

POLICE v DAYAL JAYESHWUR RAJ

2016 PL3 63

IN THE DISTRICT COURT OF PORT LOUIS (DIVISION III)

Cause Number: 3248/2016

In the matter of:

POLICE v JAYESHWUR RAJ DAYAL

Ruling

1. **Factual Background**
 - 1.1. The applicant is charged under one count of a provisional information with having on or about 22 March 2016, whilst being a public official, willfully, unlawfully, and criminally solicited from another person, a gratification for doing an act in the execution of his duties, in breach of Section 4(1) of the Prevention and Corruption Act 2002 (POCA).
 - 1.2. He has through his counsel, moved this court to strike out the present charge on the ground that the present provisional charge is an abuse of the process of the Court which has been particularized under three limbs, including prejudice to the applicant in breach of Section 10 of the Constitution; the reasonable suspicion requirement has not been met; and the allegations against the applicant are vexatious and frivolous, hence they do not warrant any charge against the applicant. The respondent has objected to the motion. Both parties were legally represented by a panel of counsels; arguments were heard from both sides, hence the present ruling.
 - 1.3. In a gist, the evidence on record reveals that on 22 March 2016, one Nawaz Soobhany reported to the Independent Commission Against Corruption (ICAC) a case of bribery against the applicant; he produced a tape in support of an alleged conversation he had with the applicant; and the recording was aired on radio. An investigation was initiated as a result; several persons were interviewed; documents were secured; and a first report was sent to the Commissioner of Police (the CP) three days later to seek his

authorization to proceed with the arrest of the applicant. Such request was however not acceded to and later on the same day the CP asked for the written version of the applicant to be included in the report. The latter was consequently convened at the ICAC; a statement under warning was recorded; and the applicant denied the charge against him. The authority of the CP for the arrest of the applicant was again sought on 05 April 2016; in that regard a second report which included the version of the applicant was sent; the opinion of the learned Director of Public Prosecutions (DPP) was sought; and the green light was given to proceed with the arrest of the applicant. It is against this background that the applicant was arrested on 06 April 2016.

2. Issues

2.1. The issues in this case can be stated very shortly.

- A. Should the provisional charge stand at this stage of the proceedings or should it be struck out as contended by learned counsel for the applicant; bearing in mind on the one hand the presumption of innocence, a sacrosanct feature of our criminal justice system and on the other the lodging a provisional information at the very early stages of a police enquiry?
- B. To answer the above question, the primary and essential issue to be thrashed out is whether at the time of arrest there was a reasonable suspicion that the applicant had committed the offence preferred against him.
- C. Do the provisions of the POCA, more particularly Sections 46 and 47, preclude the lodging of a provisional information; and if not, on what basis and at what stage of the process can a suspect be arrested, hence be the subject of a provisional charge?
- D. Would the fact that one of the matters which triggered an investigation which led to the arrest of the applicant, consisting of a tape, the admissibility and legality of which is being contested, amount to an abuse of the process of the Court by an illegal act and/or make the lodging of the provisional information in the circumstances, an abuse of the process of the Court?

- 2.2. In dealing with the ‘reasonable suspicion’ requirement and the lawfulness of an arrest, the Court will also address the purpose and *raison d'être* of a provisional charge.

3. The Law

A. **The Constitution**

- 3.1. The right to personal liberty is enshrined in Section 5 of our Constitution which has been largely inspired by Article 5 of the European Convention on Human Rights. Such a fundamental right can however be lawfully curtailed in certain circumstances as provided for by Section 5 (1) of the Constitution. The permissible derogation authorized by law and relevant to the present matter is Section 5(1)(e) which provides for the arrest and detention of a person upon reasonable suspicion of his having committed, or being about to commit, a criminal offence.

