JUGNAUTH P.K. v INDEPENDENT COMMISSION AGAINST CORRUPTION & ORS

2016 SCJ 187

Record No. 8798

THE SUPREME COURT OF MAURITIUS

In the matter of:-

P.K. Jugnauth

Appellant

v

1. **The Independent Commission against Corruption**
2. **The State of Mauritius**
3. **The Director of Public Prosecutions**

Respondents

JUDGMENT

This is an appeal against a judgment of the Intermediate Court finding the appellant guilty of the offence of conflict of interests, in breach of section 13(2) and (3) of the Prevention of Corruption Act ("the Act").

The information lodged against the appellant charged him with having, "*on or about 23 December 2010 … … whilst being then a public official, whose relative had a personal interest in a decision which a public body had to take, willfully, unlawfully and criminally (taken) part in the proceedings of that public body relating to such decision*".

Particulars of the offence, as contained in the information itself, averred that the appellant, "*whilst being then the Vice Prime Minister and Minister of Finance and Economic Development, had approved the reallocation of funds amounting to Rs 144,701,300 to pay*

Medpoint Ltd in which company his sister, one Mrs Shalini Devi Malhotra, born Jugnauth, held 86,983 shares out of 368,683 shares".

The appellant, who was represented by counsel, pleaded not guilty to the information. On 30 June 2015, the learned Magistrates of the Intermediate Court found him guilty as charged and, after hearing evidence, sentenced him on 02 July 2015 to 12 months' imprisonment which, pursuant to section 3(1)(b) of the Community Service Order Act, was suspended pending a community service suitability report from the Probation Office. On 16 July 2015, upon the filing by the Probation Office of a favourable report, the appellant was, pursuant to section 4(2)(b) of that Act, asked whether he consented to a community service order. The appellant gave no express consent to such an order and informed the Court that he intended to appeal against the judgment. In the absence of the appellant's consent to a community service order, the learned Magistrates sentenced him to the original 12 months' imprisonment and further ordered him to pay Rs 500 as costs.

The present appeal challenges both the conviction and sentence on a number of grounds. At the start of the two-day hearing before us, the appellant's leading counsel, Mrs Clare Montgomery, QC, invited us to disregard the original grounds of appeal set out in the notice of appeal dated 22 July 2015 and to instead consider the amended grounds of appeal set out in the notice of appeal dated 27 July 2015 (hereinafter referred to as "the amended grounds of appeal"), on which she based her submissions.

We wish to make a preliminary observation on the grounds of appeal which have been filed on behalf of the appellant. They have been drafted under headings and in a lengthy and extensive manner. This is not a common and acceptable practice before our Supreme Court. Time and again we have reminded legal representatives that each ground is usually required to be couched in specific, precise and succinct terms in the notice of appeal and for each ground to be later developed more extensively in skeleton arguments. In view of the length of the amended grounds of appeal, we do not propose to reproduce them but for the sake of convenience, we shall refer to them under the different headings in which they have been presented, namely:

Ground 1 – The mental element of the offence

Ground 2 – The meaning of "personal interest"

Ground 3 – Errors in relation to conflict of interest
Ground 4 – The construction of "any proceedings" relating to a "decision" "which a public body is to take"

Ground 5 – Disclosure

Ground 6 – Charging

Ground 7 – Injustice in sentencing

The present appeal, in fact, happens to be the first appeal heard by the Supreme Court in relation to an offence of conflict of interests under section 13(2) and (3) of the Act. It raises a number of fundamental legal issues, to a large extent concerned with the interpretation of certain elements of the offence itself and their application to the facts of the case. We are grateful to all counsel appearing in this matter for their comprehensive skeleton arguments, their detailed oral submissions as well as all the materials and authorities provided to us.

We propose to deal with the more straightforward grounds 6 and 7 first.

Ground 6 claims that the institution of criminal proceedings against the appellant more than two years after the act complained of was in breach of the time limitation as set out in section 4 of the Public Officers' Protection Act. However, no submission was offered on that ground by learned Queen's Counsel appearing for the appellant, who stated that the appellant reserved his right to argue before the Judicial Committee of the Privy Council that **Jhurry v ICAC** **[2015 SCJ 258]** was wrongly decided by the Supreme Court. In that latter case, the Supreme Court had found no breach of the Public Officers' Protection Act. In the circumstances, we have no alternative but to disregard ground 6.

Ground 7, challenging the sentence, raises the issue of whether the appellant had been required to elect not to challenge his conviction in order to benefit from a suspended sentence of imprisonment. Learned counsel appearing for all parties have agreed that this issue which, at the time of the appellant's sentence was occasioned by the decision in **Bajan v The State** **[2010 SCJ 348]**, has now been resolved in the recent decision of the full bench of the Supreme Court in **Beegoo v Independent Commission against Corruption** **[2015 SCJ 319]** which held that a convicted person sentenced to a community service order could not be debarred from appealing against his conviction. In view of this development, all learned counsel have also

agreed that a community service order was the appropriate sentence, subject to the appellant's consent. We shall, therefore, deem this ground to have been dropped bearing in mind, however, the procedural requirement that, should we after considering the remaining grounds uphold the appellant's conviction, he would be required to express his consent before the lower Court for the community service order to become applicable.

We shall now turn to consider ground 5 which is in relation to respondent No.1's non-disclosure of cabinet minute "CAB 250" in the course of the trial. It is the appellant's contention that the learned Magistrates were wrong not to treat CAB 250 as relevant and subject to disclosure and in concluding that the appellant's constitutional right to a fair hearing had not been breached. It has not been disputed by the appellant that respondent No.1 was not in possession of the said document. Instead, the questions raised under this ground are whether:

(a) "*the Court and the prosecution had a duty to ensure that a way was found for ensuring that disclosure was made*" [paragraph (a) of ground 5]; and

(b) whether respondent No. 1 had an "*obligation to investigate fairly and to use compulsory powers vested in it to obtain relevant documents in order to ensure a fair trial, particularly when relevant documents are in the possession of the State*" [paragraph (b) of ground 5].

