PEERMAMODE M.R.A.F.E. v THE STATE OF MAURITIUS & OTHERS

2022 SCJ 25

Record No. 8907

THE SUPREME COURT OF MAURITIUS

In the matter of:

Mohammad Rafiq Ahmed Fareed Esmael Peermamode

Appellant

v

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

Respondents

JUDGMENT

The appellant was prosecuted before the Intermediate Court for the offence of *Trafic d'influence* on two counts in breach of section 10(4) of the Prevention of Corruption Act ("the Act"). After hearing evidence, the learned Magistrate found him guilty and sentenced him to 18 months' imprisonment under each count. He now appeals against his conviction and sentence.

Ground 1

Ground 1 reads:

"Both counts of the information are void for duplicity and the learned Magistrate was wrong to have ruled otherwise."

Counts 1 and 2 of the information read as follows-

*"**COUNT I***

***THAT** on or about the 1st day of March 2006 at Velore Street, Port Louis, in the District of Port Louis, one **MOHAMMAD RAFIQ AHMED FAREED ESMAEL PEERMAMODE**, aged 52 years, businessman and residing at No. 40 Benjamine Street, Coromandel, did wilfully, unlawfully and criminally solicit a gratification from any other person for any other person in order to make use of his influence, real or fictitious, to obtain a benefit from a public body.*

PARTICULARS

On or about the date and place as aforesaid, the said MOHAMMAD RAFIQ AHMED FAREED ESMAEL PEERMAMODE solicited, from one Mr Rajkishore Nemchand, the Public Relations Officer of Bel Air Sugar Estate Ltd (BASE), for Minister Mohammed Asraf Aly Dulull, sum of 1,000,000 euros in order to use his influence on the said Minister Dulull to enable BASE to obtain a lease of Pas Geometriques land at Bel Air, Riviere des Anguilles from the Ministry of Land and Housing."

COUNT II

***THAT** on or about the 23rd day of March 2006 at Velore Street, Port Louis, in the District of Port Louis, the said **MOHAMMAD RAFIQ AHMED FAREED ESMAEL PEERMAMODE**, did wilfully, unlawfully and criminally solicit a gratification from any other person for any other person in order to make use of his influence, real or fictitious, to obtain a benefit from a public body.*

PARTICULARS

On or about the date and place as aforesaid, the said MOHAMMAD RAFIQ AHMED FAREED ESMAEL PEERMAMODE solicited from one Mr Rajkishore Nemchand, the Public Relations Officer of Bel Air Sugar Estate Ltd (BASE), for Minister Mohammed Asraf Aly Dulull, sum of Rs. 50,000,000 in order to use his influence on the said Minister Dulull to enable BASE to obtain a lease of Pas Geometriques land at Bel Air, Riviere des Anguilles from the Ministry of Land and Housing."

Section 10(4) of the Act provides that:-

"*Any person who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years."*

As stated in **Mahamudally A R v The State and Anor** [2011 SCJ 246], citing with approval **Choolun v The Queen** [1979 MR 290] *"…duplicity 'is a matter of form, independently of evidence'. In other words, whether an information is bad for duplicity is to be decided by looking solely at the wording of the information itself, in the light of the enactment creating the offence, such as to see if more than one offence is being charged in the same count."*

The question is whether a reading of both counts conveys that the appellant was charged with more than one offence under each count of the information. The charge under each of counts I and II was that on 1 and 23 March 2006, the appellant solicited

from Mr Nemchand the respective sums of 1,000,000 euros and Rs. 50,000,000 for Minister Dulull in order to use his (the appellant) influence on the Minister to enable Bel Air Sugar Estate to obtain a lease of *Pas Géométriques* land from the Ministry of Housing and Lands.

