ICAC v Gunness & anor

2014 INT 304

Cause Number: 1379-2007

In the Intermediate Court of Mauritius

(Criminal Division)

In the matter of:

Independent Commission Against Corruption

V/S

(1) Govindranath GUNNESS

(2) Dhaneswar SOOBRAH

Ruling:

Accused No 1 stands charged under count 1 and accused No 2 stands charged under count 2 with the offence of 'Public Official using office for gratification' in breach of section 7 (1) of the Prevention of Corruption Act. They have pleaded not guilty to their respective charge and they are both assisted by counsel.

The motion of the defence

Learned Senior Counsel Mr I. Collendavelloo S.C appearing for accused No.1 has moved that proceedings should be stayed on the ground that -

1. That the prosecution is harsh and that there has been unconscionable delay in instituting the present proceedings.

2. That the present proceedings have been entered as a result of the influence of certain ministers.

3. Accused is being deprived of a fair trial in as much as he was not given the facilities to put up his defence at the time of the enquiry.

4. The learned DPP was favoured with a one sided enquiry and therefore incomplete information was passed on to him.

We have fully considered the evidence adduced for the purpose of this argument; the submissions of both counsels; the written submissions and further written submissions and we hold as follows:-

Under ground 1

We find it appropriate to refer to the case of Attorney General's Reference (No 2 of 2001) (2003) UKHL68 (2004) 2 AC 72 in which it was decided by a majority that although through the lapse of time may constitute a breach, the appropriate remedy would not necessarily be a stay but would depend on all the circumstances of the case. Lord Bingham of Cornhill, who gave the leading opinion for the majority, quoted with approval the aphorism of Hardie Boys J in the New Zealand case of Martin v Tauranga District Court [1995] 2 NZLR 419, 432: *"The right is to trial without undue delay; it is not a right not to be tried after undue delay."* Lord Bingham further stated in the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed.

In the case of Boolell P v The State. Privy Council Appeal No 39 of 2005 the principle laid down in Attorney General's Reference (supra) was upheld and the sentence was reviewed to cure the abuse of process. The Privy Council also stated that the correct principle on this matter under the Mauritian jurisdiction is as follows:

32. Their Lordships accordingly consider that the following propositions should be regarded as correct in the law of Mauritius:

(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.

(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all.

In the present case, there was a first complaint made on 12th April 2005 which prompted an enquiry and on completion, the main case was lodged against both accused since the 21st of December 2007. True it is that there might have been some delay but to hold that such delay alone would warrant this Court to exercise its discretion and stay proceedings would be far-fetched at this stage and in any event this case is not of the exceptional nature elaborated in Boolell (Supra) which would call for such dramatic remedy on delay alone.

For the reasons set out above, the objection raised on the ground of delay by learned counsel for Accused no.1 therefore fails.

Under ground 2

There was a first anonymous complaint made on 12th April 2005 which prompted an enquiry; a second complaint made to the ICAC by certain ministers who have been named during examination of Mr Cheng Yuen. It is abundantly clear to us that an enquiry was already initiated since 2005 and investigation was in progress; therefore to claim that the present proceedings have been entered as a result of the influence of certain ministers and to aver that there was political or otherwise any oblique motive is

not correct. For these reasons, the second objection raised by learned counsel for the defence therefore fails.

Under ground 3

Was the investigation conducted in a fair and impartial manner?

The main features of the enquiry and the importance thereof are as follows-

1. On the 24th of November 2006 accused was convened at the ICAC and was informed that there was a charge under sections 7 and 9 of the PoCA against him. Subsequently, he was informed that the charge against him would be one under section 57 of the same Act. On that same day, whilst accused was at the ICAC, there was an attempt by ICAC to have the authorisation of the Commissioner of Police to have the accused arrested and provisionally charged and this time for the offence of "*making use of office for gratification for another person*". On the 12th of July accused No 1 was convened anew at the ICAC and this time he was informed that there was no charge against him but his version was needed to complete the enquiry. With the ever changing nature of the charges, can it be safely said that accused was given a real opportunity to give his explanation; clearly the answer is in the negative. It seems to us that the investigating authority was either on a fishing expedition to look for possible breaches of the law or simply that they themselves were not in a position to say if there was a charge and what was the charge if any.