B. **The Provisional Information**

- 3.2. The concept of ‘provisional information’ is very peculiar and unique to the Mauritian context and its distinctive features are that it is fundamentally a process to bring a suspect before Court.¹ A provisional information is lodged when a suspect is arrested or is brought into custody. The purpose of a provisional charge is to ‘*bring the detention of the individual under judicial supervision and control so as to prevent an administrative detention and to enable a judicial authority to decide whether the detainee should be released on bail or not and, if not, for how long he should be detained.*²

C. **The ‘Reasonable Suspicion’ Requirement**

- 3.3. The ‘reasonable suspicion’ requirement is a valuable protection to the Community and it is an essential safeguard against arbitrary arrest and detention. Hence, the police shall before arresting a person satisfy itself that there do in fact exist reasonable grounds for suspicion of guilt³ (a subjective test). Such reasonable suspicion, which presupposes

¹^Â **Mootoosamy v The Queen [1981 SCJ 432]**

²^Â **DPP v IOIB [1989 MR 110]**

³^Â Scott LJ in **Dumbell v Roberts [1944] 1 All ER 326** at page 329

the existence of facts or information, must also satisfy an objective observer that the person may have committed the offence⁴. Furthermore, the exercise of the power to arrest must be in accordance with the *Wednesbury principle*.⁵

- 3.4. This being said, 'reasonable suspicion' "*is no instinct, allows no guess, no sixth sense. It is scientific. It has to find support on facts, not equivocal facts but facts consistent with guilt..... Reasonable suspicion, in contrast to mere suspicion, must be founded on fact. There must be some concrete basis for the officer's belief, related to the individual person concerned, which can be considered and evaluated by an objective third person... Facts may point unequivocally to the view taken by the police or equivocally to that view. Where they point unequivocally, the suspicion is reasonable. Where they are equivocal, no coercive action may be taken by the police until the facts become unequivocal.....*"⁶ (Emphasis added)
- 3.5. Therefore, in determining whether an arrest is justified which is essentially based on the existence of a reasonable suspicion, the following principles apply⁷, namely:
- (a) Firstly, the suspicion should be reasonable.
 - (b) Reasonability, in turn, should be valued from the objective standard point of view of a dispassionate bystander and not determined from the personal point of view of an officer or his subjective standard.
 - (c) The suspicion must be based on facts; the facts relied on should be such as are consistent with the implication of the suspect in the crime; it should not be equivocal with his implication and his non implication.

D. Provisions of POCA and Conduct of Investigation

⁴^A **Fox, Campbell and Hartley v The United Kingdom, 30 August 1990** referred in **Ah Sue Mario Alain Chung Ching v The State of Mauritius [2015] SCJ 110** at page 11

⁵^A **Castorina v Chief Constable of Surrey [1988] LG Rev R 241; O'Hara v Chief Constable, Royal Ulster Constabulary [1997] 1 All ER 129**

⁶^A **Manraj D. D. & Ors v ICAC [2003 SCJ 75]**

⁷^A **Manraj D. D. & Ors v ICAC (Supra)**

3.6. The powers of the ICAC under the POCA in relation to the carrying out of an investigation and the procedure to be adopted are provided by Sections 46 and 47 of the POCA. The relevant provisions of the above sections of the Act for the purposes of the present matter, namely Section 46(3), 47(5), (6), and (7), read as follows:

'46. Investigation by the Commission

(3) Upon receipt of a report under subsection (1)(b) or 2, the Commission shall -

(a) proceed with further investigations; or

(b) discontinue the investigation.

47. Further Investigation by the Commission

(5) After conclusion of an investigation under this section, the Director-General shall submit the matter to the Commission for its opinion.

(6) After receipt of the opinion of the Commission, the Director-General shall submit a report to the Director of Public Prosecutions which shall include -

(a) all the material, information, statements and other documents obtained in the course of the investigation;

(b) a description of the articles of evidence which have remained in the custody of the Commission;

(c) the recommendations of the Commission.

(7) After consideration of the report submitted under subsection (6), the Director of Public Prosecutions may, where he does not advise prosecution or any other action, require the Commission to conduct such further inquiries as the Director of Public Prosecutions considers fit to advise.'

4. Applying the Law to the Facts

4.1. I have duly considered the arguments put forward by learned counsels for both parties, including all the relevant principles that have emerged from the authorities that have been placed before this Court.

4.2. It is undisputed that the nature of the present suspected offence is one of corruption and the investigation is being carried out by the ICAC. It is also common

ground that the ICAC has been established under the POCA and its functions include the detection and investigation of offences of corruption⁸.

