of the Act.

11. There was no evidence that Mr Hurrychurn, although styled as SP, was a police officer who had been designated by the Commissioner of Police for the purpose of the Commission making use of his services as a police officer for the purposes of the Act. In fact the evidence shows that he is no longer a police officer but only a servant of the Commission.

12. The Ag. Director of the Corruption Investigation Division of ICAC is not vested with and therefore does not and cannot possess any greater powers of arrest than those expressly, but restrictively conferred upon the Commission by section 53(1) of the Act. The learned Judge's construction of the Act is wrong and is contrary to the declared intention of the Legislature, contrary to the policy of the Act and the unambiguous language of the statute.

13. The learned Judge should have directed his mind to the fact that Counsel for the second respondent did not oppose the application (of the co-respondent's wife in the Court below) but chose to abide by the decision of the Court.

We shall deal first with the last ground which can easily be disposed of. The fact that the second respondent stated that it would abide by the decision of the trial Court does not mean that he endorsed the stand taken by the co-respondent's wife. Indeed at the hearing before us, learned Counsel for the second respondent fully supported the decision of the trial Court.

With regard to the factual issues of the case i.e grounds 2,10, and 11 the learned trial Judge found the following facts proved -

(a) the co-respondent was arrested by the Superintendent of Police Hurrychurn with the assistance of other police officers who, like S.P. Hurrychurn, were 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. The arrest of the co-respondent was in connection with an offence of money laundering under section 3 of the Money Laundering Act;

(b) whilst posted to the first respondent, S.P. Hurrychurn was appointed by the latter under section 29 of the Act to act as the Director of the Corruption Investigation Division (*"the acting Director"*).

There is the uncontested evidence on record of the Commissioner of the first respondent to the effect that –

(a) the decision to arrest the co-respondent was taken by S.P. Hurrychurn who was posted to the first respondent, together with other police officers, under the Superintendent's control and was also the acting Director, after consultation with the first respondent; and

(b) S.P. Hurrychurn, together with his other junior police officers, were officers designated by the second respondent under section 24(5)(b) of the Act.

Consequently, we consider that the trial Court was right in its finding of fact that S.P. Hurrychurn was a designated officer under section 24(5)(b) of the Act.

We could have stopped here, in the light of the concession made by learned Counsel for the appellant before us, that a Police Officer designated by the second respondent under section 24(5)(b) of the Act retains his power of arrest, namely that of the junior Police Officers working under the supervision of S.P. Hurrychurn.

We shall press ahead, however, given the substantive points of appeal grounded in law.

Section 24(1) and (5)(b) of the Act reads as follows –

> *"(1) Subject to subsection (2), the Commission shall employ such officers it considers necessary to discharge its functions on such terms and conditions as it thinks fit.*
>
> *(5) Notwithstanding subsection (1), the Commission may –*
> *(a) ……*
>
> *(b) for the purpose of this Act, make use of the services of a police officer or other public officer designated for that purpose by the Commissioner of Police or the Head of the Civil Service, as the case may be"* (the underlining is ours).

We note that the provisions of section 24(5)(b) of the Act are similar to those of section 3(4) of the defunct Economic Crime and Anti-Money Laundering Act which are as follows –

> *"3. (1) ……...*
> (2) *……...*
> *(3) ……*
> (4) *The Director may, for the purposes of conducting any investigation under this Act, use the services of any police officer or other public officer, designated for that purpose by the Commissioner of Police or the Head of the Civil Service, as the case may be"* (the emphasis is again ours).

It is clear from section 24(5)(b) of the Act that Superintendent of Police Hurrychurn has been posted, together with his other junior colleagues, to the first respondent by the second respondent because first and foremost his services as a Police Officer were required for the purposes of the Act i.e to combat corruption and fraud within the meaning of the Act. Admittedly S.P. Hurrychurn was also appointed as the Acting Director under section 29 of the Act, presumably to enable him to offer his services to the first respondent, while enjoying certain privileges attached to the post and exercising additional powers under the Act, but his substantive appointment remains an office in the Police force. Consequently, he remains a Police Officer within the meaning of the Police Act and retains all his functions under that Act, including his powers,

immunities, liabilities and responsibilities under the common law or under any other enactment. Among such powers are notably his powers of arrest, detention and of lodging a provisional information.

