

POLICE v SOORNACK NANDANEE

2017 PL3 14

IN THE DISTRICT COURT OF PORT LOUIS (DIVISION III)

Cause Number: 9221/15

In the matter of:

POLICE v NANDANEE SOORNACK

Ruling

1. Factual Background

- 1.1. Mrs. Nandanee Soornack is wanted for several criminal offences, since the year 2015, which it is alleged she committed in breach of the provisions of (a) the Financial Intelligence and Anti Money Laundering Act (FIAMLA)¹, (b) the Prevention of Corruption Act (POCA)², and (c) the Criminal Code (Supplementary) Act³. There are currently seven cases pending against her before the District Court of Port Louis (Division III) in respect of which warrants of arrest have been issued between March and August 2015.

- 1.2. The Court was informed in September 2015 that Mrs. Soornack had been apprehended in Italy where she has since then been under judicial control; extradition proceedings were initiated by the Attorney General's Office (AGO); the Court of Appeal of Bologna has on 15 September 2016 refused the request to surrender Mrs. Soornack to Mauritius⁴; the Government of Mauritius appealed against that decision; and by final judgment of 03 February 2017, filed with its Registry on 23 March 2017, the Sixth Division of the Italian Court of Cassation declared the appeal lodged by the Government of Mauritius inadmissible⁵.

¹ Cases bearing Cause Nos. 41/2015; 43/2015; and 9221/2015

² Cases bearing Cause Nos. 67/2015 and 9223/2015

³ Cases bearing Cause Nos. 9222/2015 and 9224/2015

⁴ Testimony of CI Goinden, the Enquiring Officer; and Correspondence from the solicitor representing the Government of Mauritius in Italy communicated to the Commissioner of Police and the AGO (Docs B and C) relied upon by the prosecution.

⁵ *Ibid.*

- 1.3. Notwithstanding the above, the police is still moving for an extension of the warrants of arrest against Mrs. Soornack. It has sought to rely on three grounds to support its motion, namely
 - (a) Mrs. Soornack can be arrested if she lands in Mauritius;
 - (b) 'The warrant of arrest would facilitate to flag a Red Notice against Mrs. Soornack through the Interpol for her arrest' (sic); and
 - (c) Mrs. Soornack is wanted to answer the charges against her.
- 1.4. Mr. Varma, learned Counsel appearing for Mrs. Soornack, objected to the extension of the warrants of arrest in the light of the evidence on record consisting of the correspondences from the solicitor representing the Government of Mauritius regarding the status of the extradition proceedings against Mrs. Soornack in Italy and the testimony of CI Goinden.
- 1.5. The prosecution was represented by Ms. K. Soochit, State Counsel.
- 1.6. The motions made, the objections raised thereto, and all the submissions in the present matter were repeated in the remaining six cases in their entirety.

2. Findings

- 2.1. An official copy of the judgment of the Sixth Division of the Italian Court of Cassation declaring the appeal lodged by the Government of Mauritius inadmissible is not available. The prosecution is however relying on correspondences emanating from the solicitor representing the State of Mauritius in Italy and communicated to the AGO and to the Commissioner of Police (CP), contents of which the prosecution has no reason to doubt. The said letters in no uncertain terms disclose the status of the all the proceedings against Mrs. Soornack in Italy as summarized at paragraph 1.2 above.
- 2.2. It is not disputed that the police has been requesting for an extension of the warrant of arrest against Mrs. Soornack since September 2015 on the ground that extradition proceedings were ongoing and pending against her in Italy. The

request to surrender Mrs. Soornack to Mauritius having been refused, the police is now moving for an extension of the warrant of arrest for the reasons set out at paragraph 1.3 above.