2. There is also clear evidence that, on 24.11.06, when accused was at the office of the ICAC and was still taking stock of the ever changing possible charges against him, he was shown part of the documents and materials in the case. At about the same time, another officer was dispatched to the see the Commissioner of Police to have latter's permission to arrest and detain the accused. At a time when even the charge to be preferred against the accused was not yet known,

one ponders on such a course of conduct by the investigatory authority to hastily arrest the said Accused and lay a provisional charge against him? Even the then Commissioner of Police refused to give his authority to that course of action. Such course of conduct definitely does not reflect fairness at the level of the enquiry.

3. Following the insistence of the defence to be communicated with all documents and materials, ICAC agreed to communicate but again it appears that there was selective communication and that the investigator even closed his file when a certain document was seen by the defence. The officer has agreed in cross examination that not all documents were disclosed. Again, this does reflect fairness at the level of the enquiry.

4. On the 24th of November 2006 accused was allowed access to certain documents and on the 12th of July 2007 accused No 1 was convened anew at the ICAC and this time the prosecution refused to communicate documents and materials to be used for questioning. Again this set of circumstances makes us understand that the investigating authority did not know if documents and materials should or should not be communicated. Would it be considered fair for the investigatory authority to communicate materials and documents at time and other times refused? We consider it to be most improper.

5. During his interview and the giving of his statement on the 12th of July 2007, accused No 1 started to complain that he was not agreeable with the way the investigation was being held; however he was directed to give his explanation to the case only without mentioning his grievance. The end result is that accused has not given his version into the final accusation levelled against him and the DPP has received only one sided version. The least that can be said is that there was no fairness at the level of the enquiry. This unfairness would definitely have a fatal impact on the conduct of trial.

6. After the attempt of the ICAC to arrest accused No 1 on 24th of November 2006 and which was not endorsed by the Commissioner of Police, there was a further appointment with ICAC to enable accused No 1 to give his version; yet before the scheduled appointment, officers of the ICAC made another attempt to arrest him. This is also not reflective of fairness at the level of the enquiry.

7. Following the insistence of ICAC to arrest accused No 1, the latter made an application for a writ of injunction to prevent his arrest and same was made returnable on 01.12.06 to hear the ICAC and the Police before the Supreme Court would take a decision. Before the scheduled date, again there was an attempt to arrest the accused No 1 and the circumstances of the intrusion on his property as per the records are very alarming. It is to be pointed out that during the hearing before the Supreme Court, ICAC undertook to comply with the law.

What are the consequences of an unfair enquiry disclosed at the time of trial

In R. v. Beckford [1996 1 Cr App. R. 94], the Court of Appeal identified 2 types of case where proceedings may be stayed on the basis that their continuance would be an abuse of process, namely (a) where the defendant would not receive a fair trial and/or (b) where it would be unfair for the defendant to be tried.

Although in practice the most common ground on which abuse of process is invoked is that based on delay, the alleged abuse may arise in various different forms. It may involve complaints about the methods used to investigate an offence. (R. v. Hector & François [1984 1 AER 785]) *(emphasis is ours)*

It is therefore clear that the unfair conduct of an enquiry may lead to a stay of proceedings as the whole truth will not be portrayed out and will undermine as well as

affect the integrity of the process before a Court of Law. In the present case, as highlighted above, the enquiry itself is tainted with a number of irregularities which appear to bear taints of arbitrariness against the two accused rather than opening out a conducive and fair enquiry in the interest of the public and to uphold the rule of law. It has to be stressed that the way in which the ICAC carried out their enquiry and investigated into the matter became under scrutiny during cross-examination and the modus operandi is quite revealing.

This definitely amounts to an abuse of process which entitles this Court to exercise its residual discretion to stay proceedings against Accused no.1 under count 1.

Under ground 4-

The learned DPP was favoured with a one sided enquiry and therefore incomplete information was passed on to him.

The law in the present case and its application

The relevant parts of section 72 of our Constitution stipulate that,

(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do to-

(a) institute and undertake criminal proceedings before any Court of law ...