In our view, the words "real or fictitious" are not elements of the offence of *Trafic d'influence* which the prosecution has to prove under section 10(4) of the Act which creates the offence of *Trafic d'influence* by individuals (who are not public officers). In **Ramloll B v The State & Ors [2017 SCJ 266]**, albeit a decision of the Supreme Court regarding section 10(5) of the Act which deals with the offence of *Trafic d'influence* by a public official, the Court had this to say *"…the legislator has enacted that the offence is committed* ***irrespectively of whether the influence is 'real' or 'fictitious'****."* **[Emphasis is ours].**

We are also comforted in our views by the following note from **Dalloz Répertoire de Droit Pénal et de Procédure Pénale (2e édition), 1992 Tome II** at **note 76**, referred by learned Counsel for respondents nos. 1 and 2 and which reads-

> "*Il importe peu que l'influence soit réelle ou supposée; il suffit que les dons ou promesses aient été sollicités ou agréés à raison de la croyance dans cette influence. Il n'est même pas nécessaire que des démarches aient été faites pour faire croire à cette influence…*"

We may also refer to the case of **Mahamudally** (supra), an appeal against a conviction albeit for the offence of embezzlement in breach of section 333(1) of the Criminal Code. One of the issues raised on appeal was that the information was *'bad for uncertainty'* inasmuch as it did not specify whether the remittance of the money to the appellant was for work with or without remuneration.

In determining the issue, the Court referred to section 333(1) which makes it an offence, *"inter alia, for a person to embezzle money which has been delivered to him 'for a work, with or without a promise of remuneration with the condition that the same be used for a specific purpose'"* and concluded as follows-

> "*The words 'with or without a promise of remuneration' clearly do not state two different ways of committing the offence but are simply designed to convey that it is immaterial whether there was a promise of remuneration or not. Accordingly, although the information clumsily reproduced from the*

section the words 'with or without a promise of remuneration' instead of averring either 'with a promise of remuneration' or 'without a promise of remuneration', no defect of a nature to cause prejudice to the accused thereby resulted. Indeed, an information simply averring that the money was for a work without specifying whether it was with or without a promise of remuneration would, in our view, still disclose the offence as neither of those two alternative circumstances would be an element of the offence as such."

The Court even endorsed the submissions of Counsel for the respondent that *"the essential element of the offence was the contract of work: the law does not create two separate offences i.e. one where the contract of work is <with a promise of remuneration> and one where the contract of work is <without a promise of remuneration>."*

There is no reason why the same principle cannot apply in the case of an offence under section 10(4) of the Act. We, therefore, take the view that the essential elements of the offence for which the appellant stood charged before the trial Court and which the prosecution had to prove were-

(i) the appellant solicited a gratification;
(ii) from another person;
(iii) for a person in order to use his influence; and
(iv) to obtain a benefit from a public body.

We endorse the views of learned Counsel for respondents nos. 1 and 2 that the words 'real or fictitious' do not create two different ways of committing the offence such that even if both are averred in one count it would not offend the rule against duplicity. As we have already stated, the words 'real' or 'fictitious' are not constitutive elements of the offence of *Trafic d'influence* under section 10(4) so that it is immaterial whether the appellant's influence on the Minister was 'real' or 'fictitious' and the prosecution was not required to prove same.

In any event, as correctly pointed out by learned Counsel for respondents nos. 1 and 2, the case for the defence proceeded on the basis that there was no evidence of "solicitation' and the use of "influence" on the part of the appellant. It cannot therefore be said that the appellant was either prejudiced in the conduct of his defence or that he did not know the nature of the case presented against him.

We, therefore, do not agree with the argument of learned Senior Counsel for the appellant that both counts *are "duplicitous as they ex facie charge more than one offence in each count: the influence allegedly peddled being allegedly real or fictitious*."

We accordingly find that the learned Magistrate correctly ruled that both counts were not duplicitous.

Ground 1 is accordingly devoid of merit.

Ground 2 was not pressed.

Ground 3

Ground 3 is as follows-

> *"The learned magistrate was wrong on the evidence before her to find that the appellant had solicited a gratification for former minister Dulull in order to make use of his influence real or fictitious over the said Dulull to obtain a benefit from a public body."*

The evidence adduced before the learned Magistrate revealed the following. Bel Air Sugar Estate Co. Ltd (BASE) of which Mr Nemchand was the Public Relations Officer and Mr Rountree the Executive Chairman, applied to the Ministry of Housing and Lands ("the Ministry") in June 2003 for the lease of two plots of *Pas Géométriques* land of a total extent of 44 ha (104 Arpents) situated respectively at Bel Air and Riviere des Anguilles in order to implement a hotel/Integrated Resort project (the project). In fact negotiations for the *Pas Géométriques* land had begun in 2001 inasmuch as BASE was a previous lessee of the said land which was leased to it as grazing land and which the government had retrieved in June 1999 at the expiry of the lease agreement.