- 2.2.1. The reason put forward by CI Goinden in an attempt to justify the extension of the warrant of arrest against Mrs. Soornack, namely that if she travels to any jurisdiction with which Mauritius has an Extradition Treaty, she can be apprehended by means of a Red Notice, suggests that the police has at this stage no lawful means of securing her attendance in Mauritius and is merely on a fishing expedition.
- 2.3. The testimony of CI Goinden, the Enquiring Officer duly deputed by the CP to depose in the present matter, has revealed the following essential facts, namely:
 - 2.3.1. Enquiry at the level of the police is still ongoing two years after criminal proceedings have been instituted against Mrs. Soornack before a Court of Law;
 - 2.3.2. The police is in truth and in fact not ready with any formal charge against Mrs. Soornack;
 - 2.3.3. The Learned Director of Public Prosecutions has not advised prosecution in any of the seven cases lodged and pending before the District Court of Port Louis (Division III). Furthermore, the answers of CI Goinden suggest that the case files in the said cases have in fact not been sent to the Office of the Director of Public Prosecutions;
 - 2.3.4. None of the seven ‘information under solemn affirmation’ before this Court relates to a formal charge against Mrs. Soornack; and
 - 2.3.5. Mrs. Soornack can be arrested by the police without a warrant of arrest if she lands in Mauritius.
 - 2.3.6. A ‘Red Notice’ is ‘*a process to alert the international authority with which we have an extradition treaty to arrest, to apprehend somebody who has to*

answer to a criminal charge or proceeding of a country as in this case is Mauritius' (sic). However, the exact definition of and the requirement for a 'Red Notice' could not be given.

- 2.4. In the light of the facts revealed by the testimony of CI Goinden highlighted at paragraphs 2.3.1 to 2.3.4 above, the Court finds it appropriate to intervene *proprio motu*, although the issue of abuse of process has not been specifically raised by either party.
- 2.5. Now, in the Mauritian context, an information consisting of a charge or complaint solemnly affirmed before a Magistrate that the person named in the charge or complaint has committed or is suspected of having committed an offence punishable otherwise than by a fine, can take either of two forms, i.e. a provisional information or a formal charge (commonly called a main case). The nature of such information varies depending on the stage at which it is preferred.
 - 2.5.1. A provisional information is lodged after the arrest of a suspect and at the very early stage of the enquiry when the investigation may have hardly started and is certainly not over⁶. Such an arrest is effected without a warrant; and the person arrested is present and available when such a provisional information is laid.
 - 2.5.2. Whereas a formal charge is preferred when such enquiry has been completed and the need arises for evidence to be given, so that the suspect has to answer to the charge against him/her and a trial takes place⁷. The presence of the person against whom the information is laid is not a condition precedent to the lodging of the formal charge; summons or a warrant of arrest is issued to secure the attendance of that person to answer the charge laid against him/her.

⁶ **The State v Bundhun [2006 SCJ 254]** referred to in **Jugnauth P K v The Secretary to the Cabinet and Head of the Civil Service Affairs & Co [2013 SCJ 132]**

⁷ **DPP v IOIB [1989 MR 110].**

2.6. It is undisputed that the warrants of arrest against Mrs. Soornack were issued by virtue of the powers conferred on a Magistrate pursuant to the provisions of Section 4 of the District and Intermediate Courts (Criminal Jurisdiction) Act 1888 (the Act), the relevant part of which reads as follows:

'4. Issue of warrant

(1) (a) *Where a charge or complaint is made on oath before a Magistrate in Form A of the Second Schedule that a person has committed or is suspected of having committed an offence punishable otherwise than by a fine, the Magistrate may issue a warrant in Form B of the Second Schedule to apprehend such person and to cause such person to be brought before him or any other Magistrate of the district to answer such charge or complaint and to be further dealt with according to law.*

(b)

2.6.1. It is common ground that an information upon solemn affirmation in the form prescribed under the law, namely, Form A of the Second Schedule of the Act was laid in each of the seven cases and the warrant issued was to **apprehend a party charged** in accordance with Form B of the Second Schedule of the said Act. Hence, the purport of the information and the import of the warrant of arrest which was issued following the laying of such information, is to apprehend the person named in the information and bring her before a Magistrate of the District to answer the charge against her and to be dealt with according to law.

