

**ICAC v Ng Sui Wa D.C**

**2017 INT 94**

**IN THE INTERMEDIATE COURT OF MAURITIUS**

**C N 1854/10**

**INDEPENDENT COMMISSION AGAINST CORRUPTION**

**v/s**

**NG SUI WA DICK CHRISTOPHE**

**Judgment**

The Accused stands charged under three counts of the present information with 'Public official using his office for gratification' in breach of section 7(1) of the Prevention of Corruption Act 2002 ('the Act').

He pleaded Not Guilty to all three counts against him and was assisted by Counsel.

The Prosecution case was also conducted by Counsel.

The particulars provided under all three counts are similar save and except for the alleged respective dates of offences and the respective countries to which Accused allegedly travelled so that they read as follows under the present information:

*'...[Accused] whilst being the then Chairman of the Trust Fund for Specialised Medical Care (TFSMC), requested and obtained, under an agreement between Air Mauritius and the TFSMC, a rebate ticket to travel to France (under count 1), South Africa (under count 2),*

*India (under count 3) when in fact he was not entitled to such a rebate ticket as he did not proceed on an official overseas mission on behalf of the said Trust Fund.'*

The offence has been created under section 7(1) of the Act which reads as follows:

***7. Public official using his office for gratification***

*(1) Subject to subsection (3), any public official who makes use of his office or position for a gratification for himself or another person shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.*

The Supreme Court has had an opportunity to enumerate the elements of the present offence in **Joomeer v The State 2013 SCJ 413** as follows:

*[41] As rightly submitted by learned counsel for the respondent, there is no need to prove the obtaining of any gratification under section 7(2) of the Act. We agree with him. What the prosecution needs to prove under section 7(2) of the Act is that the defendant:*

- (a) was a public official;*
- (b) made use of his office or position;*
- (c) so acted for a gratification for himself or another.*

Thus, there is no need for the Prosecution to prove the obtaining of any gratification under the said section of law. The Prosecution nevertheless has to prove the mental element of the crime which has been averred under all three counts as being '*wilfully, unlawfully and criminally*'.

We are also aware that there is a presumption of knowledge involved in corruption offences pursuant to **section 83 of the Act**. A corruption offence would necessarily entail an

*act of corruption* which has been defined under **section 2 of the Act** as, amongst others, *the abuse of a public or private office for private gain*. Thus, in the light of the averments under all three counts and in the light of section 7(1) of the Act, it is clear that the said offence involves an act of corruption so that the Accused is presumed that he knew that such gratification was made for a corrupt purpose. Such presumption is not however an irrebuttable one so that Accused has the legal burden to rebut same.

### **The first element of the offence under all three counts**

It is undisputed that during the alleged time of offence under all three counts, the Accused was the chairman of the Trust Fund and this is evidenced by the letters of appointments produced (Documents W, X refer). Now, under section 2 of the Act, a public official is, amongst others, a member of a statutory corporation. When **section 3(2) of the Trust Fund For Specialized Medical Care Act 1992** ("TFSMC Act") is considered, it is found that the Fund shall be a body corporate so that it is a statutory corporation. Pursuant to **section 2 of the TFSMC Act**, a member of the Board also includes a chairman, so that the Accused, who was at the material time the Chairman of the said Fund is therefore a member of a statutory corporation and hence a public official.

In the light of above and in view of the fact that this element of the offence under all three counts was never in dispute, we find that the first element of the offence under all three counts has been proved beyond reasonable doubt.

### **The second element of the offence under all three counts**

The Prosecution has to prove that the Accused has made use of his position in the given circumstances of this case. There is undisputed evidence from Accused himself that he travelled on the specific dates averred under all three counts on rebate tickets (.Document F refers). There are also letters produced from the Trust Fund (Documents Q, R and S refer) to the effect that the Accused is travelling to the specific countries mentioned under the three counts on the specific dates averred so that he may be granted fifty percent

rebate on his air tickets; it is to be noted here that he has been described in those letters as the Chairman of the Trust Fund.