The project entailed, inter alia, the construction of a 5-star village type hotel with an eighteen-hole international championship golf course and luxury villas within the framework of the Integrated Resort Scheme. The project site comprised both of freehold and leasehold land of a total extent of 150 hectares. 106 hectares consisted of land belonging to BASE and the two plots of *Pas Géométriques* State land made up the remaining 44 hectares. As this project was considered to be a major investment project by the Ministry of Housing and Lands, in line with its policy, the application of BASE for

the lease of the *Pas Géométriques* land was referred to the Fast Track Committee, a High Powered Committee which was set up in the year 2000 to look into the advisability of allocating state land or of approving mega projects. The Fast Track Committee was chaired by the then Prime Minister and comprised, inter alia, of several Ministers, including Mr A. Dulull (the then Minister of Housing and Lands), representatives of the Board of Investment and high level officials of the different ministries and institutions.

BASE had planned to have the hotel complex operational by November 2004 in order to coincide with the start of the tourism season. However as the application for the lease of the *Pas Géométriques* land was still pending in 2005, on 5 September 2005, Mr Nemchand (the key witness for the prosecution) wrote to the then Prime Minister who was to chair the first meeting of the Fast Track Committee regarding the said project. On 5 November 2005, BASE was invited for a Power Point presentation of its project to the Fast track Committee at which was also present Mr Dulull who was then requested by the Fast Track Committee presided by the then Prime Minister to effect a site visit of the *Pas Géométriques* land which BASE wanted to lease.

The site visit took place on 17 November 2005 and amongst those present were Mr Dulull, Mr Oozeer, (the then Permanent Secretary of the Ministry of Housing and Lands), two Members of Parliament and other public officers. Following the site visit a meeting was held on 24 November 2005 in the conference room of the Ministry at which were discussed proposals regarding BASE project. It was chaired by Mr Dulull and amongst those present were Mr Oozeer and other officers of the Ministry.

Despite the power point presentation and the site visit, BASE did not hear from the Ministry regarding its application. Then towards the end of November or beginning of December 2005, Mr Nemchand received a phone call from the appellant whom he knew very well as the appellant was the General Manager of Subaru Motors which sold to BASE a fleet of vehicles and serviced it. The appellant explained to him that he was at a dinner at which were also present Mr Dulull amongst other Ministers and members of the Legislative Assembly (MLA's) and overheard a conversation between Mr Dulull and one of the MLAs regarding BASE project.

Mr Nemchand was given to understand that the appellant was a close friend of Mr Dulull whereupon he (Mr Nemchand) asked the appellant to help him as a friend and to ask Mr Dulull to speed up matters at the level of the Ministry and finalise BASE's application for the lease of the *Pas Géométriques* land as it dated back to 2001, the

promoters of the project were feeling concerned and his various attempts to get an appointment with Mr Dulull through latter's secretary had so far proved unsuccessful. Mr Nemchand apprised Mr Rountree of his conversation with the appellant

On or about 28 December 2005, upon the intervention of the appellant, Mr Rountree met Mr Dulull at the Ministry but still no decision was forthcoming regarding BASE's application. So, in the beginning of January 2006 and thereafter on several occasions in February and March 2006, Mr Nemchand either contacted the appellant by phone or met him at his office at Rue Velore, Port Louis to ask the appellant to find out from Mr Dulull the situation regarding BASE's application.

On 1 March 2006, Mr Nemchand reported by phone to Mr Rountree, in presence of a woman police officer, a conversation he had on the same day with the appellant to the effect that the appellant had told him that Mr Dulull was asking to be paid one million Euros in relation to the application for the *Pas Géométriques* land. Mr Dulull also said that in order not to arouse suspicion, he would grant the lease of a specific part of the land to another lessee whom he would then ask to sublease that part to Mr Rountree.

WPC Ramessur confirmed that this telephone conversation between Messrs Nemchand and Rountree took place in her presence and added that it was a long conversation about BASE project in the course of which Mr Nemchand said *"Je vous dis, Mons Rountree dans ce pays la sans donne kas pas capave faire narien".*

Another meeting took place between Mr Nemchand and the appellant on 23 March 2006 at the appellant's office in Port Louis in the course of which the appellant apprised Mr Nemchand of a conversation that Mr Dulull had had with him. The appellant then told Mr Nemchand "*Dire Padi qui comme quoi donne Rs 50 million Ministre pou finalise dossier-là*", meaning that Mr Rountree would have to give Rs 50 million to Mr Dulull for BASE to obtain its lease of the *Pas Géométriques*. On 24 March 2006, Mr Nemchand emailed Mr Rountree, who was then in New York, the tenor of the appellant's conversation of 23 March. Mr Rountree sent a copy of the email to one Mr Maurice Lam who in turn forwarded it to Mr Kailash Ruhee, the then Senior Advisor and Chief of Staff at the Prime Minister's Office.