4.3. The respondent has relied on the testimony of two officers posted at the ICAC to resist the present motion, namely, Chief Investigator Seeruttun posted at the Criminal Investigation Division of the ICAC and Superintendent of Police Coret, the highest ranking police officer posted at the ICAC.

Reasonable Suspicion Requirement

4.4. The testimony of Chief Investigator Seeruttun as to the facts, circumstances, and available evidence which led to the arrest of the applicant is terse and he was loath to volunteer any details regarding the knowledge of the applicant as to whether he was being recorded at the material time and to other matters relating to the authenticity of the tape and the character of the declarant. The prosecuting authority has, in the course of the hearing, chosen to rely only on the nature of the evidence available to it without expatiating at all on the contents and details of such evidence and the reason an allegation of bribery had been levelled against the applicant. The applicant in the circumstances did not perfect the case for the respondent and did not cross examine the two officers on the details of the facts and circumstances on which the alleged reasonable grounds to arrest the applicant was based. Now, this Court is alive to the fact that, it should not at this stage, decide on the merits of the case or make a detailed evaluation of the available evidence. This being said, in determining the basis on which ‘reasonable suspicion’, if any, is founded, the Court will also have to assess the nature of the evidence against the applicant.

4.5. Before embarking on its analysis as to whether the reasonable suspicion requirement has been met in the present matter, the Court wishes to make the following observations.

⁸^ Section 20 of POCA

- 4.5.1. None of the two witnesses for the respondent are entitled to keep to themselves the subject matter of the underlying reason and/or fact on which the reasonable suspicion which led to the arrest of the applicant was based⁹.
- 4.5.2. The ICAC may be of the opinion that the facts alleged in its eyes are reasonable grounds and/or amount to *prima facie* evidence. This being said, '*the eyes of ICAC are not the laws of the country. It is the eyes of an objective bystander*'¹⁰
- 4.5.3. Counsels for both parties have an overriding duty to assist the Court in the administration of justice and to place before it all material and relevant evidence available to them to enable the Court to make a correct assessment and determination of the issues before it. True it is that every counsel has a duty to his/her client to fearlessly raise every issue and advance every argument to help his/her client's case and he/she is not expected to perfect the case for the other party. This being said, such duty is fettered. Indeed, in view of the very purpose for which a provisional charge has been laid, namely to bring the arrest of the applicant under judicial supervision coupled with counsel's overriding duty to the Court, in his/her capacity as an officer of the Court concerned in the administration of justice, both parties had a duty to ensure that relevant evidence was not unreasonably withheld for tactical or other reasons.

4.6. Can it therefore be said that such suspicion of the respondent was reasonable? On what fact/s was it based?

- 4.6.1. The lodging of a provisional charge is the mechanism which exists to give effect to the provision of Section 5 of the Constitution, which requires the prosecuting authorities to bring a person arrested on suspicion of having committed a serious criminal offence before a Magistrate within the least possible delay, and to inform the court of the reason of the arrest of an individual. '*This is not merely a*

⁹^A **Christie v Leachinsky [1947] 1 All ER 567** referred to in **Manraj D. D. & Ors v ICAC** (Supra)

¹⁰^A **Manraj D. D. & Ors v ICAC** (Supra)

*formality. The Court acts as arbiter between the executive and the citizen and, in such cases, may control the regularity of an arrest if the need for it arises.*¹¹

- 4.6.2. The Court cannot therefore overlook the purport of the provisional information laid before it. It consists of a complaint solemnly affirmed before a Magistrate that the person named in the complaint is suspected of having committed an offence punishable otherwise than by a fine and it is lodged at the very early stage of the enquiry when the investigation may have hardly started and is certainly not over.¹² Such complaint termed as a ‘provisional information’ in the Mauritian context contains a statement of offence describing the offence in the words of the law creating such offence with the material circumstances of the offence charged.
- 4.6.3. Hence, such information not only enables the Court to ensure that a suspect has been brought before it in respect of an arrestable offence known to the law but it also places before the Court an outline of the facts on which such arrest is based. In the present matter, it is averred that the applicant has solicited from another person a gratification for doing an act in the execution of his duties and the particulars regarding the manner it has allegedly been committed is that whilst the applicant was the Minister of Environment, he had solicited from one Saheed Nawab Soobhany, money for approving the issue of an EIA in respect of an application for a residential and Commercial Morcellement at Gros Cailloux.
- 4.6.4. *‘No detainee pleads to a provisional information and no trial takes place. Consequently no question arises as to whether evidence is required to be given in those proceedings. When the need arises for evidence to be given, the provisional information is simply struck out and an information is lodged to which the accused pleads and in respect of which a trial takes place.’*¹³