Thus, there is no doubt whatsoever that he made use of his position, i.e., Chairman of the Trust Fund under all three counts so that the Prosecution has also proved beyond reasonable doubt the second element of the offence under all three counts.

**The third element of the offence under all three counts.**

In **Joomeer (supra)**, the Supreme Court explained the following in respect of the third element of the offence as follows:

*In fact, under this section of the law, it is not material that someone who is using his office or position should have actually obtained the gratification he is looking for. It is enough that he is abusing his office or position for the purpose of a gift, reward or other such advantages but also for an offer or promise, whether conditional or unconditional of such a gift, reward or other advantage.*

*[43] The opprobrium lies in the abuse or misuse of the office or the position as a public officer for a gratification.*

Moreover, when the definition of an 'act of corruption' under section 2 of the Act is considered, it is clear that the corruption offence being contemplated under section 7(1) of the Act is the abuse of public office for private gain.

The question which arises therefore is whether Accused abused of his position for a private gain, i.e., rebate tickets under all three counts.

The Prosecution has provided the following particulars in respect of the said element of the offence under all three counts:

*'when in fact he was not entitled to such rebate ticket as he did not proceed on an official overseas mission on behalf of the Trust Fund'*

Thus, the abuse allegedly consists in benefitting a rebate ticket when he was not entitled to same as he did not proceed on an official overseas mission on behalf of the Trust Fund.

The Prosecution has the duty to prove whatever it has averred to prove its case and this has been consistently upheld as a basic rule in our courts ever since **Beekhan v the Queen 1976 MR 3** and recently affirmed in **Jugnauth v the ICAC and ors 2016 SCJ 187** as follows, *'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].*

Thus, the Prosecution has to prove that the Accused was not entitled to such rebate tickets since he did not proceed on an official overseas mission.

The starting point in this matter is the agreement between Air Mauritius and the Trust Fund to travel on rebate tickets which has been produced in Court (Document L refers) dated 16.07.99. The said fax letter reads as follows:

*Dear Sir,*

*I refer to your fax dated 4<sup>th</sup> June 1999 and am pleased to confirm to you our offer to grant 50% discount on applicable fares and class of travel for doctors, Nurses and administrative Personnel of the Cardiac Centre.*

*It should be noted that this facility is being granted to the Trust Fund, therefore it will cover travel only when payment is made by the Trust Fund. Personal travel is not covered under this agreement. This facility is also being extended to visiting medical consultants provided that the air fares are paid by the Trust Fund.*

*Your offer for Cardiac assessment of our staff is gladly accepted and we will transmit this to our staff.*

*Kind regards.*

*S.Seegobin.*

When the above letter is considered in its fullest, it is clear that the offer of 50% discount on fares is not restricted to official missions abroad. It is recalled here that the version of one Mr. Peeroo to the effect that the Accused did not proceed on official missions for those three trips was specifically confronted to him in his statement (Document F refers). When Mr. Peeroo deposed in Court, he confirmed that the rebate ticket would apply whenever an officer of the Trust Fund would proceed on official mission. However, when he was confronted with the said letter (Document L refers), he conceded that it is not mentioned therein that the rebate ticket is in respect of official mission.

It is also worth noting that the Accused was also confronted with a version from one Mr. Poinosawmy to the effect that the Trust Fund had never delegated him to attend official mission on the dates averred under the three counts. The Accused denied the said version. Whenever a version is put to an Accused in his statement, it is understood that the Prosecution is relying on it so as to prove its case and the least which may be expected during trial is for the said witness to be called. However, in the present matter, the said witness was never called although his name appeared on the list of witnesses.

The evidence of Mr. Ramlochurn on this score is crucial. He stated during examination in chief that the 50% rebate ticket applied to all staff of the Trust Fund for official mission and that the Board takes cognizance of the said overseas mission duly noted in the minutes of proceedings.