The evidence also revealed that the then Acting Chief Town and Country Planning Officer had discussed BASE project with the Board of Investment and had recommended that the Ministry takes up the matter with Cabinet. In that context, officials of the Ministry

prepared a Cabinet Memorandum which was submitted for the Minister's approval and which was eventually placed on the agenda of the Cabinet Meeting of 17 February 2006 at which meeting Cabinet decided that the project be re-considered at the next meeting of the Fast Track Committee. Cabinet also decided that any decision on the project would henceforth rest with the Fast Track Committee. On 18 February 2006, the Fast Track Committee discussed the project anew and convened that a policy decision was required for the request of *Pas Géométriques* land.

The appellant did not give evidence. His elder brother was called to give evidence of various phone calls which were made between October 2005 to March 2006 from mobile number 57687017 (which was registered in his name as per the evidence of a representative of the Mauritius Telecom) to mobile number 7608910. We open a parenthesis here to remark that according to the evidence of witness Mohammad Acktar Hussain Ramchurn, he was advisor at the Ministry of Housing and Lands and was the agent of Mr Dulull during the general election of 2005. Mr Dulull had been using mobile number 7608910 prior to 2005. On 25 September 2005, Mr Dulull requested him to have the number registered in his (witness Ramchurn) name although Mr Dulull was the sole user of the said number.

According to the appellant's brother, he personally called Mr Dulull from his mobile number 57687017 on different dates between October 2005 and March 2006 to request his assistance in securing a seat for his younger son at John Kennedy Secondary School. Mr Dulull asked him to speak to his advisor which he did and the latter told him that he would do the needful. He added that no point in time did the appellant use his mobile.

The appellant's version which can be gathered from his unsworn statement to the police is that he is the General Manager of Subaru Motors. Bel Air Sugar Estate was a client of his company and as such, he had a client relationship with Mr Nemchand. In March 2006, Mr Nemchand called at his showroom to enquire about the purchase of a new vehicle and in the course of their conversation spoke of BASE project to him. Mr Nemchand gave him a wealth of details about the project and even wrote them down and drew a site plan on two sheets of A4 paper which he (the appellant) produced to the police. Mr Nemchand also told him that BASE was still awaiting the government's decision regarding its project.

The appellant admitted that Mr Dulull was his long time friend and was at the material time the Minister for Housing and Lands. He also admitted that prior to March 2006 he met Mr Nemchand once towards the end of the year 2005 and thereafter in January and February 2006. He further admitted that in December 2005, at the request of Mr Nemchand, he arranged a meeting between Mr Rountree and Mr Dulull and accompanied Mr Rountree to Mr Dulull's office at Moorgate House, Port Louis. Mr Rountree explained the project to Mr Dulull whilst he (the appellant) passively observed them and did not intervene at all. In the end, Mr Dulull promised "to look into the matter".

Although the appellant admitted that it was possible that Mr Nemchand had met him in his office on 23 March 2006 at about 10.30 a.m., he however denied having told Mr Nemchand that he (appellant) had met Mr Dulull on the same day and that the latter had told him that if BASE was willing to give him Rs 50 million which represented 2.5% of the cost of the project, BASE application would be finalised within 10 days. The appellant denied having ever made any proposal on behalf of Minister Dulull to Mr Nemchand regarding the project. He added that he had no power and influence on Mr Dulull and so he could not have intervened in Mr Dulull's decision regarding the said project.

According to the appellant, Mr Nemchand had levelled a false allegation against him out of revenge as BASE project did not materialise.

The evidence on record also revealed that the appellant frequently phoned and met Mr Dulull in the year 2005 and between February to March 2006 at Moorgate House, Port Louis where was situated the Ministry of Housing and Lands. Documentary evidence was also adduced before the learned Magistrate to establish phone calls between the appellant and Mr Dulull.