No doubt as a Police Officer S.P. Hurrychurn is subject to the orders and directives issued to him by the second respondent under section 6 of the Police Act but when posted to the first respondent and being the acting Director he is also amenable to the directives of the first respondent. There is nothing abnormal about this nor in the fact that he is deemed to be an *"officer"* within section 2 of the Act by virtue of his being both a designated officer for the purposes of section 24(5)(b) of the Act and an acting Director of the first respondent. Being, however, the substantive holder of an office in the Police Force, S.P. Hurrychurn remains subject to the disciplinary control exercised by the Disciplined Forces Service Commission established under section 91 of the Constitution. To all intents and purposes, therefore, S.P. Hurrychurn remains essentially a Police Officer who retains all his powers as a Police Officer under the common law, the Police Act and any other enactment, including his power to arrest, detain and lodge a provisional information – vide **Deerpalsing v The Director of the Economic Crime Office [2001 SCJ 225]**. Moreover, it would be anomalous, in our opinion, for junior Police Officers working under the supervision of S.P. Hurrychurn to retain their powers of Police Officers under the common law, the Police Act or any other enactment while the former forfeits such powers simply because he is also the acting Director.

The advantages of having Police Officers posted at the Serious Fraud Office in England and Wales have been highlighted in the article by Mr John Wood**,** the Director of the Serious Fraud Office in England and Wales - vide **(1989) Crim.L.R. 175,** quoted by learned Counsel for both respondents. At page 177 of that article, we read -

> *"Nevertheless, section 1(4) of the Criminal Justice Act 1987 gives the Director of the Serious Fraud Office the right to conduct an investigation in conjunction with the police, who will exercise any necessary powers such as those of arrest and detention under the Police and Criminal Evidence Act 1984 . . . . . "* (the underlining is ours).

> *"Thus the Serious Fraud Office came into being with a complement of 26 lawyers, 19 accountants and support staff with police officers concerned in the investigation of cases handled by the Office to be located in the same building. The advantages of co-location are obvious: there is ease of access, conferences can be arranged at a moment's notice, everyone involved in the case has access to statements and documents and can see them soon after they are obtained. And perhaps the greatest advantage of working in teams is that when the investigation is complete and the prospective defendants interviewed it should not be long before charges are formulated and papers served. Indeed, the aim is to identify at an early stage those likely to be charged and to have in mind the nature and number of charges well before the investigation is completed. It is also intended that the preparation of the evidence should be an on-going process so that the serving of the papers is not delayed"* (the emphasis is again ours).

We consider that the same observations hold true in the case of the first respondent and those Police Officers posted to the first respondent under section 24(5) (b) of the Act.

The trial Court was right, therefore, in our opinion to consider that the arrest effected by S.P. Hurrychurn was lawful in the circumstances of the case.

We wish to point out, however, that we do not agree with the views and reasoning of the learned trial Judge when he expressed himself in the following terms –

> *"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".

Section 53(1) of the Act states as follows –

"53(1) Where the Commissioner is satisfied that a person who may assist him in his investigation –

(a) is about to leave Mauritius;
(b) has interfered with a potential witness; or
(c) intends to destroy documentary evidence which is in his possession and which he has refused to give to the Commission,

the Commission may, in writing, direct an officer to arrest that person".

The limited powers of arrest of the first respondent specified in section 53 of the Act are, in our opinion, without any derogation from, but in addition to, the undoubted powers of arrest and detention of police officers held under common law, the

Police Act and any other enactment. No doubt the intention of the Legislator was to curtail and rightly so too, in our opinion, the powers of arrest of the Commissioner of the first respondent who significantly is employed on contract and does not hold any constitutional or public office, unlike the Commissioner of Police, in order to safeguard the liberty of the individual while at the same time enabling the second respondent to perform effectively its functions under the Act. How could the first respondent do so if it does not enlist the assistance of Police Officers, make use of them and avail itself of their power of arrest and detention? That is why, in our view, the Legislator deliberately provided for this crucial assistance by virtue of the provisions of section 24(5)(b) of the Act. It also did so, in the case of the defunct Economic Crime Office, under section 3(4) of the former Economic Crime and Anti-Money Laundering Act, as indicated already.

It is noteworthy that the Legislator could also have achieved the same purpose by specifying in the Act, as was done in Section 101B of the Independent Commission Against Corruption Act 1988 of New South Wales, Australia, that police officers who are seconded for duty at the Independent Commission Against Corruption retain all their powers, immunities, liabilities and responsibilities attached to their office.

What is important, however, is that the result aimed at and achieved by the Legislator, both in Mauritius and Australia, remains the same, namely ensuring to the Independent Commission Against Corruption the crucial assistance of Police Officers in the fight against corruption and fraud.

For all the reasons given, we dismiss this appeal, with costs.

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A.G. PILLAY
CHIEF JUSTICE

K.P. MATADEEN
ACTING SENIOR PUISNE JUDGE

5 November 2003

Judgment delivered by Hon. A.G. Pillay, Chief Justice

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

For respondent No. 1: **State Attorney**
Mr I. Maghooa, Ag. Assistant Parliamentary Counsel
Mr S.K.J. Ramphul, of Counsel

For respondent No. 2: **State Attorney**
Mr I. Maghooa, Ag. Assistant Parliamentary Counsel