However, during cross examination, whilst confirming that he prepared the minutes of the Board (Documents Y, Y1 to Y 20 refer), he however had to first concede that there is no such minutes noted in respect of any matter discussed by the Board concerning the approval of rebate tickets for any persons entitled to it. He was also confronted to his statement dated 17.11.10 in which he had stated he is being shown a correspondence dated 16.07.99 from Air Mauritius to Dr. Guness following he stated that he is aware there was an agreement for 50% rebate for all staffs of the Cardiac Centre who proceeded on official mission. However, when he was confronted with the same correspondence in Court (Document L refers), he had to concede that the words 'official mission' did not appear on the said letter.

It is now obvious from the above evidence on record that the rebate ticket pursuant to the agreement between the Trust Fund and Air Mauritius was not restricted solely for 'official overseas mission'.

It is also clear that the rebate ticket is applicable to all staff of the Trust Fund. Dr. Babajee was more explicit on this issue when he explained that he understood the term 'administrative personnel' to cover anyone from the Chairman to the attendant of the Trust Fund. Thus, a chairman is entitled to such rebate.

The question which arises therefore is in which circumstances the Accused is entitled to such rebate. It has already been cleared that this rebate ticket is not restricted to 'official missions'. It is also noteworthy that the fax letter (Document L refers) specifically excluded personal travel so that a person travelling for his private business is not eligible.

The reason why the agreement specifically mentions the exclusion of personal travel can be better gauged when the letter addressed by Dr. Guinness to Mr. Seegobin dated 04.06.99 (Document M refers) is considered, the relevant extract of which reads as follows:

*Dear Sir,*

*We are about a hundred employees (doctors, nurses and administrative personnel) of the above parastatal body. We travel very regularly by your highly esteemed company. Our travels represent trips to international medical meetings and also family trips on holidays. Furthermore, every year, our centre is visited by about twenty foreign medical consultants who help us to deal with difficult cases.*

*We would be very grateful if we could be considered for a rebate on our air fares when we are travelling by Air Mauritius.*

*...*

*Dr. T.K Guinness*

Thus, it is obvious that the specific exclusion of 'personal travel' in the agreement dated 16.07.99 (Document L refers) is in relation to the mention made by Dr. Guinness in his letter concerning family trips on holidays. It also becomes clear that the rebate tickets would be applicable whenever one of the eligible staff is proceeding to attend an international medical meeting. In fact, it clearly transpires from the said letter (Document M refers) that the application for rebate tickets was never in respect of official missions overseas.

Dr. Guinness' evidence is most essential to understand when a rebate ticket may be requested. He explained that a staff from the cardiac centre would be entitled to a rebate ticket whenever he is travelling with a view to benefit the cardiac centre. Thus, whilst specifically and definitely excluding a personal or private trip, Dr. Guinness admitted that to be entitled to a rebate ticket under the said agreement, one does not necessarily have to proceed solely for official mission. He substantiated his answer by giving his own example in as much as he himself benefitted from such rebate ticket whenever he proceeded to attend medical conference which he explicitly distinguished from an official mission.

Thus, in line with the above criteria explained by Dr. Guinness who also happened to be the authorized officer for the Cardiac Centre to approve such request, we will now consider whether Accused was entitled to such rebate on each of the three occasions.

#### **Count 1**

The Accused explained in his statement that he visited 'Georges Pompidou' hospital during his trip to France and met with several cardiac surgeons including Pr. A. Lafont. He supported his version by producing a letter he sent to Pr. Lafont dated 15.10.02 (Document H refers) informing the latter of his request to visit the cardiac centre of the hospital in Paris as well as a reply from Pr. Lafont dated 13.09.02 (Document G refers). He further stated that he also met with one Dr. Vaislic and referred to a mail to support his words (Document J refers). He explained that the purpose of his visit to France in October 2002 was to establish contacts with distinguished professors and cardiac surgeons so as to obtain their co-operation to make the Cardiac Centre a better one and to enhance its standards.