We have gone through the judgment of the learned Magistrates and their finding in relation to CAB 250. It would not be appropriate for us, as counsel for the respondents have done, to embark upon a speculation as to the date, content and even relevance of a document which was never in the first place before the trial Court. Nonetheless, we are of the view that the reasoning of the learned Magistrates cannot be impeached for the following reasons:

(a) the undisputed evidence on record, namely that of witness Seebaluck, the then Secretary to the Cabinet, shows that CAB 250 had not been communicated to respondent No. 1 during the criminal investigation and was thus not in the latter's possession;

(b) since the document was not in the possession of respondent No. 1, it could not logically constitute an "*unused material*", within the meaning of section 65(1) and (2) of the Criminal Procedure Act;

(c) it follows that the decision of **Maigrot v The District Magistrate of Rivière du Rempart & Ors [2005 SCJ 106]** – (that the duty of disclosure arises only in circumstances where the prosecution is itself in possession of the document) – relied upon by the learned Magistrates, was both relevant and applicable;

(d) it was for respondent No. 1, in conducting the prosecution before the trial Court, to determine whether CAB 250 was relevant to proving the charge beyond reasonable doubt. If respondent No.1 considered that the document was not relevant to the prosecution, which it appears to us was the case here, it would not only be unfair, but also unreasonable, to impose an obligation on it to obtain that document;

(e) we note that before the trial Court, the defence neither cross-examined the main enquiring officer nor witness Seebaluck in relation to the importance or relevance of CAB 250, nor did it choose to call evidence to that effect, such that the appellant cannot be said to have shown any grave or serious prejudice caused to him as a result of the non-disclosure of CAB 250;

(f) the appellant had avenues open to him to seek disclosure of the document in question. We take judicial notice of the fact that he did enter an application before the Supreme Court seeking authority under section 4(2) of the Official Secrets Act "*to be allowed to refer and publish*" certain documents to respondent No. 1 "*for the purposes of a statement recorded from him*". In the course of that case, two documents were disclosed. However, in relation to a third category of documents, detailed particulars were requested from the appellant. Upon failing to provide the particulars, his application was set aside: vide **Jugnauth v The Secretary to the Cabinet and Head of the Civil Service & Ors [2013 SCJ 132]**. It is interesting to note that, in its judgment, the Supreme Court held that: "*… … the defendant No. 1 has consistently maintained that such documents, if they exist, are not Cabinet papers and are not in his possession. The defendant No.1's stand on this issue is*

not contradicted either by any averment of the plaint or any particulars furnished. As such the court cannot order the defendant No. 1 to give his authority for the plaintiff to refer to and publish to the co-defendant, documents of which he has no knowledge and which he has claimed are not in his possession." [Underlining ours]

Ground 5, accordingly, fails.

We shall next consider ground 4. In essence, it is submitted on behalf of the appellant that the act of signing the minute addressed to him on reallocation of funds did not amount to the appellant voting or taking part in "*any proceedings*" relating to a "*decision*" "*which a public body is to take*". The main thrust of the argument is that the appellant's signature constituted a mere administrative act which approved a proposal or recommendation made by other officials of the Ministry of Finance and Economic Development ("MOFED"), in furtherance of decisions already taken by the Government in Cabinet for the acquisition of land and building to set up a National Geriatric Hospital ("NGH"). It is contended that such an administrative act was neither sufficient to constitute "*proceedings*" nor amounted to a "*decision*" for the purpose of section 13(2) of the Act.

The expression "*public body*" is defined in section 2 of the Act as follows:

"public body" –

(a) means a Ministry or Government department, a Commission set up under the Constitution or under the authority of any other law, a local authority, or a statutory corporation; and

(b) includes a Government company;

On the other hand, neither have the words "*decision*" and "*proceedings*" been defined in the Act, nor do the parliamentary debates (debate No. 1 of 04 February 2002) in relation to the Act offer any assistance in gauging the intention of the legislator through the use of those words in section 13(2). In the circumstances, we are to give those words their plain ordinary meaning. The Oxford English Dictionary [12th Edition 2011] defines these words as follows:

"*decision*" : *"a conclusion or resolution reached after consideratio*n";
"*proceedings*" : *"an event or a series of activities with a set procedure*".

At the very beginning of their analysis of the charge, the learned Magistrates observed that "*most of the evidence ushered in by the Prosecution as regards approval of re allocation of funds by Minister/MOFED, FMM* (Financial Management Manual)*, FI* (Financial Instruments) *2008 & 2009, approval by Minister or not … …*" was "*irrelevant to the actual matter before the Court*". We do not agree. We consider that such remark was not only unwarranted but also unfair on the prosecution. In fact, the evidence adduced on these matters was central to determining whether the appellant's signature on the minute amounted to a "*decision*" and to taking part in "*proceedings*".

Be that as it may, after analysing the evidence before them, the learned Magistrates were satisfied that by considering the minute addressed to him and signing at the bottom of the minute after the word "*approved*", the appellant had taken part in "*proceedings*" of MOFED and had taken the "*decision*" to approve the reallocation of funds from MOFED's Lottery Fund (the originally approved source) to the Ministry of Health and Quality of Life's ("MOHQL") identified savings (the new source).

We have gone through the evidence before the trial Court. We are unable to say that the learned Magistrates erred in reaching the above conclusion and we agree with the submissions made on behalf of the respondents on these issues for the following reasons:

(a) it is clear from the evidence of witness Jeewooth, read in conjunction with that of witness Jhugroo, that the approval of MOFED was required in the present matter being given that the originally identified source of funds was MOFED's Lottery Fund and also that any subsequent reallocation of funds from one Ministry to another had to obtain the prior approval of MOFED, as per the Financial Management Manual;

(b) the evidence of witness Ramchurn was to the effect that usually the Financial Secretary approved files submitted to him, unless he decided that the final approval of the Minister was required. In the present matter, the minute in question was ultimately addressed to the appellant, which clearly showed that the final approval of the appellant was sought. This is supported by the evidence of witness Yip who stated that the appellant had the "*final agreement*";

(c) the use of the words "*any proceedings*" in section 13(2) of the Act suggests that these words are meant to be given a wide interpretation and to encapsulate any category of proceedings, including a single event, which is capable of leading to a situation of conflict of interests in the manner described in that provision;

(d) had it been the intention of the legislator to exclude merely procedural or administrative acts such as the mere signing of a minute from the ambit of this provision, this would undoubtedly have been specified in the Act;

(e) at any rate, we are not persuaded by the argument that the appellant's signature constituted a mere administrative act having regard to the facts of the present matter. We are of the view that it is the effect or consequence of his act which needs to be analysed.

In **United States v Selby [United States Court of Appeal for the Ninth Circuit, 5 January 2009]**, referred to by learned Counsel for respondents Nos. 2 and 3, which concerned the offence of "*felony conflict of interest*" under section 208 of the United States Code, the Court quoting with approval from a previous decision in **United States v Irons, 640 F. 2d 872 (7th Cir. 1981)** held:

> *" … … In United States v. Irons, 640 F.2d 872 (7th Cir. 1981), the Seventh Circuit undertook an extensive analysis of the legislative history of 18 U.S.C. § 208, and concluded that it "demonstrates an intention to proscribe rather broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions . . . [The scope of 18 U.S.C. § 208 includes] acts which [lead] up to the formation of the contract as well as those . . . which might be performed in the execution of the contract." Id. at 877. We adopted much of this analysis in United States v. Jewell, 827 F.2d 586 (9th Cir. 1987), where we explained:*
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> > *"the import of the Seventh Circuit's statement is clear: liability for conflict of interest may be founded on a variety of acts leading up to the formation of a contract even if those acts are not specifically mentioned in the text of section 208(a). The section's "catch all" language ("participates … … through decision, approval, recommendation, the rendering of advice, investigation, or otherwise ….") was designed to allow prosecution on the basis of any type of action taken to execute or carry to completion a contract. Id. at 587." "* [Underlining ours]

In these circumstances, it can neither be said that the appellant did not take part in "*proceedings*" nor that his approval did not amount to a "*decision*". Ground 4, therefore, fails.