¹¹^A **Alain Gordon-Gentil v State of Mauritius [1995 SCJ 118]**

¹²^A **The State v Bundhun [2006 SCJ 254]** referred to in **Jugnauth P K v The Secretary to the Cabinet and Head of the Civil Service Affairs & Co [2013 SCJ 132]**

¹³^A **DPP v IOIB [1989 MR 110]**

- 4.6.5. Now, it has remained unchallenged and unrebutted that when the applicant was arrested, the particulars of the information were read and explained to him in the presence of his counsel and the charge was explained to him in detail. In the absence of any evidence to suggest the contrary, the court observes that the charge that is put to a suspect for the purpose of either recording his statement under warning or putting him on notice as to the reasons leading to his arrest, includes the very complaint that was made by the declarant. Furthermore, it is not the case for the applicant that the averments of the provisional information are inconsistent with the contents of the declaration given by Mr. Soobhany.
- 4.6.6. It is also undisputed that the allegation of bribery was made to the ICAC by Mr. Soobhany himself; he produced a recording found in his mobile phone purporting to corroborate an alleged conversation he had with the applicant; the applicant has confirmed the presence of Mr. Soobhany in his office but has denied the allegation of ‘soliciting’ levelled against him; the recording was made without the knowledge of the applicant; the version of the applicant has not shaken the available evidence; and a technical report shedding light on the accuracy and authenticity of the recording, that the applicant did not wish to listen to, had been shown to the applicant on 06 April 2016.
- 4.6.7. Last but not least, it cannot be said that the applicant was arrested on a mere hunch without any check and balance. True it is that the mere fact that an arresting officer has been instructed by his superior to effect an arrest cannot amount to reasonable grounds for suspecting that the arrested person committed the offence¹⁴. This being said, the surrounding circumstances of the present matter leading to the obtention of the authorization to arrest can be distinguished from the latter situation. The arrest in the case in hand was only effected after the learned DPP and the CP had been informed of the nature of the evidence then available to the ICAC and consequently gave their authorization to proceed with the arrest.

¹⁴ **O’ Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286**

- 4.7. The character of Mr. Soobhany was made a live issue in the course of the hearing. Lack of information relating to the good or bad character of the declarant which will be relevant to his credibility and/or otherwise on the strength of the case for the prosecution, although desirable, is neither a condition precedent to arrest nor does it vitiate the decision to arrest. There is nothing before this Court to suggest or from which it can reasonably be inferred that the character of Mr. Soobhany is such that, it would render the fact on which the reasonable suspicion to arrest the applicant was based, impeachable.
- 4.8. CI Seeruttun and SP Coret both stated in the course of their testimony that they were satisfied that there was a *prima facie* case against the applicant. This being said, the test to be applied in the present matter is not whether there is *prima facie* evidence linking the applicant to the charge of bribery by a public official but whether the information available to the respondent and on which it chose to rely to arrest the accused amount to a reasonable suspicion.
- 4.9. The threshold for establishing ‘reasonable suspicion’ is a lower one than information sufficient to prove a *prima facie* case. *Prima facie* proof must rest on admissible evidence whereas reasonable suspicion may take into account matters which are not admissible in evidence; a police constable can rely on hearsay evidence provided that it is reasonable and that the constable believes in it¹⁵; a constable may arrest a person as a result of radio information or even an anonymous telephone call, provided that the person arrested corresponds to the description in the message¹⁶ hence a police constable may arrest a person as a result of information from an informer, but such a source should be treated with considerable reserve.¹⁷ It is not necessary to prove what was known to the person who gave the information to the police officer or to prove that any facts on which the officer based his suspicions were actually true. Moreover, there is no need, at the stage when a police officer is acting on a reasonable suspicion to effect

¹⁵^A **Ah Sue Mario Alain Chung Ching v The State of Mauritius** (Supra)