#### **Count 2**

He explained that he had travelled to Durban, South Africa, so as to meet Dr. Kalangos, eminent cardiac/ paediatric surgeon and chairman of 'Association Coeur pour tous' and the purpose of the said visit was to understand how private hospitals in South Africa operated and so as to develop co-operation. When he was in Durban, he was however informed that the said doctor would not be able to meet him. He filed a document to support his words

(Document K refers) in which Dr. Kalangos confirms he could not meet with the Accused as scheduled due to an emergency cardiac surgery.

### **Count 3**

The purpose of his visit to India was to develop Indo-Mauritian co-operation in cardiology and to recruit an Indian cardiologist. He met with Dr. Kulkarni as well as intended to visit hospitals but could not do so since there was bomb explosion during that period. He added that since his trip to India, Dr. Kulkarni came twice to Mauritius. This is confirmed by Mr. Ramroop who stated he once drove Dr. Kulkarni to the Parliament. Mrs. Jhowry who had initially given a statement dated 11.08.07 in which she stated that Dr. Kulkarni had never visited the Cardiac Centre for any surgical mission had to concede that Dr. Kulkarni attended a meeting at the Cardiac Centre (Document Y17 refers).

In the light of his version as well as his testimony in Court supported by those documents, it is clear that his trip to France under count 1, South Africa under count 2 and India under count 3 respectively for which he benefitted from a rebate ticket was with a view to benefit the cardiac centre. It was certainly not one which one might describe as a personal private trip and which has been specifically excluded under the agreement (Document L refers). None of the facts put forward by the Accused have been contradicted by the Prosecution and the Accused who deposed in Court did not give us an iota of indication that he should not be believed on the purpose of his trips overseas under all three counts. Moreover, Dr. Gunness confirmed that Dr. Kulkarni and Dr. Kalangos became known to the Cardiac Centre and that the Accused contributed in making them known to the Centre. We thus find that he was entitled to a rebate ticket in the given circumstances and in the light of the evidence on record as well as the nature of the agreement between the Trust Fund and Air Mauritius. His trips under all three counts were definitely not in the nature of an official mission but was nevertheless with a view to benefit the Cardiac Centre and therefore covered by the agreement between the Trust Fund and Air Mauritius.

The Accused moreover followed the proper procedure so as to make his request for the rebate. In fact, Mr. Beeharry explained that for someone to benefit from the rebate tickets, a letter from the director of the Cardiac Centre to Air Mauritius was needed. Mr. Seegobin

also confirmed that an official letter from Cardiac Centre was sufficient. Mr. Deenanath, of Air Mauritius, further confirmed that whenever Air Mauritius obtained a request from the Trust Fund by way of an official letterhead, they would process the said request for rebate ticket as per the agreement. He emphasized that it was mandatory for the Trust Fund to issue a letter of request emanating from an authorized officer who usually would be the director or someone replacing him.

When the requests from the Cardiac centre to Air Mauritius in respect of the three counts are considered (Documents T, U and V refer), it is found that it is as per the procedure explained by the witnesses in Court.

One question may be raised as regards the condition of payment. In fact, it was specified in the agreement (Document L refers) that the payment had to be made by the Trust Fund. In the present matter, there is undisputed evidence from Accused himself that he personally paid those rebate tickets. In this regard, the evidence from Dr. Guinness is enlightening. The latter explained that there was no budget at the Cardiac Centre for those travelling and that the Trust Fund did not pay for those trips he travelled to attend medical conference and benefitted from a rebate ticket. He explained that he would pay for those trips himself out of his passage benefit. Thus, it is clear that any of the staff who would benefit from the rebate ticket scheme would have to pay for the said ticket out of their own pocket and personal funds. Thus, in the absence of any budget at the Trust Fund, there was an impossibility to satisfy the said requirement of the agreement and in any event, Air Mauritius had no issues whatsoever. This is supported by the fact that Air Mauritius had issued invoice in respect of the trips under counts 2 and 3 respectively in the personal name of the Accused and not to the Trust Fund (Documents U2, V2 refer).