Grounds 2 and 3 may be considered together since they both essentially concern the nature of the interest which may constitute the basis for criminal liability and conviction for an offence under section 13(2) of the Act.

Ground 2 concerns the meaning of "*personal interest*". The issue is whether, in the circumstances of the present case, the appellant's sister could be said to have had any "*personal interest*" in the appellant's decision to approve the reallocation of funds.

It was submitted that the learned Magistrates were wrong to proceed on the basis that the appellant's sister's shareholding in Medpoint Ltd meant that she held a "*personal interest*" in the decision relating to the payment to be made to the company. The interests of a shareholder and the interests of a company are distinct and separate. As a result, the learned Magistrates were wrong to disregard the separate personality of the company. The learned Magistrates wrongly conflated the appellant's sister's interest in Medpoint Ltd with Medpoint Ltd's interest in its contract with the Government.

The words "*personal interest*" are not defined in the Act. They are, therefore, to be given their plain ordinary meaning as intended by the legislator. The Oxford English Dictionary [12th Edition 2011] defines each of those words as follows:

"*personal*" : " *1. of, affecting, or belonging to a particular person. ► involving the presence or action of a particular individual.*

2. of or concerning a person's private rather than professional life.

… … …"

"*interest*" : " *… … …*

3. the advantage or benefit of someone.

4. a share or involvement in an undertaking. ► a legal concern, title, or right in property.

… … …"

The particulars of the information averred that the appellant's sister "*held 86,983 out of 368,683 shares*" in Medpoint Ltd. Having regard to the wording used in section 13(2) of the Act, the prosecution is required to prove that the relative had a "*personal interest in a decision which a public body is to take*".

We have perused the judgment of the learned Magistrates. Their finding on this issue is set out at pages 21 and 22 of their judgment:

> *"It is undisputed that the decision was in respect of Medpoint Ltd. However, as a shareholder with no less than 23% of the total shares as well as being a director (Doc U refers), it goes without saying that* ***Accused's sister has a direct personal interest in whatever decision affecting Medpoint Ltd.*** *The Ministerial decision to find funds so as to pay Medpoint Ltd unavoidably has a direct effect on her financial situation and therefore definitely* ***her personal interest****."*

We have to admit that this is where we begin to struggle with the reasoning of the learned Magistrates. The first difficulty we have is their inference that the appellant's sister had a "*direct personal interest*" in "*whatever decision affecting Medpoint Ltd*" from the mere fact of her being a shareholder "*with no less than 23% of the total shares*" and a director in Medpoint Ltd. As rightly submitted by learned Queen's Counsel for the appellant, the learned Magistrates appear to have failed to recognise that Medpoint Ltd was a separate and distinct legal entity and appear to have conflated Medpoint Ltd's interests with those of the appellant's sister. We cannot overlook the views of Lord Sumption in **Prest v Petrodel Resources Ltd and Ors [2013] 2 AC 415**; **[2013] UKSC 34**, a recent case before the Supreme Court of England and Wales, wherein he stated:

> *"8. Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own and not that of its shareholders. In Salomon v A Salomon and Co Ltd [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. … … …*
>
> *27. In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. … …"*
> [Underlining ours]

The Court cited with approval the statement made by Lord Buckmaster in **Macaura v Northern Assurance Co Ltd [1925] AC 619** at **pp 626-627**: "*No shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein.*"

In **Eutetra Bromfield v Vincent Bromfield [2015] UKPC 19**, the Judicial Committee of the Privy Council, placing reliance on the above reasoning of Lord Sumption, was of the view that the Court of Appeal of Jamaica had been wrong in holding that where one party held 100 shares (or 15.55%) of the issued share capital in a company which owned a property, that party had a corresponding 15.55% interest in that property. The Judicial Committee pointed out that the Court of Appeal was wrong to conclude that a company property was owned by its shareholders.

What then is the nature of the interest which the legislator seeks to criminalise under section 13?

One of the conditions for an offence to exist under section 13(2) is that the decision must relate to a decision in which the relative has a personal interest. The use of the term "*personal*" is purposive and crucial in several respects. By adopting such a wording, it is clear that any interest would not suffice to create criminal liability for an offence under section 13(2). Quite significantly, section 13(2), as opposed to section 13(1), limits interest to "*personal interest*". Had it been the intention of the legislator to encompass any other interest, direct or indirect, such words would have been expressly included and spelt out in section 13(2) as was done by the legislator when it was its intention to do so for an offence under section 13(1) of the Act.

Thus, we are of the opinion that:

(a) the wording of section 13(2) is not concerned with any remote interest and it clearly relates to such personal interest of a relative which may, accordingly, give rise to a conflictual situation confronting the public official at the time of his participation in the decision-making process;

(b) although a relative may have an interest as shareholder, he would have no "*personal*" interest in a decision of Government to allocate funds to a company which is, in law, a different entity.

In our view, the learned Magistrates were wrong in simply inferring from the appellant's sister's shareholding in the company that she had a "*direct personal interest in whatever decision affecting Medpoint Ltd.*" This finding was generalised and ignored the need to analyse and assess each specific decision individually to determine whether the sister had a personal interest in it.

Additionally, the learned Magistrates' finding on the issue of "*personal interest*" was glaringly flawed because the Ministerial decision was not one to "*find funds*" but one to approve the reallocation of funds, which had already been previously earmarked, from one source to another. The learned Magistrates clearly failed to make this crucial distinction in their appreciation of the evidence before them in determining the issue of interest.

This confusion of the learned Magistrates is further evidenced by their subsequent finding that:

> *"It is clear that had no source of funds been identified urgently, the Government would not have been able to pay Medpoint Ltd within fiscal year 2010, hence the importance of the decision."* (page 23 of the judgment).