¹⁶^A **King v Gardener (1979) 71 Cr App R 13**

¹⁷^A **Blackstone’s Criminal Practice 2001** paragraph D1.5 at page 968

an arrest, to seek complete proof of the suspected offence or to discount all possible defences which may be open to the suspect.¹⁸

- 4.10. In the light of all the matters placed before this Court as expounded at paragraphs 4.6.1 to 4.6.7 above, it can neither be said that the applicant has been arrested on a charge of bribery in the abstract nor that the declaration was made by a person who was not present when the alleged soliciting for gratification was made, for instance, nor that there is no evidence to link the applicant with the allegation made. As stated earlier, the court is not at this stage hearing the case on its merits to make a determination on issues of guilt or otherwise. The Court is satisfied that the suspicion of the police in the present matter is not a ‘mere suspicion’ based on instinct and/or guess but it is based on ‘reasonable suspicion’ based on facts. An arrest may be effected very early on in an investigation. The stage of the investigation at which the applicant was arrested in the present matter is not one where further enquiries ought to have been conducted before a suspicion could properly crystallize¹⁹ nor is it one where it can be said that ICAC is at this stage only on a fishing expedition.
- 4.11. The Court therefore holds that, although it would have been strongly desirable for the witnesses for the respondent to come forward in an open rather than spasmodic manner, whilst deposing in Court, with the available evidence on which the suspicion that the applicant has allegedly solicited money and/or done what he is being accused of, is based, such shortcoming on their part, is not fatal for the reasons given at paragraphs 4.6.1 to 4.6.7 above. It can be reasonably inferred from the facts before this Court, without more, to an objective observer, that the applicant is a suspect in the eyes of the law.

Provisional Information under the POCA

- 4.12. It is submitted on behalf of the applicant that given that the ICAC is governed by the specific, mandatory, and direct statutory provisions of the POCA, more particularly to Section 47, which provide for the procedure in the event of a further investigation, the

¹⁸^A **Ah Sue Mario Alain Chung Ching v The State of Mauritius** (Supra) at page 12 referring to **Blackstone's Criminal Practice 2013** at page 1190.

¹⁹^A **Armstrong v Chief Constable of West Yorkshire Police [2008] EWCA Civ 1582.**

question of a provisional information does not arise; the more so, that the decision to arrest the applicant and lodge a provisional information was taken before sending the case file to the learned DPP.

- 4.13. The misconception in this reasoning are the propositions that (a) a provisional information cannot be preferred in the manner and at the stage it was done in the present matter in relation to a suspected offence under the POCA and (b) the pronouncement of the Judicial Committee of the Privy Council on the constitutionality of the secondment of police officers to the ICAC²⁰ is not relevant and applicable to the issue raised in respect of provisional charges.
- 4.14. Learned Counsel for the applicant appears to have overlooked the fact that the arrest of the applicant was effected by SP Coret, who purported to exercise the ordinary powers of arrest available to a police officer in relation to a person suspected of a serious offence. As rightly submitted by learned counsel for the respondent, the exercise of such powers of arrest on the basis of suspected commission of an offence of corruption at enquiry stage and before a decision to prosecute has been taken cannot be said to be unlawful. The Court finds support for such findings in the light of the pronouncement of the Supreme Court of Mauritius²¹ and the Judicial Committee of the Privy Council²² where the legality of an arrest by the ICAC before any decision to prosecute was taken have been addressed.
- 4.15. The provisions of Section 47 of the POCA cannot and should not be read in isolation but considered in its true intent, meaning, and spirit. The powers of the ICAC are limited only to the carrying out of an investigation in the manner set out under Section 46(1)(2)(3)(4) of the Act. It is "*precluded from taking any prosecutorial decision and is bound by law under the provisions of Section 47(6) of the Act, after the conclusion of an investigation, to submit the matter to the Director of Public Prosecutions (DPP) for his advice and*

²⁰^A **Peerthum v ICAC & Anor 2013 PRV 82**

²¹^A **Ah Yeung v ICAC [2003] SCJ 273**

²²^A **Peerthum v ICAC & Anor 2013 PRV 82**

decision. It is only the DPP who is empowered both by law and under the Constitution, to take decisions regarding prosecution or otherwise of the matter.”²³