Learned Senior Counsel for the appellant referred to the evidence adduced before the learned Magistrate, in particular to the answers of Mr Nemchand under cross-examination and re-examination, and reiterated the submissions he made before the trial Court that the evidence of Mr Nemchand merely revealed that the appellant had reported to Mr Nemchand that former Minister Dulull had asked for a bribe for himself and that it fell short of establishing that the appellant had on the 1st and 23rd of March 2006 *'asked for or tried to obtain'* a gratification from Mr Nemchand for and on behalf of former Minister Dulull. Reference was also made, inter alia, to the contents of the email which Mr Nemchand had sent to Mr Rountree and to the wordings used by Mr Nemchand to

convey the appellant's conversation with him and to his answers under cross-examination in support of the argument that there was not an iota of evidence to support a finding of influence of peddling by the appellant.

We find it appropriate to refer to the following extracts of the examination, cross-examination and re-examination of Mr Nemchand whose evidence was material in determining whether the appellant had indeed solicited a gratification from him on two occasions for the benefit of the former Minister as averred in the information

Examination-in-chief-

*"**Q:** Qui banne causer casse ti enan avant 23 Mars 2006?*

A: *Mo pas rappelle date mais si mo mémoire pas faire moi défaut peut être dans le mois de février ou début mars même mo ti enan. Enfin, a l'époque mo ti pe join Monsieur Raffick Peermamode assez souvent ou bien nous tiper cause lors téléphone et a ene moment mo pas rappelle date la encore ene fois mo ti enan ene réunion avec li et lerla ti enan ene causer casse. Lerla li ti cause en euro lerla.*

Q: *Li ti cause en euro, qui line cause ou en euro? Qui line dire ou?*
A: *Li ti dire moi, Ministre Dulull pe dire bizin ene million euros.*
….

Q: *Et sa banne casse qui ti dire ou de 1,000,000 euros la même quand oune mention du 50 million euros là.*

Q: *Rs 50 million la pardon ou sire ca c'était pas pou Monsieur Peermamode mais c'était l'argent tiper demander par le Ministre Dulull.*
A: *I had that impression all the time that it was not Mr Peermamode who was asking for himself but … was asking it was on behalf of the Minister.*
….

Q: *…la conversation qui ti enan le 01 Mars 2006 avec Monsieur Peermamode li ti dire ou coume sa l'homme…*
A: *Yes, if it is in my statement it must be true.*
….
Q: *Yes, Monsieur Nemchand je vais relire. In dire:*
«L'homme in faire so chiffre in dire 1 million euros pou li.
A: *Yes.*
….
Q: *Par l'homme qui oune comprend?*
A: *Par l'homme mone comprend le Ministre Dulull.*

Q: *Qui faire oune comprend sa comme Ministre Dulull?...*
A: *…, tout le temps li tiper adresse le Ministre comme l'homme."*

Cross-examination on the event of 23rd March 2006

*"**Q:** Et oune zoin Monsieur Raffick Peermamode later during the day, quelle heure à peu près?*
***A:** Avant le déjeuner.*
…..
***Q:** Dans so bureau cotte enan so showroom?*
***A:** Exact*
….
***Q:** …Monsieur Raffick Peermamode dire ou qui Ministre Dulull qui in faire appelle li?...*
***A:** Exactement ce jour du 23, …peut être vers le 09hr00/09hrs30.*
….
***Q:** Peermamode in dire ou sa, avant le dejeuner?*
***A:** Exact"*

Mr Nemchand was then referred to the email (document E1) he acknowledged he had written and sent to Mr Rountree and which reads as follows:

"Dear Mr. Rountree

Hope everything is fine with you

The news I have to convey to you is most discouraging.

Hon. Dulull convened Mr. Raffick Peermamode yesterday morning 23/03 to appraise him of latest development and I met Raffick later during the day.

He informs me that Mr. Dulull would be prepared to give us both plots conditional that we pay 50M based on the following figure: Rs. 500,000 for each acre i.e. 100 Acres 500000= 50M. If it is agreed he will finalise all papers within 10 days. According to Raffick the prime Minister is aware of this demand. As regards Sir Bhinod & Kailash, Dulull told Raffick that these two are advisers and not decision makers or takers and they can in way be of help to us.*

Dulull has also told Raffick that this 50M represents only 2.5% of 2,000M (costs of project) and that other promoters are willing to have these plots. He is awaiting a reply from us at the earliest

I've tried to contact both Sir Bhinod & Kailash but they are both not in office today presumably attending Sir Satcam Boolell's Funeral

Also from my information the Government valuers have valued the P.G. land as being worth >3.5M per acre.