The above finding poses two problems. Firstly, it confirms the trial Court's misconception that funds had to be "*identified*" whereas, as we have stated above, the decision was rather one of "*reallocation*" of existing funds. Secondly, there is purely and simply no evidence on record to support the finding that the Government would not have been able to pay Medpoint Ltd within financial year 2010 (the financial year at the relevant time coincided with the calendar year), had the appellant not taken the decision which he did. On the contrary, there is evidence that the Financial Secretary had, in November 2010, directed that the project needed to be implemented and the payment needed to be effected before the end of December 2010. To that extent, we agree with the submission of learned Queen's Counsel for the appellant that, had the reallocation decision not been taken, the default position would have been that the existing course of payment (MOFED's Lottery Fund) would have been a source of payment. No evidence was adduced showing the contrary.

Moreover, in order to determine whether the appellant's sister could have had a "*personal interest*" in the appellant's specific decision to approve the reallocation of funds, it is

important to consider the circumstances and the stage at which such approval was sought and obtained. The evidence on record shows that:

(a) in March 2010, the Government approved a project for the setting up of a NGH;

(b) in April 2010, a public bid was launched for the project and the bid procedure was closed on 03 June 2010;

(c) on 09 July 2010, the amount of Rs 150 million was allocated from MOFED's Lottery Fund in 2010 to fund the project;

(d) on 09 November 2010, the Financial Secretary directed that the purchase of the building to house the NGH should be implemented and payment effected before the end of December 2010;

(e) on 14 December 2010, the Central Procurement Board informed MOHQL that it had awarded the contract to Medpoint for the NGH project for the total sum of Rs 144,701,300. This amount was determined following assessment by the Valuation Department;

(f) on 22 December 2010, MOHQL made a request to MOFED for funds to be made available, by way of departmental warrant, from MOFED's Lottery Fund to finance the acquisition of Medpoint Ltd;

(g) in the course of internal discussions at MOFED, it was considered that although the project had initially been earmarked for payment from MOFED's Lottery Fund, the project being of a capital nature, the identified savings of Rs 200 million on capital projects in MOHQL's budget should be reallocated to the NGH project;

(h) on 23 December 2010, a minute to that effect was accordingly addressed by Mr Ramchurn, a Senior Analyst of MOFED, to the appellant, in latter's capacity as Minister of Finance, to seek his approval for the reallocation of funds. The minute was submitted through Analyst Mr Ramyead, Budget Coordinator Mr Acharaz, Director Mr Yip and Financial Secretary Mr Mansoor. All of them initialed the

minute before it was submitted to the appellant, who approved and signed the minute on the same day;

(i) the material part of the minute consisted of the following facts:

(i) the Central Procurement Board has approved the award of the tender for Rs 144,701,300;

(ii) MOHQL is now requesting funds for payment;

(iii) funds are currently earmarked under MOFED's National Lottery Sub-Programme;

(iv) however, since there is a sum of 200 million rupees already available under capital projects of MOHQL, it is proposed that that Ministry be requested to reallocate funds from its identified savings instead of effecting payment from MOFED's Lottery Fund;

(j) on 24 December 2010, MOFED informed MOHQL that approval had been given to reallocate the sum of Rs 144,701,300 from MOHQL's savings under capital projects; and

(k) on 27 December 2010, funds were reallocated and Medpoint Ltd was duly paid from the Consolidated Fund.

As was expressly recognised by the learned Magistrates themselves, the decision to reallocate funds was "*… at the very last stage of the whole process, when all major steps had already been fulfilled for the acquisition of Medpoint site and decision to pay had already been taken. The sole decision that had to be taken at that stage and in which accused confirmed having participated is the source of funds for the agreed payment to Medpoint Ltd.*"

Therefore, it stands to reason, having regard to the above sequence of events, that the decision taken by the appellant to approve a reallocation of funds at the stage after funds had been identified, after the payment deadline had been determined, after the contract had been

awarded and after the contract amount had been determined could not possibly have resulted in any "*personal interest*" to his sister. The sum of Rs 144,701,300 was already due to be paid by Government and there was already an available and identified source of payment which was MOFED's Lottery Fund. By affixing his signature to the minute, the appellant approved the proposal to use MOHQL's savings as the source of funding the payment rather than MOFED's Lottery Fund. It was an internal administrative decision which was merely concerned with an allocation choice between two possible sources of funding, resulting in payment being effected from another available source. It was not a decision to "find" or "identify" funds, as erroneously found by the learned Magistrates.

Moreover, as rightly submitted by learned Queen's Counsel for the appellant:

(a) any decision for the reallocation of funds would not have affected Medpoint Ltd's entitlement to receive payment; and

(b) the appellant's sister could not have had any preference for the source of the funds since the money would have emanated from the Consolidated Fund at any rate, and whether the money came from MOFED or MOHQL could not have mattered to her.

Under ground 3, it was submitted that the learned Magistrates failed to address the issue of conflict of interest correctly in law and on the facts, before convicting the appellant for an offence under section 13(2) of the Act.

The mischief which the legislator seeks to repress under section 13(2) of the Act is that a public official must refrain from taking part in a decision of a public body which may involve a conflict between the interest of the public body and his own personal interest or that of a relative or associate.

From the evidence on record, it is beyond dispute that following the decision of Government and before the appellant gave his approval to effect payment, Government was already bound to pay the sum of Rs 144,710,300 to Medpoint Ltd. Having ascertained that the decision had already been taken to pay, no situation of conflict could arise with regard to the obligation to pay. It was no longer an issue that Medpoint Ltd was entitled to the payment of

Rs 144,710,300. Government had not only taken the decision to award the contract to Medpoint Ltd but had also expressly bound itself to effect payment to Medpoint Ltd. The only remaining issue was payment of the sum in question. The interest of Medpoint Ltd to obtain payment of that sum had already been secured since 14 December 2010, well before the appellant affixed his signature for the approval of the reallocation of funds. As we have found earlier, the decision to reallocate funds could not in the least have affected the interest of Medpoint Ltd.

In the circumstances, on the facts, it cannot be said that the appellant had, at the time he approved the minute and affixed his signature, participated in a decision in which his sister had a "*personal interest*" or which would give rise to any conflict of interest situation within the purview of section 13(2) of the Act.

As regards the legal principles applicable, we are of the view that the learned Magistrates erred in holding that an appearance of bias would apply for the purpose of establishing an offence under section 13(2) of the Act. After concluding that " … *In short, there is absolute prohibition to take part in any way whatsoever in any decision making process*", the learned Magistrates immediately went on to state "*The reason for such an absolute prohibition is to preserve the integrity of the decision making process so that there may not be any perception of bias in the mind of a fair-minded and informed observer.*" [Underlining ours]

The learned Magistrates relied on the test of apparent bias laid down in **Porter v Magill [2002] 2 AC 357 at p 494** which is "*whether the fair-minded and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased*".