4.15.1 Hence, the main purpose for which police officers are posted at the ICAC on secondment is that their services as Police Officers are required for the purposes of the POCA to combat corruption and fraud within the meaning of the Act²⁴. The applicant was arrested by SP Coret, who was seconded under Section 24 (5)(b) of the POCA. He therefore ‘*remained a police officer within the meaning of the Police Act and retained 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.*²⁵ Furthermore, the limited powers of arrest of the ICAC under section 53 of the POCA are ‘*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.*²⁶

4.15.2 The proposition of learned counsel for the applicant, in effect suggests that a suspect (a) cannot be arrested unless and until the procedure under Section 47 has been completed or (b) cannot be arrested for an offence under the POCA. In the light of the abovementioned decisions of the Supreme Court and the Judicial Committee of the Privy Council, his submission that the question of a provisional information does not arise in view of the statutory provisions of the POCA, is flawed.

4.15.3 In the absence of any specific statutory provision to that effect, the procedure laid down under Section 47 of the POCA cannot derogate from or be held as an exception to Section 5(1)(e) of the Constitution, which provides for the arrest and

²³^A **Jugnauth P K v The Secretary to the Cabinet and Head of the Civil Service Affairs & Co (supra)**

²⁴^A **Ah Yeung v ICAC [2003] SCJ 273**

²⁵^A **Ah Yeung v ICAC (supra) at pages 5 and 6; Deerpalsing v The Director of the Economic Crime Office [2001 SCJ 225]**

²⁶^A **Ah Yeung v ICAC (supra) at page 8**

detention of a person upon reasonable suspicion of his having committed, or being about to commit, a criminal offence.

- 4.16. In view of the purpose of a provisional charge as expounded at paragraph 3.2 above, the Court is satisfied that the provisions of the POCA and/or the procedure laid down under Section 47 of the Act neither precludes the lodging of a provisional charge nor is there any statutory requirement to wait for the case file to be sent to the learned DPP for a decision to be taken in respect of prosecution, before an arrest can be lawfully effected.

Abuse of Process : Acting on an illegality to keep the applicant on a provisional charge

- 4.17. As far as the recording is concerned, much emphasis was laid, on behalf of the applicant, both in the course of the cross examination of the witnesses for the respondent and during the submissions of learned counsels for the applicant, that it was tainted with illegality in view of the fact that it was made without the knowledge of the applicant, hence vitiated the whole process of the arrest of the applicant and the subsequent lodging of the provisional information.
- 4.18. It was argued on behalf of the applicant that the integrity of the investigation process has been undermined because an illegal recording has triggered an enquiry which led to the arrest of the applicant; there has been an unfair manipulation, by acting upon the recording which is not admissible at all in that it was made without the consent of the applicant and against his constitutional rights and basic human rights, to arrest the applicant; hence the Court has the power to enquire to see to it that its process is not being abused by any illegal act.
- 4.19. At the risk of repeating itself, this Court has already ruled in the preceding paragraphs that it is not at this stage dealing with the admissibility and/or lawfulness of evidence relied upon by the prosecuting authority to arrest the applicant. Such matters will be determined in the course of the hearing of a main case, if it reaches that stage.

- 4.20. The nature of the recording neither falls within the category of evidence which is *per se* and outright inadmissible nor is it the sole evidence which is being relied upon by the prosecuting authority; hence it cannot be said for instance that the officer arresting the applicant knew that at the time of arrest that there was no possibility of a charge being made. The relevant considerations could arguably have been different if the only available evidence to link the applicant to the commission of the alleged offence was a tape which had been communicated by a person not privy to the contents it purports to establish. The tenor of the answer of SP Coret in cross examination which shows that the tape is in the nature of corroborative evidence has not been challenged. Furthermore, the evidence led in respect of the nature of the recording is not such as to suggest that the circumstances arising in the ruling of the Intermediate Court²⁷ and/or the authorities referred to therein, which has been relied upon by learned counsel for the applicant, are applicable to the present matter as well. Indeed, the witnesses for the respondent were not cross examined on the manner the recording was made, and the evidence on record does not show conclusively that the present matter involves telephone tapping by the use of a network for instance. Hence, it would be presumptuous to comment on the legality and/or admissibility of the recording at the outset and at this stage of the proceedings.
- 4.21. The Court is, at this early stage of the investigation where a decision to prosecute has not even been made, governed by the general rules of evidence relating to the admissibility of evidence which has been obtained by an irregularity. The general rule is that except in the case of confessions, and in appropriate circumstances, privileged documents, evidence obtained unlawfully, improperly, or unfairly, is admissible as a matter of law²⁸, subject of course, to the existence and extent of the discretion to exclude evidence thus obtained. It is also pertinent to note that such improperly obtained evidence which are not *per se* inadmissible include eavesdropping and invasion of privacy where for example evidence of an