2.6.2. It is useful to state at this stage that the power conferred to a District Magistrate to issue a warrant of arrest is by virtue of Section 118 (1)(a) of the Courts Act and the issue of such a warrant is confined to the apprehension of **a party charged**. Sections 4 and 69 A(2) of the District and Intermediate Courts (Criminal Jurisdiction) Act 1888 provide the manner and the circumstances in which the power to issue a warrant of arrest shall be exercised.

2.6.3. The import of a warrant issued pursuant to Section 4 of the Act quoted above is specific and clearly defined i.e. to answer a charge or complaint laid before the Court and to be dealt with according to law. A warrant of arrest can

therefore neither be issued for the purpose of securing the attendance of a suspect for the purpose of a police investigation or for facilitating the flagging of a red notice nor should it be used towards such ends.

- 2.6.4. Notwithstanding the fact that *ex facie* the information laid against Mrs. Soornack, no reference is made to the word ‘provisional’, the information cannot be in relation to a provisional charge for the following reasons:
- (a) The lodging of a provisional charge is the mechanism which exists to give effect to the provision of Section 5 of the Constitution, which requires the prosecuting authorities to bring a person arrested on reasonable suspicion of having committed a serious criminal offence before a Magistrate within the least possible delay, and to inform the court of the reason of the arrest of an individual.
 - (b) There is no statutory provision regarding the lodging of a provisional information and such an information is lodged, as a matter of practice, after a suspect has been arrested or when he/she is brought into custody. The purpose of a provisional charge is to *‘bring the detention of the individual under judicial supervision and control so as to prevent an administrative detention and to enable a judicial authority to decide whether the detainee should be released on bail or not and, if not, for how long he should be detained....’*⁸
 - (c) *‘The purpose of such a charge is to serve as a basis for the detention or conditional release of the suspect. Accordingly when only a provisional charge has been laid against a suspect, he cannot be considered as a person “charged”...’*⁹
 - (d) More importantly, *‘no detainee pleads to a provisional information and no trial takes place.’*

⁸ *Ibid.*

⁹ **The State v Bundhun [2006 SCJ 254]**; ‘Person charged’ within the meaning of Rule III (b) of the Judges’ Rules.

(e) Hence, in view of the purpose for which and the stage at which a provisional information is lodged, it can neither come into existence before the arrest of a suspect nor used as an instrument to effect such arrest nor can the person arrested answer the charge to such an information.

- 2.6.5. In the light of the above, a warrant of arrest issued following an information lodged pursuant to Section 4 of the District and Intermediate Courts (Criminal Jurisdiction) Act 1888, can therefore only be in respect of a formal charge.
- 2.7. The facts disclosed at paragraph 2.3.3 above establish that proceedings in the present matter and in four other cases¹⁰ which relate to alleged breaches of the provisions of the FIAMLA and the POCA, have therefore been instituted in breach of the mandatory provisions of Section 82(1) of the POCA¹¹. Indeed, the consent of the Learned DPP, is at the very least required, for the institution of prosecution for offences under the POCA and Part II of the FIAMLA. Consequently, such a serious irregularity vitiates the proceedings in the said five cases, including the present one, thereby rendering them a nullity.
- 2.8. Therefore, being given that:
- (a) the police was aware at all material times that the enquiry was at its very early stages when it laid the information before the Court and it could not be the subject matter of a formal charge; and
 - (b) the advice and consent of the Learned DPP was not obtained prior to the lodging of the present cases against Mrs. Soornack; and

¹⁰ Bearing Cause Nos. 41/2015, 43/2015, 67/2015, and 9223/2015.

¹¹ Section 82(1) of the POCA provides that '*Subject to subsection (2), no prosecution for an offence under this Act or Part II of the Financial Intelligence and Anti-Money Laundering Act shall be instituted except by, or with the consent of, the Director of Public Prosecutions.*' Subsection (2) provides for the locus standi of those who are entitled to swear an information and conduct prosecution in respect of any offence under the POCA and Part II of the FIAMLA.