Section 13(2) of the Act is not concerned with any perception of bias but creates a criminal offence which requires the prosecution to prove an actual conflict of interest when the public official takes part in a decision-making process including the personal interest of a relative. There must not be merely an apparent conflict of interest. Whilst the test for apparent bias is appropriate to determine the impartiality of an adjudicating tribunal or an administrative body entrusted with a statutory decision-making process as in **Porter v Magill** (supra) or in **Khedun -Sewgobind v The Public Service Commission [2010 SCJ 6a]**, the same principle or test would not apply to the proof of a criminal offence under section 13(2) of the Act.

The composite wording of section 13(2) of the Act conveys in no uncertain terms that it is incumbent on the prosecution to prove beyond reasonable doubt that the appellant took part in proceedings relating to a decision in which his relative had an actual personal interest. It is not a situation where an apparent interest perceived by a fair-minded observer would give rise to a criminal conviction under section 13(2). Thus, the views of a fair-minded and informed observer on the existence of an apparent conflict of interest would be irrelevant. The learned Magistrates erred when they proceeded to convict the appellant based on an apparent conflict of interest. Section 13(2) of the Act does not criminalise apparent conflicts of interest but actual conflicts of interest, to which the learned Magistrates utterly failed to apply their minds.

For the above reasons, we consider that the appeal must succeed under both grounds 2 and 3.

We shall now turn to consider the only remaining ground left which is ground 1. This ground hinges on the mental element aspect of the offence and reproaches the learned Magistrates of having failed to properly appreciate the mental element required for the offence to be proved.

The submissions of learned counsel for the appellant in that connection may conveniently be summed up as follows:

(a) the learned Magistrates were wrong to treat the offence under section 13(2) and (3) of the Act as being an absolute one involving strict liability. They failed to recognise that the prosecution had to prove that the appellant knew and intended the conduct elements of the offence. The presumption of *mens rea* was not displaced expressly or by necessary implication in section 13 of the Act;

(b) in any event, the prosecution charged the appellant for having acted "*willfully*" and "*criminally*". The learned Magistrates were not entitled to ignore the need to prove that the appellant knew that he was taking part in proceedings of a public body where a relative of his had a personal interest in a decision to be made by that public body;

(c) the learned Magistrates failed to recognise that even if (contrary to the primary contention in (a)) the prohibition in section 13(2) and (3) of the Act was an absolute one, an honest and reasonable belief in the existence of facts that would render the conduct innocent would be a defence;

(d) the learned Magistrates were wrong to dismiss the evidence relating to the appellant's disclosure of interests at Cabinet level as it provided powerful evidential support for the appellant's good faith defence;

(e) the learned Magistrates should also have considered whether the appellant, as Minister of Finance charged with the responsibility for exercising general direction and control over that Ministry under section 68 of the Constitution, may have been acting in the *bona fide* execution of his duty as Minister, in approving the technical proposition already validated and approved by, amongst others, the Financial Secretary, when he signed the allocation of funds minute on 23 December 2010.

In the course of their submissions, learned counsel for the respondents referred extensively to various documents which included Working Papers on Conflict of Interest as well as Codes of Conduct of Parliamentarians from other jurisdictions. Learned counsel for respondents Nos. 2 and 3, in particular, laid much emphasis on the content of the Select Committee Report of the National Assembly which preceded the enactment of the Prevention of Corruption Act. In **Peerthum v Independent Commission Against Corruption [2014] UKPC 42**, when construing certain provisions of the Prevention of Corruption Act, the Judicial Committee of the Privy Council pointed out that "*the Select Committee report cannot be resorted to in aid to its interpretation*" inasmuch as the Report did not contain any draft Bill and the Act subsequently adopted by Parliament plainly departed from the Report.

Likewise, the wide ranging references to offences of a cognate nature in other jurisdictions cannot be of much assistance in construing the ambit of section 13(2) of the Act in Mauritius. Although there may be some similarities, the wording is different and the constitutive elements of the offences are not identical. We, therefore, need to turn to the language of section 13(2) of the Act which creates the offence in order to examine the ambit of its

constitutive elements and the scope of its application, as intended by the Mauritian legislator when enacting the legislation.

True it is that section 13(2) of the Act contains no expression indicating that a mental element is a necessary constituent of the offence. However, we note that this is also the case as regards the other "corruption offences" listed under Part II of the Act. Does this, by itself, remove any presumption in favour of the requirement of *mens rea*? The proper starting point for ascertaining the mental requirements of any statutory offence is to presume that the prosecution must prove *mens rea* in respect thereof. That presumption may be displaced expressly or by necessary implication. If it is not displaced, the *mens rea* requirement persists. These principles are made explicit in the following passage from **Sweet v Parsley [1970] AC 132 at p. 148-149**:

> "*Our first duty is to consider the words of the Act; if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence made it clear that mens rea is required in one form or another. Such cases are quite frequent. <u>But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did</u>. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.*"
> [Underlining ours]

Lord Reid added that "*it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that this is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly", is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. … … it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted*".

In interpreting the intention of the legislator, Lord Reid went on to highlight the dangers and injustice which result from a manifestly unjust conviction for serious offences of a "*truly criminal character*" but which have been held to be absolute offences:

> " *But when one comes to acts of a truly criminal character, it appears to me that there are at least, two other factors which any reasonable legislator would have in mind. In the first place a stigma still attaches to any person convicted of a truly criminal offence and the more serious or more disgraceful the offence the greater the stigma. So he would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape. And equally important is the fact that fortunately the Press in this country are vigilant to expose injustice and every manifestly unjust conviction make known to the public tends to injure the body politic by undermining public confidence in the justice of the law and its administration. <u>But I regret to observe that, in some recent cases where serious offences have been held to be absolute offences, the court has taken into account no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence</u>*."
> [Underlining ours]

It is also useful to refer to **Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong [1985] AC 1**, where the Judicial Committee of the Privy Council (Lord Scarman) laid down the following propositions with regard to the requirement of *mens rea* as an essential ingredient of a criminal offence:

> "*(i) there is a presumption of law that mens rea is required before a person can be convicted of a criminal offence;*
>
> *(ii) the presumption is particularly strong where the offence is "truly criminal" in character;*
>
> *(iii) the presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the Statute;*
>
> (iv) *the only situation in which the presumption can be displaced is where the Statute is concerned with an issue of social concern, for example, public safety;*
>
> *(v) even where the Statute is concerned with an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to greater vigilance to prevent the commission of the prohibited act.*"

The above principles from **Sweet v Parsley** (supra) and **Gammon** (supra) have been considered and applied in a number of cases where the question arose as to whether the offence imported a requirement of *mens rea*. The following extract from **Halsbury's Laws of**

England Vol. 25 Criminal Law at paragraph 18 provides a helpful summary of the principles applicable to statutory offences under English law:

> "*In all statutory offences wherever a provision is silent as to mens rea there is a presumption that the mens rea is nonetheless an essential element of the offence. The presumption can be rebutted only by express provision or by necessary implication, and a 'necessary implication' connotes one which is compellingly clear, truly necessary and free from ambiguity; also the presumption must not involve an internal inconsistency.*"

It is significant to consider, in that respect, that the interpretation of a penal statute requires that any ambiguity or inconsistency must be interpreted in a manner which is favourable to the accused.