²⁷^A ICAC v Vassoo Chinnarassen Cause No. 250/2011

²⁸^A Blackstone's Criminal Practice 2001 paragraph F2.6 at page 1970

incriminating conversation was obtained by means of a secret electronic surveillance device²⁹.

- 4.22. The Court is alive to the fact that the safeguard of a fair trial includes the methods of investigation by the prosecuting authorities and the trial process is equipped to deal with the bulk of complaints on which applications for stay of proceedings are founded.³⁰ All this being said, given that the very purpose of lodging a provisional charge is to bring the detention or conditional release of an accused party under judicial control, this court will not hesitate to intervene where it is sufficiently shown that such intervention is necessary to ensure that the prosecuting authority is not making an abuse of the process of the court in acting *mala fide* and/or is deliberately causing a delay as opposed to merely being inefficient.

Prejudice and Section 10 of the Constitution

- 4.23. The general provisions of Section 10 of the Constitution do not find their application as far as a provisional charge is concerned and they only apply when a person is ‘charged with a criminal offence’. The Supreme Court of Mauritius has on several occasions explained the ambit of Section 10 of the Constitution and ‘*the term “charged” is to be restricted to the arraignment of a person, the charging of a person with an offence before a court of law by which he is to be tried*’³¹
- 4.24. ‘*With regard to the question of prejudice, any accused party who has the shadow of a criminal charge hanging over his head will inevitably suffer some sort of prejudice and the longer the delay the greater would be the prejudice. However, it is not just any prejudice, which will avail an accused party. The Court must be satisfied that the accused has suffered trial- related prejudice.*’³²

²⁹^A Khan [1997] AC 558

³⁰^A The State v Velvindron [2003 SCJ 319]

³¹^A Police v Labat [1970 MR 214] referred to in Jugnauth P K v The Secretary to the Cabinet and Head of the Civil Service Affairs & Ors (supra)

³²^A The State v Bissessur and Ors [2001 SCJ 50]

5. Conclusion

- 5.1. As expounded at paragraphs 4.6 above and its sub paragraphs and paragraphs 4.57 to 4.11, the reasonable suspicion requirement, which is essential and the basis on which a person can be arrested, has been met in the present matter. Hence, neither is the arrest of the applicant unlawful nor is the lodging of the provisional charge against the applicant an abuse of the process of the court.
- 5.2. In view of the matters addressed to at paragraphs 4.14 to 4.16 above, it cannot be said that the arrest and lodging of a provisional charge is frivolous and vexatious because it goes against Section 47 of the POCA. Nor is the submission of learned counsel for the applicant that the Court is being used to keep the applicant under a provisional charge which is based on an illegality or impropriety, sustainable in the circumstances.
- 5.3. For the reasons enunciated at paragraphs 4.19 to 4.22 above, the Court is satisfied that its process is not being abused by an illegal act.
- 5.4. The Court is furthermore not prepared to hold that any prejudice which has been and/or is being suffered by the applicant is unacceptable or is such as to avail to the applicant in having the provisional struck out, at this stage.
- 5.5. In the light of the reasons given at paragraphs 4.6 to 4.25 and their respective sub paragraphs above, I am satisfied that the provisional charge is serving its purpose of bringing the applicant under the judicial supervision of the Court. This court is therefore not ready to exercise its inherent powers to strike out the provisional charge. The motion made on behalf of the applicant is therefore set aside.

A.HAMUTH (Miss)

[Delivered by: A.HAMUTH (Miss), Senior District Magistrate]
[Delivered on: 27 April 2016]