If you have the occasion please phone me.

Yours faithfully

Anil"

He was then questioned as follows-

*"**Q:** Donc, li clair qui dans sa conversation la Monsieur Peermamode fine raporte ou ce qui Monsieur Dulull pe dire?*
***A:** Exact"*

Mr Nemchand was also referred to his account of the events of 1 March 2006 to the police and he was then cross-examined as follows:

*"**Q** Ce que vous expliquez dans vos statement c'est arriver le 01 mars 2006?*
***A:** Oui.*

***Q:** Et le lendemain, ou dire, the next day, 02nd of March 2006 I apprise my manager, Mr Ramtree* (sic) *of the full tenure* (sic) *of the conversation I had the previous day with Mr Peermamode?*
***A:** Oui.*

***Q:** Et encore ene fois, Monsieur Peermamode qui camarade avec Ramtree* (sic)*, camarade avec ou?*
***A:** Oui.*

***Q :** Et aussi camarade avec Dulull pe dire ou qui Dulull pe dire?*
***A :** Oui*

***Q:** Pe répète ou parole Dulull?*
***A:** Oui.*

***Q:** Et li clair qui dans les deux conversations Monsieur Peermamode pe raconte ou ce qui Dulull pe dire li?*
***A:** Oui.*
….
***Q:** Et dans tous conversation qui ou fine gagner avec missier Peermamode, Peermamode comme ene camarade avec ou fine communique ou qui Dulull a pe dire?*
***A:** Exact.*
….
***Q:** Et ou bizin maintenant en temps ki ene camarade avec missier Peermamode ou rende hommage à la vérité ou confirme ek La Cour qui a aucun moment Monsieur Peermamode pas fine faire aucun sollicitation au nom de Monsieur Dulull, d'accord ek sa?*
***A:** Comment je peux dire sa parce qu'effectivement Monsieur Peermamode m'a fait la demande au nom de Monsieur Dulull.*
….
***Q:** … A aucun moment Monsieur Peermamode vous a fait une sollicitation.*
***A:** Oui."*

Re-examination

*"**Q:** A ene question quine pose ou, in dimande ou, ou dire qui jamais missier Peermamode in dire ou alle paye monsieur Dulull. Et quand Monsieur Peermamode in dire bizin paye 1 million euros avec Rs 50 million qui oune comprend la quand fine transmette ou sa message la?*

A: *Line transmette moi message qui Monsieur, de la demande de li. Pou moi a cette l'époque Monsieur Peermamode était un intermédiaire entre ce que Monsieur Dulull nous demandait. Il me transmettait le message c'est tout."*

Q: *Pour l'argent.*

A: *Effectivement pour l'argent."*

The learned Magistrate found that Mr Nemchand was a trustworthy witness and had given an honest account of the events of the 1 and 23 of March 2006. She then considered the submission of the defence that the evidence of Mr Nemchand, even if believed, did not establish that the appellant solicited a gratification from him. In so doing she referred to the case of **Ellapen A G N v The State** [2015 SCJ 335] in which the court adopted the meaning of the word "to solicit" from the Concise Oxford Dictionary which is to *"ask for or try to obtain (something) from someone*", and concluded as follows-

> "*This Court finds that based upon the submission of learned Counsel for the defence that Accused was passing on a message, that would still constitute the offence of soliciting in as much as he was asking for money allegedly on behalf of Mr Dulull for a specific purpose namely to obtain a lease of Pas Geometriques land at Bel Air, Riviere des Anguilles from the Ministry of Land and Housing. The messages that Accused transmitted under both counts to Mr Nemchand were not innocuous and simple ones but precise ones namely asking for substantial amounts of money to be allegedly remitted to Minister Dulull for the purpose of obtaining a lease of the abovementioned Pas Geometriques which as such amounted to 'soliciting' by the accused. I am not prepared to uphold the submission of learned Counsel for the defence that Accused was acting as a simple messenger and that he did not commit the offence of soliciting."*

We have carefully considered the finding of the learned Magistrate in the light of the evidence of Mr Nemchand and the submissions made before us by learned Senior Counsel for the appellant and learned Counsel for the respondents. With regard to the meaning to be ascribed to the word 'solicit', in the course of his submissions, learned Counsel for respondents nos. 1 and 2 referred, inter alia, to Art. 178 of the French Pénal Code, Black's Law Dictionary; note 839 of Dalloz Encyclopedique Juridique 2e Edition; and section 2 of the Hong Kong's Prevention of Bribery Ordinance.