Moreover, the more serious the offence, the greater is the weight to be effected to the presumption that *mens rea* is required. "*One should be slow to attribute to the legislator the intention of inflicting severe punishment and stigmatizing a person as a serious criminal unless he is proved to have acted with a guilty mind*", vide **Hin Lin Yee And Another v HKSR [2010] HKCHA 11**.

More recently, the Supreme Court of England and Wales reaffirmed the importance of the presumption of *mens rea* in **R v Brown [2013] UKSC 43, [2013] 4 All ER 860**, holding that the presumption should not be displaced in the absence of clear statutory language or unmistakably necessary implication. The Court emphasised that the presumption is enhanced in cases, such as this one, where the offence is "truly criminal" and carries a heavy penalty:

> *"The constitutional principle that mens rea is presumed to be required in order to establish criminal liability is a strong one. It is not to be displaced in the absence of clear statutory language or unmistakably necessary implication. And true it is, as the appellant has argued, that the legislative history of an enactment may not always provide the framework for deciding whether the clearly identifiable conditions in which an implication must be made are present. It is also undeniable that where the statutory offence is grave or "truly criminal" and carries a heavy penalty or a substantial social stigma, the case is enhanced against implying that mens rea of any ingredient of the offence is not needed."*

As a result, it is well settled in English law that, even where the provision which creates the offence is silent or ambiguous as to the required state of mind, the starting point for ascertaining the mental requirements for any statutory offence is to presume that it is incumbent

upon the prosecution to prove the requisite *mens rea* in relation to each element of the offence: **Sherras v De Rutzen [1895] 1 QB 918 D.C.; Brend v Wood [1946] 175 LT 306, 307; Sweet v Parsley** (supra)**; B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428 at 460**. Further, in **R v K [2002] 1 AC 462 at 477**, Lord Steyn pointed out that although the presumption applies in cases of ambiguity, "*the applicability of the presumption is not dependent on finding an ambiguity in the text. It operates to supplement the text*".

Section 162 of the Courts Act in Mauritius provides that in the absence of any special laws in force in Mauritius, the English law of evidence shall be applicable. Indeed in **Rayapoulle v R [1990 MR 286]**, the Supreme Court of Mauritius applied the same guiding principles laid down by Lord Scarman in **Gammon** (supra) which have already been reproduced earlier in this judgment. The Court went on to hold that *mens rea* is an essential ingredient of an offence of possession of a firearm under section 36 of the Public Order Act, even though the statutory provisions creating the offence are silent as to the requirement of *mens rea*.

Applying the above principles to the offence created under section 13(2) and (3) of the Prevention of Corruption Act, it is plain that there is a presumption that *mens rea* is an ingredient of the offence and that *mens rea* is required before the appellant can be convicted of such a criminal offence. The presumption is reinforced by the fact that it is an offence which is "*truly criminal*" in character and is categorised as a "*corruption offence*" (under Part II of the Act) as defined by section 2 of the Act. The seriousness of the offence is enhanced by a severe penalty of up to ten years' penal servitude which adds to the weight to be attached to the presumption that *mens rea* is required for such an offence.

We, therefore, hold that the presumption of law that *mens rea* is required before a person can be convicted of an offence under section 13(2) has neither been rebutted by any express provision in the Act nor by necessary implication.

Additionally, it is significant to highlight another important provision which the legislator has included in the Act, namely section 83 of the Act, which reads as follows:

> "***83. Burden of proof***
>
> *In the course of a trial of an accused for a corruption offence, it shall be presumed that at the time a gratification was received, the recipient knew that such gratification was made for a corrupt purpose."*

By enacting section 83 of the Act, the legislator has unequivocally indicated, first, its clear intent that *mens rea* should be an essential ingredient of a corruption offence and, secondly, that for the purpose of proving the *mens rea* in respect of such a corruption offence, the required guilty knowledge is presumed and the burden accordingly shifts upon the accused to prove absence of any guilty knowledge on his part.

It is not the least surprising, therefore, that the prosecution chose to aver all the ingredients of *mens rea* in the information against the appellant. The charge brought by the prosecution against the appellant is that the appellant acted "*willfully*", "*unlawfully*" and "*criminally*". Thus, the charge which the appellant had to answer and to which he pleaded expressly mentions that full *mens rea* is required.

Independently of whether *mens rea* is a constitutive element or not, there is another fundamental issue which we, sitting as an appellate Court, are unable to overlook, namely, the bearing of the charge, as formulated, on the fairness of the proceedings. The appellant prepared and conducted his defence, which includes the presentation of his case, the calling of evidence and cross-examination of the prosecution's witnesses, on the basis that it was incumbent upon the prosecution to prove that he had guilty knowledge. It is a fundamental feature of a fair trial that an accused party should know with precision from the outset the exact nature of the charge brought against him so that he is not misled or prejudiced in the conduct of his defence. It is highly questionable whether the appellant can be considered to have benefitted from a fair trial when, throughout his trial, the proof of his guilty knowledge has been treated as a live issue which he had to answer. At no stage was any amendment brought to the charge. The trial proceeded on the basis of an information that imparted to the accused (now appellant) that *mens rea* was an essential ingredient of the offence. Absolute liability was out of question since it was, by virtue of such an averment in the information, incumbent upon the prosecution to prove beyond reasonable doubt not only that the offence was "*willfully*" but also "*criminally*" committed. It is trite law that "*what must be averred must be proved, and reciprocally what must be proved should be averred*": vide **Beekhan v The Queen [1976 MR 3]**.

The approach adopted by the learned Magistrates with regard to the mental element is, accordingly, flawed in several respects. They were clearly wrong to treat the offence under section 13(2) and (3) as being an absolute offence creating an absolute prohibition. They failed to recognise that the prosecution had to prove beyond reasonable doubt the requisite mental

element on the part of the appellant in order to establish his guilt at the material time of the commission of the offence in conformity with section 13(2) of the Act.