(6) In the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.'

Section 47 of the Prevention of Corruption Act *provides as follows-*

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

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

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

(c) the recommendations of the Commission.

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

A reading of these two extracts show that the DPP is vested with the power to institute criminal proceedings before the Intermediate Court which is the present case. However, before the DPP makes a decision, it is incumbent on the commission to submit all the material, information, statements and other documents obtained in the course of the investigation; together with a description of the articles of evidence which have remained in the custody of the Commission. We hold that the cumulative effect of the PoCA and the Constitution makes it mandatory to submit all documents and evidence gathered to the learned DPP for him to enable him to tender the appropriate advice.

Did ICAC communicate all documents to the DPP's office?

Proceedings reveal that there has been a failure to disclose all documents and materials to the DPP and these are as follows-

a. The video tapes which contained the interview and interrogation of accused No 1 were not forwarded to the DPP and this has been clearly acknowledged by the enquiry officer Mr Cheng Yen.

b. It came to light that accused No 1 produced a report of the then Honourable Valayden to the ICAC which he asserted was the origin of this case. It is unknown whether this report was communicated to the learned DPP.

c. At one time the DPP was led to believe that accused No 1 was communicated with all documents and statements and that the charges were put to him but this was not the case. The communication was made by sending an executive summary to the DPP.

d. Two further statements made by one Vidianand Lutchmeeparsad were not communicated to the DPP.

e. The allegations of accused No 2 against certain officers of the ICAC were also not communicated to the learned DPP.

In R v Grant (Edward) [2005] 2 Cr. App. R. 28, CA, it was held that-

> *where the Court is faced with illegal conduct by police or prosecutors which is so grave as to threaten or undermine the rule of law itself, the Court may readily conclude that it will not tolerate, far less endorse, such a state of affairs and so hold that its duty is to stop the case (the deliberate interference with a detained suspect's right to the confidence of privileged communications with his solicitor, by eavesdropping , seriously undermined the rule of law and justified a stay on grounds of abuse of process, notwithstanding the absence of prejudice).*

Therefore, irrespective of whether or not there has been prejudice, the Court can stay the proceedings when confronted with illegal conduct by investigating authorities which is so grave as to threaten or undermine the rule of law. In the present matter,

there is a flagrant admission from the part of the Investigating officer that all materials were not communicated to the DPP so that it is clear that the mandatory legal requirements under section 47 of the Act had not been complied with.

In the case of Police v P.G Noel & Anor I.C. CN 1037 of 2004, the Court pointed out the following:

> *"The consequences would be staggering if, in theory, the police could decide which materials to retain and which materials to communicate to the DPP..., the possibility of enquiries being framed to gear the decisions of the DPP to prosecute or to advise no further action would affect such a large number of cases that it would become a serious danger to the rule of law in our country. Indeed, no citizen would feel safe knowing that the ICAC or the police force can, at any time, start an enquiry against him and then gear a decision to prosecution or take no further action by communicating statements, documents and materials selectively to the DPP. At the same time it would turn the DPP into a toothless tiger with no real authority to oversee the decision process of prosecution, thus rendering the Constitutional provisions creating the office of the DPP of no real effect.*
>
> *If the Court was to condone non-compliance by the ICAC with the clear and unambiguous provisions of a statute to disclose all documents to the DPP before the latter takes any decision, we would be sending the wrong signal to the ICAC and other institutions responsible for the investigation and detection of crime amongst which the much larger force of the police. We would in effect be encouraging non-compliance*

with clear statutory provisions, thus flouting the basic principles of good governance and transparency and ironically encouraging corrupt practices..."

The above ruling from Noel (Supra) finds all its application in the present matter and is fully relevant to the present objection raised by the Defence.

All these interviews of accused as depicted above were recorded but the tapes were not sent to the DPP who would have been informed of the potential unfairness to accused during investigation. Without prompting what would have been the decision of the DPP, we can safely hold that he would have been able to order a more conducive enquiry. Irrespective of what may have been his decision, the crude fact is that the DPP was not communicated with all the material which the law had made it mandatory to be communicated with. Hence the DPP was prevented to exercise his powers in a more independent and judicious manner.