Thus, the Prosecution has not been able to prove its averment in respect of the third essential element of the offence, namely, 'when in fact he was not entitled to such rebate ticket as he did not proceed on official mission on behalf of said Trust Fund'. All the evidence on record from the Prosecution case itself show that the rebate ticket was not restricted to overseas official mission; moreover the evidence on record show that the

Accused as Chairman was entitled to such discount since he travelled on those three occasions with a view to benefit the Cardiac Centre and not on private business.

In fact, there is no evidence of any abuse of his position when he requested for the rebate ticket to the director of the Cardiac Centre on each of the three occasions. It is also worth considering that had he not been eligible, then surely the director of the Cardiac Centre would have automatically refused such a request.

The Prosecution has therefore failed to prove one of the most essential elements of the offence against the Accused under all three counts beyond reasonable doubt. This shortcoming in their case is reflected in the written submission filed. Despite the particulars of the element of the offence provided under all three counts and despite the nature of the evidence throughout their case, we find that the nature of abuse submitted by the Prosecution is of a different kind. It has been submitted by the Prosecution that the alleged purpose for which the Accused travelled abroad on the three occasions do not fall within the provisions of the TFSSMC Act and therefore not within the functions of the Chairman of the Board of the TFSSMC. It was submitted that the mission of the Accused as a Chairman was not to travel abroad to meet doctors. The least that can be said is that the written submission is not supported by any evidence and is in any event most materially in contradiction with the particulars of the element of the offence provided under all three counts. The particulars provided was to the effect that he was not entitled to such rebate ticket as he did not proceed on an official overseas mission on behalf of the said Trust Fund and not whether the purpose of the trips abroad was not within the provisions of the Trust Fund for Specialised Medical Care Act and not within the functions of the Chairman of the Board of the Trust Fund.

**We therefore find that the Prosecution has not proved one of the essential elements of the offence forming part of the actus reus of the offence under all three counts, namely, that the Accused abused of his position for a gratification.**

**The mental element of the offence**

As stated above, there is a presumption that Accused knew that such gratification was made for a corrupt purpose, pursuant to section 83 of POCA. The Supreme Court in **Jugnauth (supra)** has explained the extent and implications of this presumption of knowledge as follows:

*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.*

Hence, the burden lies on the Accused to prove absence of any guilty knowledge on his part on a balance of probabilities. We find that the Accused has consistently shown in his statement and then under oath during his deposition in Court that the purpose of his overseas trips under all three counts had as primary purpose the benefit of the Cardiac Centre. He fully supported his version by documentary evidence showing some contacts with cardiologists in those countries. Moreover, it is also on record that at least two of them had subsequently come to Mauritius and benefitted the Cardiac centre. He has thus rebutted any presumption of guilty knowledge on a balance of probabilities since it is clear that he did not travel for his private gain but for the benefit of the Cardiac Centre.

The presumption of guilty knowledge is also rebutted when we consider the fact that between 17.07.02 to 24.06.05, Accused travelled overseas on no less than 18 occasions (Document D refers). Yet, it is on record from Mr. Bhoobun that Accused benefitted from rebate tickets for his overseas travels only on three occasions which are subject matter of the present information. The only reasonable conclusion which may be inferred from the above is that the Accused requested for rebate tickets for his overseas travels only when the trip concerned the Cardiac Centre, since despite also travelling on 15 other occasions during the period he was chairman, he did not request for such rebate ticket.

In the light of above, even if this Court would have found the actus reus of the offence proved against the Accused under all three counts, it would have found that the guilty mind

is missing under all three counts so that the offence with which the Accused is charged under all three counts lacks from the mens rea.

**We therefore find that the Prosecution case against the Accused has not been proved under all three counts beyond reasonable doubt so that we dismiss the charge against the Accused under all three counts of the information.**

**Bissoonauth K. (Mrs.)**

**Neerooa M.I.A**

**Vice President, Industrial Court.  
Court.**

**Magistrate, Intermediate**

**This 15<sup>th</sup> March 2017.**