The learned Magistrates' approach in that respect is reflected in the following extract from their judgment:

> "*The Court has already highlighted that the prohibition to take part in **any** proceedings is an absolute one in the light of the provision of the law under section 13(2) of POCA, so that even if the accused acted in good faith, it would not constitute any defence.*"

Earlier in their judgment when the learned Magistrates set out to consider at the outset the constitutive elements of the offence, they stated the following:

> "*Our first observation in respect of the present offence as provided by law is that by using the words "**shall not**", the Legislature has, in its wisdom, imposed an absolute prohibition on the public official to either vote or take part. It goes without saying that such absolute prohibition destroys the possibility of an accused party availing himself of the defence that he acted in good faith.*"

This approach adopted by the learned Magistrates is wrong in law. The use of the words "*shall not*" by the legislator does not operate to exclude the need to establish "*mens rea*" or "*a guilty intent*" for the purpose of establishing an offence under section 13(2) of the Act. The learned Magistrates failed to appreciate the presumption that it was incumbent on the prosecution to prove *mens rea* in relation to all the constitutive elements of the offence. Such presumption had not been displaced expressly by any statutory provision nor by necessary implication.

As the learned Magistrates proceeded, at page 19 of their judgment, to enumerate the elements of the offence which were required to be established, it is significant to note that "*mens rea*" or the "*mental element*" is not included by them as an element of the offence, and this despite the fact that the information clearly averred the word *"willfully"*. Nowhere in the judgment do the learned Magistrates consider or find that the offence was committed *"willfully"*.

Yet, at page 28 of the judgment, we have the following finding:

"Unfortunately, Accused's reckless attitude when the decision to reallocate funds so as to enable payment to Medpoint Ltd in which company his sister has a personal interest led to the commission of the present offence."

It would appear, therefore, that the learned Magistrates' view was that recklessness was sufficient. However, we further note that when pronouncing the sentence of the Court (at page 4 of the sentence), the learned Magistrates stated *"… … there is ample evidence that Accused willfully and recklessly took part in the decision making process … …"* when there was never any finding in the judgment that the offence had been "*willfully*" committed. This adds to the confusion in the approach adopted by the learned Magistrates as to the exact mental element required for the offence to be proved.

In our view, the learned Magistrates erred in two material respects on the issue of mental element:

(a) they wrongly construed section 13(2) of the Act as an absolute offence which created an absolute prohibition. As a result, they failed to import and consider the requisite *mens rea* or guilty mind in respect of all the prohibited acts which constitute the offence;

(b) they also wrongly construed section 13(2) of the Act as precluding the appellant from establishing that he had acted in good faith by showing, on a balance of probabilities, that he had acted with an honest and reasonable belief in a state of facts which would render his performance of the prohibited acts devoid of any guilty intent.

As a result of the misdirections in law under (a) above, the legal approach adopted by the learned Magistrates was vitiated and defective from the outset. It was incumbent upon the prosecution to prove beyond reasonable doubt that the appellant had the requisite guilty intent in respect of all the prohibited acts which constitute an offence under section 13(2). No such finding was reached by the learned Magistrates. The prohibited acts which constitute an offence under section 13(2) are quite composite and inextricably linked. These are not limited merely to the taking part by a public official in any proceedings which relate to a decision involving the personal interest of a relative. They also consist of the prohibition to take part in a decision-making process involving a conflict of interest as contemplated by section 13(2), that

is, in a situation where the exercise by the public official of his public duty would conflict with the "*personal interest*" of his relative. In other words, it was incumbent upon the prosecution to establish that the appellant acted at the material time with the requisite guilty intent that he was taking part in proceedings despite a conflictual situation which involved the personal interest of a relative. This is what emerges from a plain reading of the text which creates the offence under section 13(2).

Furthermore, as set out under (b) above, the learned Magistrates could not rule out, in law, the defence of good faith which was invoked by the appellant. The learned Magistrates declined to apply their minds to the appellant's defence of good faith and to determine whether, at the material time, the appellant was led by any honest and reasonable exculpatory belief.

Following a comprehensive review of the authorities in various Commonwealth jurisdictions, the Hong Kong Court of Final Appeal (Hong Kong Special Administrative Region) in **Hin Lin Yee and Another v HKSAR** (supra) considered that in order to avoid a person being convicted without any fault on his part, the Courts are inclined to allow the accused to rely on the common law defence that he was acting in good faith.

The Hong Kong Court of Final Appeal explained how in several Commonwealth jurisdictions such as Australia, Canada and New Zealand, the courts have adopted what is commonly known as "*a half-way house*" by recognising a defence of good faith based on an honest and reasonable belief held by the accused, the more so, where the presumption of *mens rea* has been displaced.

Although the existence of this "*half-way house*" or intermediary solution has not been readily adopted in later English decisions, Australian Courts have adopted the well-known statement of Cave J **in Reg v Tolson [1889] 23 QBD 168** which reads as follows:

> "*At common law, an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence.*"

In **The Bank of New South Wales v Piper [1897] AC 383**, the Privy Council favoured the view expressed by Cave J in **Tolson** (supra) by stating that:

> "*… … the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.*"

The Australian High Court in **Proudman v Dayman [1941] 67 CLR 536** stated: "*As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.*"

In **Maher v Musson [1934] 52 CLR 100**, the court adopted the same view considering that the imposition of absolute liability was wholly unacceptable for an offence of having custody of illicit spirits.

In **He Kaw Teh v The Queen [1984 -1985] 157 CLR 523**, the Australian High Court went even further and affirmed that the defendant has only to raise the issue of the possible existence of his exculpatory belief. The burden would then be upon the prosecution to prove beyond reasonable doubt that he did not honestly hold that belief, or if he did, that it was not held on reasonable grounds.

Both in Canada and in New Zealand, the courts have adopted the "*half-way house*" with some modification in their approach. The Court of Appeal in New Zealand summarised the position reached in the development of New Zealand law in the case of **Civil Aviation Department v Mackenzie [1983] NZLR 78** in the following terms:

> "*… … as a general approach to statutory offences when the words give no clear indication of legislative intent and there is no overriding judicial history, it will be right to begin by asking whether there is really anything weighty enough to displace the ordinary rule that a guilty mind is an essential ingredient of criminal liability. If there is, the next inquiry should be whether the statutory purpose and the interests of justice are on a balance best served by allowing a defence of total absence of fault, with the onus on the defendant*".

Similarly in Canada, the Supreme Court of Canada (Dickson J) stated in **R v City Sault Ste Marie [1978] 85 DL R (3d) 161** that "… *when confronted with an offence of absolute liability, … a defence to avoid liability will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render his act or omission innocent* …".

The presumption of *mens rea* is, thus, accepted across various Commonwealth jurisdictions and, unless displaced, it is accepted that the prosecution must prove *mens rea* beyond reasonable doubt. The half-way house issue would arise particularly in case of any displacement of the presumption: "*It is to confer a defence on an accused who would otherwise be defenceless even if he had acted under an honest and reasonable belief which, if true, would have made his act innocent.*" [**Hin Lin Yee v HKSAR (supra) at para. 109**].