- (c) a final decision to prosecute Mrs. Soornack had therefore not been reached when the information were laid; and
- (d) the police very well knew that it had the power to arrest Mrs. Soornack without a warrant at enquiry stage if the reasonable suspicion requirement has been met,

it was not open to the police to invoke Section 4 of the Act to move for a warrant of arrest against Mrs. Soornack as it did.

- 2.9. This Court can therefore only conclude that the police has in the circumstances misused its process when it instituted what appeared to be a formal charge against Mrs. Soornack and obtained a warrant of arrest as a result, thereby depriving Mrs. Soornack of a protection provided by law.

3. Conclusion

- 3.1. Given that the attendance of Mrs. Soornack cannot be lawfully secured at this stage, extradition being declined, coupled with the fact that she can be arrested without a warrant of arrest if she lands in Mauritius, the prosecution has failed to substantiate its motion for the extension of the warrant of arrest against her. The warrants of arrest in all the seven cases against Mrs. Soornack before the District Court of Port Louis (Division III) are recalled accordingly.
- 3.2. In the light of the facts revealed by the testimony of CI Goinden enunciated at paragraph 2.3 and its respective sub paragraphs above coupled with the statutory provisions under which proceedings were instituted and for the reasons given at paragraphs 2.6.2 to 2.6.4 and 2.7 to 2.9 above, I hold that the facts known to the police when it instituted proceedings against Mrs. Soornack are at variance with the invocation of the statutory provisions of Section 4 of the District and Intermediate Courts (Criminal Jurisdiction) Act 1888 to obtain a warrant of arrest.

- 3.3. This Court is alive to and fully recognizes the public interest in ensuring that those who are accused of serious crimes should be tried. In that respect, some may say that Mrs. Soornack attempted to avoid criminal responsibility by leaving the country and argue that the means adopted by the police in an attempt to bring her back was justified. But this must never become an area where it will be sufficient to consider that the end has justified the means. The competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute is equally, if not more, important. Fundamental legal principles relating to the maintenance and promotion of human rights, the need to ensure that the individual is protected against unlawful detention, the respect of the limits of territorial jurisdiction and the Sovereignty of States, and guaranteeing fairness of the legal process, cannot be overlooked and outweigh public interest reasons to justify inappropriate interference with the right to personal liberty of a person, presumed to be innocent.
- 3.4. In that respect, it is to my mind unconceivable that the Court should consider itself powerless whilst its process is being abused. Indeed, '*the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law.*'¹² Furthermore, the Court '*cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of the law is not abused.*'¹³
- 3.5. This Court has strong reservations regarding the recent practice of invoking Section 4 of the Act to institute criminal proceedings merely to obtain a warrant of arrest through the back door when the police is not ready to prefer any formal charge against a suspect and rejects any suggestion that such proceedings could be put in motion by any police officer who thought it desirable that a person whom he suspected of having offended and is abroad should be surrendered to

¹² **R v Horseferry Road Magistrates Court, ex parte Bennett [1994] 1 AC 42**

¹³ Per Lord Devlin in **Connelly v Director of Public Prosecutions [1964] AC 1254**

Mauritius for the purposes of a police investigation by misusing the court process.

- 3.6. For all the above reasons and in view of the serious procedural flaw which has been addressed at paragraph 2.7 above, cases bearing cause nos. 41/2015, 43/2015, 67/2015, 9221/2015, and 9223/2015 are accordingly struck out.
- 3.7. For all the reasons given earlier, I take the view that a stay of proceedings in cases bearing cause nos. 9222/2015 and 9224/2015, is necessary and warranted to prevent the process of this Court from being further abused. I order accordingly.

A.HAMUTH (Miss)

[Delivered by: A.HAMUTH (Miss), Senior District Magistrate]

[Delivered on: 07 April 2017]