

ICAC v Baboolall

2012 INT 77

Cause Number:1397-2010

In the Intermediate Court of Mauritius
(Criminal Division)

In the matter of:

Independent Commission against Corruption

V

Prakash BABOOLALL

JUDGMENT

The Accused stands charged with ‘Public official using his office for gratification’ in breach of section 7(1) of the Prevention of Corruption Act, to which he pleaded Not Guilty and was assisted by Counsel.

The Prosecution was also assisted by Counsel.

Ms. Pamela Rengasamy, IT Support officer at Mauritius Telecom, produced an itemized bill in relation to cellular phone number 7890114, registered under the name of Accused (Document A refers).

Mr. Armoogum Teddyven, an officer at Emtel, produced a list of incoming and outgoing calls from cellular phone number 7268445 (Document B refers).

S.I Bachun read and produced two statements from the Accused (Documents C, C1 refer).

Mr. Juguthsing Ramchurn, deposed to the effect that in March 2008, he was Police Sergeant and the officer in charge of a unit called ‘Central Traffic Field Division’ and had 15 officers working under his supervision whilst CPL Neerooa seconded him. He confirmed that the Accused was

also working under his supervision. He added that he himself prepared the roster for 27-03-08 and handed same to CPL Neerooa as he would be on leave on the said date. He then produced the said roster (Document D refers).

CPL Neerooa was called who produced certified copies of Diary Book entries dated 27-03-08 (Document E refers). He added that since PS Ramchurn was on leave on 27-03-8, he was in charge of the division. He confirmed that Accused called on duty on 27-03-08 at 07.16 hrs. He then explained that Accused's duties on that day consisted of patrolling and regulating traffic at the junction of corner St. Paul and Floreal. The latter also performed speed checks with another police officer and took contraventions. He also explained that all contraventions issued had to be inserted in the Diary Book.

Inspector Tengnah stated that on 26-02-09 at the office of ICAC, he performed an identification exercise between the Accused and the complainant, Mr. Asraf Adamsaib after having explained the latter of the purpose of the identification exercise and after having explained the Accused of his constitutional rights and the different modes of identification. He then informed the complainant of the nature of his complaint in presence of Accused and his counsel and then asked the complainant to identify the Accused. However, the complainant did not identify the Accused and stated, 'mo pas remarque li.'

S.I Sawmy stated that on 28-03-08, he witnessed the recording of the complainant's statement when the latter showed to him his cellular phone, make Nokia. He viewed the said phone and found that there were two incoming calls registered on 27-03-08 at 1.58 p.m and 3.08 p.m on that phone from cellular phone number 7890114. He also found two missed calls were recorded on the said phone from the same phone number on 28.03.08 at 10.08 hrs.

The Prosecutor then produced one official status of the Accused (Document F refers).

The complainant, Asraf Adamsaib, thereafter deposed as follows:

On 27-03-08, whilst he was driving his 'jeep' number AX 1014 and towing a car, a police officer stopped him and told him that he was talking on the phone. He denied he was on the phone

following which the Accused verified his vehicle and the car being towed. He then informed him that no plate “on Tow” was affixed on the car. He admitted same upon which the Accused told him that he could let him go provided he was given 500 rupees. He then told him to come and pay him 500 rupees as Midlands Police station after which he took his business card. At that time, his cousin Imteaz Adamsaib, was in the car which was being towed. In the evening, the Accused called him but he did not go to meet him. He called him again the next day and told him should he not come, he would then insert an entry in the book. He then identified the Accused as being the Police officer who stopped him.

Mr. Imteaz Adamsaib deposed under oath to confirm that he was in the car which was being towed. He added that he saw a Police officer stopping his cousin and talking to the latter but he did not hear the conversation as he was behind. He could not remember the date when the incident occurred.

The Prosecution then closed its case.

The Defence also closed its case.

Both Counsel then lengthily submitted as well as the Counsel for the Prosecution also filed a written submission and referred to some authorities. Both Counsel made submissions on law as well as on facts. It is first proposed to find out whether the Prosecution case is supported by the facts adduced.

I have duly considered the evidence and submissions made.

It is clear that the case for the Prosecution is wholly based on the version put forward by Asraf Adamsaib. Thus, the destiny of this case revolves on the credibility this Court attaches to his testimony as a witness.

Whilst the identity of the Accused is not disputed by the latter, the testimony of the main witness for the Prosecution is most relevant to be highlighted on this issue. It is to be noted that the

alleged offence occurred on 27-03-08. The complainant was invited by the ICAC officers to identify the Accused during a direct confrontation identification exercise on 26-02-09, i.e., barely one year after. However, he could not identify the Accused during the said exercise and stated 'mo pas Remarque li'.

What is astonishing is that some four years after and following his inability to identify the Accused in 2009, the same complainant readily identified the Accused in Court. When he was cross-examined on this issue he explained that he could not identify the Accused during the identification exercise since the Accused had changed his style as he was wearing a 'body' t shirt, sunglasses (rayban) and had a different hair style. He added that he stated same to the ICAC officer. When he was confronted with the version of SI Tengnah who only mentioned that the complainant stated 'mo pas Remarque li', he confusingly stated that he could not identify the Accused since there were two other persons with the Accused. It is also most relevant to note that contrary to what he asserted in court as to why he could not identify the Accused, he stated in his statement dated 26-02-09 that he could not identify the Accused as he had met with the Accused only once a year ago. When he was cross-examined as to his ability to identify the Accused in Court on the day of trial despite the fact that the latter was not wearing his uniform and helmet, the complainant stated that he had been able to recognize the Accused with the help of his cousin.

