ICAC v Chaundee

2012 INT 88

Cause Number: 734-2009

In the Intermediate Court of Mauritius
(Criminal Division)

In the matter of:

Independent Commission Against Corruption

V

Ameeth Kumar CHAUNDEE

RULING

The Accused stands charged with 'Bribery of public official' in breach of section 5(1)(b) and 2 of the Prevention of Corruption Act ('the Act') to which he has pleaded Not Guilty and was assisted by counsel.

The Defence has moved that the present proceedings against the Accused be stayed in as much as the present case amounts to an abuse of process of the Court since the Accused was the person who initiated the enquiry by disclosing to Police an alleged act of corruption without warning him that the facts and matters disclosed by him could be used against him in a court of law.

The Prosecution has resisted the present motion so that a Voire Dire was held.

During the voire dire, the Prosecution first called S.I Soodagur of ICAC. The latter stated he recorded a statement from the Accused on 03-04-2008 and he stated that four statements were recorded altogether from the Accused, including one by the Police. He explained that the statement he recorded from the Accused started as a witness statement since it related to an identification exercise following an allegation the Accused made against a Police officer and subsequently the statement continued under caution as the Accused would be confronted with some incriminating questions.

During cross-examination, he admitted the following facts:

a) That the Accused made a declaration to the Central CID on 21 May 2007 at 1615 hrs alleging that one Sergeant Koolwant of Traffic branch had solicited bribe from him;
b) That on the same day at 1930 hrs, the Accused gave a statement to PS Mohit wherein he confirmed and gave further details of the allegations he had made;
c) That the matter was then referred to ICAC on 24 May 2007;
d) A statement was subsequently recorded from the Accused by CPL Naiken of ICAC on 07 June 2007 as regards details of the allegation made by the Accused against PS Koolwant;
e) A further statement was recorded by ICAC officers on 21 August 2007 at 1020 hrs which was in relation to an exercise during which the Accused was requested to show to ICAC officers the house of the said PS Koolwant;
f) An identification exercise was then carried out at ICAC office on 03 April 2008 during which however the Accused could not identify the Police sergeant and a lady named Pooroy.

PS Mohit was then called and the following salient facts came out from his deposition:

a) He recorded a statement from the Accused on 21 May 2007 at 1630 hrs;
b) He stated that prior to recording the said statement he advised the Accused to report the matter to ICAC as it was in relation to an allegation of bribe;
c) He explained that the statement started as a witness statement but was subsequently continued under warning since there was a likelihood of incriminating questions against him

Both Counsel then offered their respective submissions supported with authorities duly filed for ease of reference which this Court has deeply considered.

The first question to consider and which, in fact, has been on numerous occasions subject matter of pronouncements by our local Supreme Court as well as Courts of other jurisdictions is whether this Court has any such power as to stay proceedings and its nature as well as extent.

A very useful summary of these principles is provided by the Supreme Court in **State v Wasson 2008 SCJ 209** where the learned Judge expressed the following :

The Courts have a duty to protect the integrity of the criminal process and to secure fair treatment to any person charged with a criminal offence in conformity with the norms prescribed under the Constitution. In exercising its power to ensure that there should be a fair trial in accordance with these norms, a criminal Court has a general and inherent power to stay proceedings not only to protect its process from abuse but also to secure a fair trial to those persons who are charged with a criminal offence.

Thus, it is clear that the Court has such a power to stay proceedings. The Learned Judge then reviewed the following authorities from foreign jurisprudence from which the nature and extent of such power may be gauged:

The Court's exercise of its jurisdiction to prevent abuse and to stay proceedings has been explained and set out in a number of decisions in the United Kingdom. In the words of Lord Devlin in Connelly v. D.P.P. [1964 A.C. 1254] "The Courts have an inescapable duty to secure fair treatment for those who come or are brought before them" and at page 1296 Lord Reid said "…… there must always be a residual discretion to prevent anything which savours of abuse of process." The views expressed in Connelly (Supra) were further considered in D.P.P. v. Humphrys [1977 A.C.1] where Lord Salmon stated the following at p. 46.
"…… a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has power to intervene." (Emphasis added).

This power to stay proceedings for abuse of process is considered to include a power to safeguard an accused from oppression or prejudice (Connelly (Supra)) and has been described as a formidable safeguard to protect persons from being prosecuted in

circumstances where it would be seriously unjust to do so (Attorney-General of Trinidad and Tobago v. Philips [1995 1 A.C. 396]).