In Black's Law Dictionary solicit is defined as: *"To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; …To tempt a person; to lure on, especially into evil…"*. Note 839 of Dalloz Encyclopedique Juridique reads-*"…la sollicitation est une offre de pacte de trafic d'influence, tentative*

érigée en délit consommé, ses suites étant ainsi indifférentes, le délit étant dès lors formel. La sollicitation peut émaner de l'agent lui-même ou d'un tiers qui lui sert d'intermédiaire." Section 2(b) of the Hong Kong's Prevention of Bribery Ordinance provides that "*a person solicits an advantage if he, or any other person acting on his behalf, directly or indirectly demands, invites, asks for or indicates willingness to receive, any advantage, whether for himself or for any other person.*"

In line with the meaning to be ascribed to the word "solicit" as set out above, it is a question of law whether the evidence of Mr Nemchand established that the appellant had on two occasions solicited a gratification on behalf of former Minister Dulull. It is true that at times the testimony of Mr Nemchand appears to be confusing, especially that part of his evidence which we have earlier reproduced. However, when his version is looked at as a whole, it is beyond doubt, as correctly pointed out by learned Counsel for respondents nos. 1 and 2, that the appellant was indeed acting as an "intermediary" between Minister Dulull and BASE; that the act of soliciting was done when the appellant related to Mr Nemchand that former Minister Dulull had asked for a bribe. It is therefore clear that by the words of the appellant he was soliciting a gratification on behalf of Minister Dulull in order to make use of his influence on the latter so as to obtain an advantage from the Ministry.

It can be gathered from her judgment that the learned Magistrate relied on the following evidence from which she concluded that the appellant was not merely conveying messages from Mr Dulull to Mr Nemchand but was indeed soliciting a gratification on latter's behalf namely:

(i) it was the appellant who contacted Mr Nemchand to query about BASE project;

(ii) the appellant's admission that Mr Nemchand discussed the project in details with him and even wrote them down on two sheets of A4 paper which he produced to the police;

(iii) the appellant either spoke to or met Mr Nemchand more than once regarding the project;

(iv) the appellant knew from his conversation with Mr Nemchand that BASE was desperate for the lease of the *Pas Géométriques* land to concretize so that it could proceed with its five star village type hotel and international championship golf course project;

(v) the appellant held himself as being a close friend of former Minister Dulull and readily and willingly helped in setting up a meeting between the Chief

Executive Officer of BASE and Mr Dulull in December 2005 whereas Mr Nemchand's numerous attempts at doing so had proved unfruitful;

(vi) the appellant not only accompanied the Chief Executive Officer of BASE at the meeting but was also present during the discussions of BASE project;

(vii) the several phone calls between the Minister and the appellant as per document AQ and his several appointments with the Minister as per the evidence of the confidential secretary of the former Minister; and

(viii) the appellant's following words to Mr Nemchand *"Dire Padi qui comme quoi donne Rs 50 million Ministre pou finalise dossier-là*".

In the light of the above, it cannot be seriously contended that the appellant was merely acting as a 'messenger' and was not asking for a gratification. Although the appellant denied in his out of court statement the version of Mr Nemchand, however, from the line of the cross-examination of Mr Nemchand, it was his case that he was merely imparting the messages of Minister Dulull to Mr Nemchand. But as correctly found by the learned Magistrate the 'messages' relayed by the appellant were not 'innocuous and simple' but in fact amounts to asking for substantial amount of money to be remitted to Minister Dulull.

We also endorse the submissions of learned Counsel for respondents nos. 1 and 2 that *"the acts and doings of the appellant showed that he could manage to get an advantage/favour for BASE against payment by making use of his influence in view of his proximity with the Minister"*. The evidence showed beyond the shadow of a doubt that the appellant not only portrayed himself but also acted as an "intermediary", between former Minister Dulull and BASE and as such had solicited a gratification from Mr Nemchand. The evidence also showed that Mr Nemchand had faith in the appellant and genuinely believed that he would be able to help BASE's application for the *Pas Géométriques* to materialise.