In addition to the above, it is to be noted that the complainant stated that the Accused had changed his hair style, amongst others and hence he could not identify him during the identification exercise. Now, is it not the case that when the Accused is on duty patrolling the road on his motorcycle, he wears a helmet so that it would not be possible in any case for the complainant to have noticed Accused's hair style? It would be even more difficult for complainant's cousin who did not see the Accused again ever since 2008 to be able to help the complainant in identifying the Accused on the day of trial. One final note as regards his evidence of identification is to the effect that as per his own statement to Police, he described the Accused with a moustache. It is here amazing to note that whilst he agreed that on the day of trial, the Accused did not have a moustache and yet somehow, he identified the Accused.

As already stated, the identity of the Accused is not disputed by the Defence but the testimony of the complainant on this issue is undeniably most valuable to assess the latter's credibility.

It is also noted that the complainant stated that he was not talking on phone whilst he was driving when the Accused stopped him. It is gathered from the Accused's statement (Document C refers at folio 49761) that as per complainant's version put to the Accused, the alleged incident occurred on 27-03-08 at about 12.10 hrs. Now, when the document from Emtel is considered (Document B refers), it is found that on 27-03-08 at 12.11 pm, the complainant in fact received a call on his cellular phone 7268445 and the conversation lasted about 53 seconds. Thus, it is clear that the complainant has been shown to be not a witness speaking the whole truth at least on that issue.

On a different note, the complainant maintained that the Accused called him twice on 27-03-08 and then on 28-03-08, the Accused again called him and told him that should he not come and see him, he would then insert the entry in the book. However, it is obvious from the documents produced both from Mauritius Telecom and Emtel (Documents A and B refer), there was no call received on 28-03-08 on cellular phone number 7268446, i.e., complainant's phone from cellular phone number 7890114, i.e., Accused's phone. When the complainant was confronted with this scientific reality, he continued on maintaining that he received a call from the Accused on 28-03-08 which was even evidenced by the ICAC officer. It is here relevant to note that SI Sawmy stated he verified complainant's phone but found 2 missed calls from Accused's phone number. Now, surely there is a marked difference between missed calls and received ones and it is only blatant fact that there can only be conversation between two persons during a received call and not during missed ones. Thus, it is clear that there could not have been any conversation between Accused and the complainant on 28-03-08.

The complainant further stated that the Accused asked him for his business card so that he could phone him, and the latter gave it to him. He was then confronted with his statement dated 28-03-08 wherein he stated that the Accused asked him his phone number which he told him (mo fine dire numero...). He was then asked whether he stated same in his statement to which he replied that he did not remember having stated same but remembered that he gave the Accused his

business card. He also desisted to clarify whether the said extract of his statement was true by claiming that he did not remember this detail.

When he was asked as to why he did not refuse to give the Accused any bribe, he stated that he did tell the Accused that he would not pay any bribe but the Accused insisted on same. When he was confronted with part of his statement wherein he stated that he agreed to give the Accused 500 rupees, the complainant was astonished and clarified that it could be that he did not express himself properly.

As regards the supporting witness called, i.e, Mr. Imteaz Adamsaib, the least that can be said is that he was not of any support to the complainant or the Prosecution case. This is so since he admitted that he did not hear the conversation between the Accused and the complainant.

During cross-examination, he stated that his cousin related to him afterwards the incident with the Accused. He was then confronted with his statement dated 28-01-09, wherein he stated that except that the complainant told him that the Accused booked him for allegedly using his cellular phone, the complainant did not tell him anything else. The said witness retracted from his earlier version in Court and confirmed that whatever he stated in his statement was correct.

Whilst it is settled rule of evidence that *“cross-examination of a witness in court is not a memory test which the witness must pass before his evidence can be accepted and relied upon” – vide Dhuny v. R [1991 SCJ 145] - and that “a witness is not expected to remember every fact he had stated to the police in the course of the investigation” - vide Chatoorsingh v. R [2002 SCJ 4], it is equally true as stated by Tapper in Cross and Tapper on Evidence, ninth edition, at page 291, that the object of cross examination is two fold, one of which is to cast doubt upon the accuracy of the evidence in chief given against the Accused.* Thus, it is clear that the credibility of a witness is tested during cross examination.

In the present case, after the cross examination of the said witness, it cannot be said by any stretch of imagination that the credibility of the complainant has remained untainted. The flaws revealed in the complainant’s testimony cannot be explained on account of mere memory lapse.

The fact of the matter is that he has been shown to be so blatantly inconsistent and confused that the only reasonable conclusion reached is that the said witness is devoid of any credit usually attached to a truthful and reliable witness.

It would thus be most unsafe and insecure to rely on such evidence to find the Prosecution case proved beyond reasonable doubt.

I therefore find that the Prosecution has not been able to prove its case against the Accused beyond reasonable doubt.

I accordingly dismiss the present charge against the Accused.

Neerooa M.I.A (Mr.)
Magistrate, Intermediate Court.
This 29 March 2012.