In R. v. Croydon J.J., ex p. Dean (1994) 98 Cr. App. R. 76 DC, the prosecution went back on its promise that a 17-year-old boy would not be prosecuted if he assisted the police. Proceedings were instigated despite implied representations by the police that he was viewed solely as a witness. Staughton L.J. at 206 stated that "the prosecution of a person who has received a promise, undertaking or representation from police that he will not be prosecuted is capable of being an abuse of process". In R v Swindon Magistrates' Court ex. p. Nangle [1998) 4 AER 210], the defendant complained that he had been brought into the UK by improper state disguised extradition. CJ Bingham, at page 222, considered the test to be followed by the court as follows: "The question in each of these cases is whether it appears that the police or the prosecuting authorities have acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign states or abused their powers in a way that should lead this court to stay the proceedings against the applicant".

He then came to the following conclusion which is also endorsed by this Court:

Every Court has thus undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and constitute an abuse of the process of the Court.

Now when the above extract from Wasson is considered, it is clear that the exercise of discretion by the Court to stay proceedings becomes imperative so as to prevent its process from being abused so that the next question to be raised here is what amounts to an abuse of process. Whilst some elements of an abuse of process may be found from the foregoing paragraphs, further definition is given in Wasson which reads as follows and which would form the criteria to decide whether there is an abuse of process compelling the Court to intervene:

In Re Barings PLC and others (No. 2); Secretary of State for Trade and Industry v. Baker and 0rs. [1999 1 AER 311], the Court stated that it may stay proceedings where to allow them to continue would bring the administration of justice into disrepute among right thinking people and that would be the case if the Court was allowing its process to be used as an instrument of oppression, injustice or unfairness.

In R. v. Horseferry Road Magistrates' Court ex.[Bennett [1994 A.C. 42],

Lord Lowry, at 72G observed:

"I consider that a court has a discretion to stay any criminal proceedings on the grounds that to try those proceedings will amount to an abuse of its own process either

(1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or

(2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case."

Lord Griffiths indicated at p. 61 that the Court had the power to interfere with the prosecution "because the judiciary accept the responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law." He further observed at p. 62: "The courts have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution."

…

And in Hui Chin Ming v. R. [1992 1 A.C. 340], an abuse of process was defined as "something so unfair and wrong that the Court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding." It involves the use by a party of sharp practices which threaten the integrity and effectiveness of the Court. (R. Pattenden, 'The power of the Courts to stay a Criminal Prosecution' [1985 Crim L R 175, 185]).

In R. v. Latif and R. v. Shahzad [1996 1 W.L.R. 104], the House of Lords upheld a decision not to stay proceedings which had been arrived at by the trial Judge and held that, in criminal proceedings, whilst weighing countervailing considerations of policy and justice, it was for the trial Judge, in the exercise of his discretion, to decide whether there had been an abuse of process which amounted to an affront to the public conscience

and thereby required those proceedings to be stayed.
Further, in determining abuse of process, the Court in R. v. Derby Crown Court ex p. Brooks [1985 80 Cr. App. R. P. 164], after quoting with approval the statement of Lord Diplock in Sang [1979 2 AER 1222 p. 1230] pointed out that "the ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution."
Lord Roger Ormrod C.J., at 168, stated:
"The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either
(a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or
(b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable …"
In R. v. Martin (Alan) [1998 2 W.L.R. 1, at 25], Lord Clyde stated: "No single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness."

I however hasten to add that the learned Judge in Wasson also made it clear with the support of several other authorities that this power to stay proceedings is only an exceptional measure. This exceptional nature was also stressed upon in **D.P.P v Beeharry 2007 SCJ 89**.

In the light of the above principles, the fact whether there is firstly an abuse of process in the present case will be analysed.

The Defence has submitted that because it was the Accused who was the instigator of the present case since he disclosed an alleged case of bribery against a Police officer and subsequently following enquiry by ICAC, he now finds himself in the Accused dock, there is an abuse of process the more since he has not benefitted from provisions under section 49 of the Act.

However the reading of the Prosecuting authority in the present case is altogether different since Counsel for the Prosecution has submitted that as the Accused initially reported the alleged case of corruption to the Police, the provisions under section 49 of the Act was not applicable. He added that there would definitely be an automatic application of section 49 of the Act had the Accused reported the matter directly to ICAC.

The said section reads as follows:

49. Protection of witnesses
(1) Subject to subsection (6), where a person-
(a) discloses to a member of the Board or an officer that a person, public official, body corporate or
public body is or has been involved in an act of corruption; and
(b) at the time he makes the disclosure, believes on reasonable grounds that the information he discloses may be true and is of such a nature as to warrant an investigation under this Act, he shall incur no civil or criminal liability as a result of such disclosure.