Rightly or wrongly the documents and materials were not communicated to accused No 1 at the stage of enquiry, but, was the DPP aware of that? Again, all the interviews of accused were recorded but none of the video tapes was submitted to the DPP to assist him in his decision making process. What would have been the stand of the DPP? No one knows, because the tapes were not sent to him.

But most importantly, the truth of the matter is that the DPP has not been able to give an advice to prosecute after having been favoured with all materials in compliance with section 47 of the Act. As per law, his advice can only be tendered after consideration of all material, documents related to the case but this is not the reality in this matter.

CONCLUSION

In the case of The State v Velvindron [2003 SCJ 319] the Supreme Court stated that-

"One of the safeguards provided under section 10(1) of our Constitution is that any person who is charged with a criminal offence shall be afforded a fair hearing. In that respect, the principle which underlines the jurisdiction to stay proceedings is that the Courts have the power and the duty to protect the law by protecting its own purposes and functions as was expressed in the words of Lord Devlin in Connelly v.D.P.P. (1964 A.C. 1254) "The Courts have an inescapable duty to secure fair treatment for those who come or are brought before them" and at page 1296 Lord Reid said "…… there must always be a residual discretion to prevent anything which savours of abuse of process." …

... This power to stay proceedings for abuse of process is considered to include a power to safeguard an accused from oppression or prejudice (Connelly (Supra)) and has been described as a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so (Attorney- General of Trinidad and Tobago v. Philips [1995 1 A.C. 396]).

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

In R. v. Horseferry Road Magistrates' Court ex.p Bennett [1994 1 A.C. 42] Lord Griffiths indicated that the Court had the power to interfere

with the prosecution "because the judiciary accept the responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

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

From the above, it is clear that fairness is an overwhelming concept in the criminal system and it also encompasses the conduct of enquiry by the investigating authorities. In fact, the Supreme Court clearly explained in AUCKLOO S.M.S V THE STATE OF MAURITIUS 2004 SCJ 312 that an enquiry *"has to be serious, credible, independent, transparent, complete and objective and inspire public confidence which includes the trust of those directly afflicted."*

It could not be made clearer than the following extract from SUMODHEE S I & ORS v STATE 2005 SCJ 71 that *"….it is true that the concept of a fair trial guaranteed by section 10(1) of the Constitution involves fair and impartial inquiries into the allegations of accused parties without in*

any way causing any prejudice to them in their defence or in the preparation of their defence."

The unfair enquiry and the non submission of documents and materials to the learned DPP are definitely serious objections successfully raised by the Defence to rightly lead this Court to judiciously exercise its judicial discretion to stay proceedings against Accused no.1 under count 1. This definitely leads to unfairness since the commission did not comply with the legal framework under which it was meant to operate and had a legal mandatory requirement to comply.

We find it apt to cite the following extract from Noel (Supra) as regards non compliance of statutory requirements by public bodies:

In Bradbury V. Enfield LBC [1967] 1 WLR 1311 Danckwerts L.J said that:

> *"It is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place."*

(The underlining is ours)

The above was said in relation to matters pertaining to the field of administrative law, but we find no reason why these principles could not be applied in the present case. Indeed, one can read the following in Wade, Administrative Law, at p. 249:

"…where the effect is penal, scrupulous observance of statutory conditions is normally required." (the underlining is ours)

Thus, it goes without saying that non compliance by a statutory body with a statute which created the said body is even more serious breach. The observance should have been even more stringent the more so the consequences are penal in nature. Thus, breach of such mandatory statutory requirements would necessarily lead to an overall unfairness.

We accordingly order that the present proceedings against Accused no.1 under count 1 be stayed.

Since it is obvious that the proceedings against Accused no.2 would have also suffered from the same unfair manner of conduct of enquiry as well as lack of informed consent of DPP to prosecute in the light of withholding of documents and materials, we find that it would be unfair to allow proceedings to proceed against Accused no.2 as well.

We therefore stay the proceedings against Accused no.2 under count 2 as well.

Neerooa M.I.A (Mr.)
Appadoo V (Mr.)

Magistrate, Intermediate Court
Magistrate, Intermediate Court

Delivered on 21/10/14.