In the present matter, the trial court refused to apply this test by refusing to give any consideration to the defence of good faith which was raised by the appellant. The learned Magistrates emphatically asserted in their judgment "*that the prohibition to take part in any proceedings is an absolute one in the light of the provision of the law under section 13(2) of POCA, so that even if the accused acted in good faith, it would not constitute any defence …*" .

During the trial, the appellant gave evidence under oath. He stated that since he had previously already declared his interest in Cabinet and had never participated in the decision-making process that led to the award of the contract, he thought that "*everything had been decided*". He also stated that he had no other choice but to approve the reallocation. Indeed, it is not in dispute that during the whole of the sequence of events starting from the inception of the proposal to set up a NGH until the award of the contract to Medpoint Ltd and the Government's undertaking to effect payment as a result of the allocation of the contract to Medpoint Ltd, the appellant had nothing to do, and even on crucial occasions abstained from participating in any decision-making process to award the contract to Medpoint Ltd. For instance, when an Information Paper was presented to Cabinet on 05 March 2010 to provide details of the proposal to set up the NGH, the appellant withdrew from Cabinet and did not participate in the discussions.

Again, at the 18th meeting of Cabinet held on 18 June 2010, when the issue of the NGH was raised, the appellant immediately declared his interest in Medpoint Ltd. He stated that he did not want to be involved in any manner whatsoever with this exercise and he withdrew from the Cabinet meeting. It was at this meeting that Cabinet expressed its agreement to the proposal for the acquisition of buildings to accommodate the NGH.

On 09 July 2010, when the Minister of Health wrote to the appellant for the reallocation of funds for the NGH, the appellant referred the letter to a senior adviser, stating that he did not want to have anything to do with the process and the setting up of the NGH.

The evidence also shows that the appellant did not participate and was not involved in any of the steps in the decision-making process concerning the procurement, valuation or award of the contract.

We are of the view that the previous line of conduct of the appellant was not only relevant but also material in assessing whether he could have known that his sister had any "*personal interest*" in the reallocation decision. Having formally abstained from dealing with the matter on previous occasions when he was aware that Medpoint Ltd was involved, it does not stand to reason that he should have deliberately got himself involved on this occasion.

Learned counsel for respondents Nos. 2 and 3 made a bold attempt to salvage the situation despite all the material misdirections in law by the learned Magistrates with regard to *mens rea* and the defence of good faith. Although this was not apparent from the Skeleton Arguments filed on behalf of respondents Nos. 2 and 3, learned Counsel has, in the course of his oral submissions, submitted that in order to establish an offence under section 13(2) of the Act in the present case, the prosecution had to establish knowledge of the appellant in relation to each of the three conduct elements of the offence, namely:

(a) knowledge that he was a public official;
(b) knowledge that he took part in proceedings of a public body relating to a decision; and
(c) knowledge that his sister possessed a personal interest in that decision.

Learned counsel further submitted that the learned Magistrates had found the required *mens rea* proved.

We do not agree. True it is that the learned Magistrates found that the appellant knew that his sister possessed an interest "*in Medpoint Ltd*" and also knew that his decision to approve the reallocation of funds related to the payment of Medpoint Ltd. However, it cannot be said that they found the requisite *mens rea* in respect of all the conduct elements of the offence, in particular the third conduct element, proved beyond reasonable doubt. What they found was that the appellant must have known that his sister was a shareholder. This cannot, *de facto*, be equated or stretched to a finding that he knew that she had any "*personal interest*" in the

decision to reallocate funds and that he knowingly participated in a decision-making process involving a conflict of interest.

Independently of the above, however, since the learned Magistrates failed to adopt from the outset the correct legal approach as to the required *mens rea* and the defence of good faith, they did not focus on the appellant's state of mind in relation to all the relevant and material circumstances surrounding his performance of the acts prohibited under section 13(2) of the Act. They proceeded on the wrong basis that it was an absolute offence with an absolute prohibition which destroys any defence of good faith. As a result of this total lack of discernment as to what constitutes *mens rea*, there are insufficient findings of fact to support an acceptable conclusion that the appellant had, at the material time, the requisite guilty intent or knowledge in respect of all the composite elements of the offence for which he stands charged under section 13(2) of the Act.

As we have held under grounds 2 and 3 earlier, the act of approving the reallocation of funds was merely to effect payment of an amount to which Medpoint Ltd was already entitled to in law and the decision of the appellant therefore did not affect Medpoint Ltd's right to payment. It related only to the internal choice of the "*drawer*" or fund within the Ministry from which payment which was already due was to be effected.

In these circumstances, it was highly questionable whether the appellant had the requisite guilty intent at the material time that he participated in a decision limited solely to a reallocation of the funds for payment to which Medpoint Ltd was already lawfully entitled, the more so when this was done at a time and in a situation where there was a total absence of any competing interests or conflict of interests.

In view of all the above, we hold that:

(a) the learned Magistrates erred in law in misconstruing the requisite *mens rea* and as a result failed to make a proper assessment of the criminal and guilty intent of the appellant which had to be established beyond reasonable doubt in respect of all the composite elements of an offence of conflict of interests under section 13(2) of the Act;

(b) the highly questionable nature of the evidence cannot safely support a conclusive finding that the appellant had the requisite guilty knowledge in respect of all the constitutive elements of an offence under section 13(2);

(c) the learned Magistrates erred in law when they failed to consider whether the appellant may have been acting in the *bona fide* execution of his duty as Minister of Finance in approving the proposal for reallocation of funds essentially to suit the internal financial and administrative convenience of the Ministry and in the absence of any conflict of interest.

It necessarily follows that the appeal must also succeed under ground 1.

For all the reasons we have given above, we allow the appeal and quash the conviction and the sentence of the Intermediate Court. We make no order as to costs.

K.P. Matadeen
Chief Justice

A.A. Caunhye
Judge

25 May 2016

Judgment delivered by Hon. K. P. Matadeen, Chief Justice

For Appellant	**:**	**Mrs S. Sonah-Ori, Attorney-at-Law** **Mrs C. Montgomery QC, together with Messrs D. Basset SC, R. Chetty SC and R. Gulbul, of Counsel**
For Respondent No. 1	**:**	**Mr S. Sohawon, Attorney-at-Law** **Mr A. Roopchand, together with Mr H. Ponnen and Mrs A. Subratty, of Counsel**
For Respondents Nos. 2 & 3	**:**	**Mr M. Lallah, Deputy Chief State Attorney** **Mr R. Ahmine, Senior Assistant Director of Public Prosecutions, together with Mr D. Mootoo, Assistant Director of Public Prosecutions, Mr M. Armoogum, Ag. Senior State Counsel and Mr R. Rammaya, Ag. Senior State Counsel**