Thus, subject to section 49(6), a complete civil or criminal immunity is given to a person when he discloses an act of corruption provided:

1. The said disclosure is made to a member of the Board or an officer;
2. That the person reasonably believes at the time of making the disclosure that his information is true and of such a nature as to warrant an investigation.

Now, the definition of an officer is given under section 2 and 24 of the Act so that in short an officer is a person employed by the Commission (ICAC). By member of the board, it is understood to be pursuant to section 19(3) of the Act, either the Director General of the Commission who is also the Chairperson of the Board or any of its two members.

The contention of the Prosecution is that since the Accused made his allegation originally to a Police officer of the Central CID, it was therefore not made in compliance to the first

requirement under section 49(1) of the Act so that the section is not applicable, hence no immunity as per subsection (1) subject obviously to subsection (6). It is also clear that at no point in time during the able submission of the Counsel for the Prosecution did he rely on the non compliance with the second requirement highlighted above for the application of section 49 so that same may be safely inferred to be present. In any event, there is no such evidence to the contrary at this stage.

The facts of this case as highlighted above shows undisputedly that the Accused chose to report and therefore disclose the alleged act of corruption against a Police Officer to the Police department and this after he was advised by PS Mohit that he could report the matter to ICAC.

There is also undisputed evidence that the Police referred the matter to ICAC three days after the initial declaration recorded by the CID officer, i.e., on 24 May 2007. Thus, as at 24 May 2007, the Commission was made aware of an alleged act of corruption and therefore disclosed of an alleged act of corruption which it would not been aware of otherwise at least as at that date.

The question that needs to be solved here is whether it is not a fact that the Accused himself disclosed the alleged act of corruption to the Commission therefore inevitably to either the members of the Board or to any of its Offcers on 24 May 2007, albeit indirectly. It is always to be borne in mind here that had the Accused not reported or disclosed the alleged act of corruption to the Police on 21 May 2007, such an act would never have been disclosed to ICAC as well.

It is obvious that a very narrow literal reading of section 49(1) of the Act would be in line with the submissions of the Prosecution in this case as the disclosure was made in the first instance to the Police authorities and not directly to the ICAC so that the Accused may not benefit the immunity.

However , it is also undisputed that after the matter was referred to ICAC on 24 May 2012, the Accused re iterated his allegation of the act of corruption against PS Koolwant to ICAC officers namely CPL Naiken who recorded same in presence of a senior investigator of the Commission

on 07 June 2007. Thus, this time there can be no doubt that the Accused directly disclosed the alleged act of corruption to two officers of the Commission and falls squarely within the four corners of section 49 of the Act.

There cannot be any question as to whether the first requirement under section 49(1) of the Act has not been satisfactorily complied with so that there is no reason whatsoever why the said section 49 should not be made applicable in favour of the Accused who originally gave his statement as a witness.

The natural legal consequence of such an application of section 49 is that the Accused should benefit from the civil and criminal immunity as a result of such disclosure there and then. He is thus fully entitled to the civil and criminal immunity guaranteed by law as a result of his disclosure. It cannot be disputed in either situation that he has been the disclosing agent without whom an alleged act of corruption would not have been disclosed to ICAC. The other natural flow from the above facts is that should the Accused be found following enquiry to have made a false disclosure, he can only be prosecuted under section 49(6) of the Act.

The Commission initiated an investigation thereafter following which an identification exercise was conducted during the Accused however did not identify those persons he made allegations against. The Commission then decided that the Accused must have surely made a false allegation against the said PS Koolwant. I need to pause here to state that since he was not able to identify the said PS koolwant, it goes without saying that his statements were put to doubt to such an extent that it may be reasonably said that even the alleged act of corruption having actually taken place was now shadowed with huge clouds of doubt. But what is not in doubt is that the Accused might have made up a false allegation against the Police Officer and therefore bearing potentially all elements of an offence under section 49(6) of the Act.

It is here that section 49(6) of the Act bears all its importance since in its very enlightened wisdom the Legislature had already pre empted such situations where false allegation may occur and the solution would be as follows:

(6) A person who makes a false disclosure under subsection (1) or (2) knowing it to be false shall be guilty of an offence and shall, on conviction, be liable to pay a fine not exceeding 50,000 rupees and to imprisonment not exceeding one year.

Thus, in cases where it is revealed following investigation by ICAC that the person has made a false disclosure, the Legislature has provided that he loses his immunity under subsection (1) only to the extent that he would now be liable to prosecution for false disclosure under subsection (6).

In the present matter however instead of being prosecuted under section 49(6) of the Act which should have been the only fair and reasonable outcome as per law, the Accused is however being presently prosecuted for 'Bribery of Public Official' in breach of section 5 of the Act.

Now, the prosecution is obviously entitled to decide upon the charge which it would bring against the accused and this fully and comprehensively provided by section 72 of the Constitution since the decision of the offence under which the Accused is to be charged rests with the Director of Public Prosecutions and not the ICAC. This is why this case has been referred for prosecution in Court by the Director of Public Prosecutions. As stated in **Archbold digital edition at paragraph 4-58**, the decision to prosecute or otherwise is for the Prosecutor. The following extract from Archbold summarises perfectly the said situation and the inappropriateness for the Court to interfere generally in such circumstances:

The jurisdiction to stay proceedings on the basis of abuse of process is to be exercised with the greatest caution; the fact that a prosecution is ill-advised or unwise is no basis for its exercise; the question whether to prosecute or not is for the prosecutor; if a conviction is obtained in circumstances where the court, on reasonable grounds, feels that the prosecution should not have been brought, this can be reflected in the penalty: Environment Agency v. Stanford[1998] C.O.D. 373, DC. See also DPP v. Humphrys (Bruce Edward) ([1977] A.C. 1), ante, §4-49, and cf. Postermobile Plc v. Brent LBC>,The Times, December 8, 1997, DC, post, §4-62.

Furthermore, as highlighted in the extract from **Wasson (Supra)**, the court should not be seen as directing discipline on the Prosecuting authorities.

However, the situation is far cry in the present case since this Court has found that section 49 of the Act is perfectly applicable so that the Legislature has already provided for situations where the end result of an enquiry is that there is a false declaration revealed so that the correct procedure is to follow section 49(6) of the Act. The law has provided for immunity as protection whenever a person discloses an act of corruption to ICAC and where there is false declaration, the only automatic consequence is a prosecution under section 49(6).

Any contrary measure by the Prosecution would in the present given circumstances be tantamount to what Lord Roger Ormrod CJ ***R. v. Derby Crown Court ex p. Brooks [1985 80 Cr. App. R. P. 164]*** qualified as '***to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality and therefore amounting to abuse of process.'***

The Supreme Court in Wasson had also cited **R. v. Croydon J.J., ex p. Dean (1994) 98 Cr. App. R. 76 DC**, where the prosecution went back on its promise that a 17-year-old boy would not be prosecuted if he assisted the police. However, proceedings were instigated despite implied representations by the police that he was viewed solely as a witness. Staughton L.J. at 206 stated that *"the prosecution of a person who has received a promise, undertaking or representation from police that he will not be prosecuted is capable of being an abuse of process".*

In the present case the guarantee for immunity, hence the promise is a statutory one under section 49(3) and the specific offence under section 49(6) has even been provided should enquiry reveal a false allegation so that there is an even stricter and stronger duty on the Prosecution to apply the law in its spirit and letter and give it full effect. The contrary action would be most unfair not only to the Accused but would also be in breach of the very purpose and effect of the Act. i.e., to combat corruption by unfairly punishing an apparently false whistle blower otherwise than by way of prosecution under section 49(6) of the Act which has precisely been provided for such situations.

This is not a case where the investigating or prosecuting authority give a certain promise to a witness and then fail to comply with its promise. This is rather a case where the law itself, and not an authority or a person in authority, guarantees a person with a specific civil or criminal immunity under section 49(1) of the Act as well as limited liability under section 49(6) of the Act so that rule of law must prevail and the law must be complied with. Where a situation then arises as contemplated and provided for by our Legislature under section 49(6) of the Act, the Court finds that it has to be complied with and rule of law should prevail to give effect to the clear and unambiguous intention of the Legislature. The Court finds it most unfair to prosecute a person under any other section of the act when he has disclosed an act in accordance with section 49 of the Act.

It is therefore clear to this Court that allowing prosecution under the present information is tantamount to the Court allowing its process to be used as an instrument of unfairness. Denying the Accused of the benefit of application of section 49 so that he may be only prosecuted under section 49(6) for false disclosure is something so unfair that it ought not be allowed.

This case therefore contains all the ingredients of an abuse of process as defined by authorities cited in Wasson so that there is a high need for the Court to intervene.

In the light of above, I find that the motion to stay proceedings in the present matter is definitely well founded and I therefore exceptionally exercise my discretion and order that the present proceedings against the Accused be stayed.

Neerooa M.I.A (Mr.)
Magistrate, Intermediate Court.
This 11 May 2012.