In addition, as correctly submitted by learned Counsel for respondents nos. 1 and 2, Mr Nemchand's opinion expressed in cross-examination, excerpts of which we have reproduced above, that the appellant was transmitting messages from Minister Dulull was immaterial. Whether or not the prosecution had established that the appellant had solicited a gratification on two occasions from Mr Nemchand was a matter for the sole appreciation of the learned Magistrate in the light of all the evidence adduced before her. We are satisfied that there was ample evidence to support the learned Magistrate's finding that the element of soliciting was established and we see no reason to disturb her finding.

Ground 3 accordingly fails.

Ground 4

Ground 4 reads-

"There is a variance between the charge and the evidence which disclosed that former minister Dulull could not provide any lease of pas géométriques land but only cabinet or the fast track committee which could only be cured by amendment and the learned magistrate was wrong to find the appellant guilty as charged."

In support of the above ground, learned Senior Counsel reiterated the submissions which he made before the learned Magistrate namely that on the evidence adduced before her, in particular the testimony of witness Oozeer, *"…Minister Dulull could not on his own procure the coveted lease … and the fact that the matter was all along under the thumb of the so called 'Fast Track Committee' pursuant to cabinet decision*." It was also contended that since as per Cabinet's decision the Fast Track Committee and not the Ministry of Housing and Lands was the decision maker, therefore, there could not have been any influence peddling on former Minster Dulull by the appellant.

The learned Magistrate considered at length the testimony of Mr Oozeer regarding inter alia the site visit on 17 November 2005, the meeting on 24 November 2005 in the conference room of the Ministry of Housing and Lands, the meetings of the Fast Track Committee subsequent to the site visit and the decisions taken thereat, the evidence of Mr B.P. Jaddoo (the then Managing Director of the Board of Investment) and concluded as follows:

"*The information averred that the gratification was meant for Mr Dulull to obtain a lease of Pas Geometriques land at Bel Air, Riviere des Anguilles from the Ministry of Land and Housing.*

It is borne out by the evidence on record that the Ministry of Housing and Lands played a prominent role in the issue of the said lease of Pas Geometriques to BASE ltd.

….

…it is clear that the Ministry of Housing and Lands was an active participant in the acquisition procedures of the said lease and the then Minister played a major role in those procedures.

I am not prepared to uphold the submissions of learned counsel for the defence on this score."

As correctly submitted by learned Counsel for respondents nos. 1 and 2, the fact that in the course of his testimony before the trial Court Mr Oozeer stated that the Ministry of Housing and Lands could not on its own approve BASE's application for the *Pas Géométriques* without the authorisation of either the Cabinet or the Fast Track Committee is neither here nor there and did not render the information defective. We also agree with the submissions of learned Counsel for respondents nos. 1 and 2 that the evidence showed that the Ministry of Housing and Lands had an important say in the matter and as it can be gathered from the testimony of Mr Nemchand, it was BASE's point of view that it was Minister Dulull who was considering the application. Hence, Mr Nemchand's several attempts at contacting the Minister to discuss the progress of BASE's application and his faith that the appellant would be instrumental in intervening on behalf of BASE on being apprised of the appellant's friendship with the Minister. We further agree with learned Counsel for respondents nos. 1 and 2 that at the end of the day, it was immaterial to the charge who had the power to grant the lease [vide **note 839 Dalloz Encyclopedique** (supra)]. The learned Magistrate cannot accordingly be faulted for having rejected the submissions of the defence.

Ground 4 is equally devoid of merit.

Ground 5 reads as follows-

> *"On the evidence before her the learned magistrate was wrong to have inferred that the accused would 'potentially' have had an influence over former minister Dulull and that he intended to traffic* (sic) *therein."*

It was contended under that ground that the finding of the learned Magistrate that *"…the Accused had a good relationship with Mr Dulull and he potentially could have had an influence over the Minister"* is not borne out by the evidence adduced before her. It was reiterated before us that it was not within the powers of the Minister to decide on the application of BASE and there was no evidence that the appellant had influenced the Minister.

As rightly submitted by learned Counsel for respondents nos. 1 and 2, true it is that there was no direct evidence that the appellant had told Mr Nemchand that he would use his influence to get him an advantage. There was, however, enough circumstantial evidence on record in support of the finding of the learned Magistrate *viz*:

a) the appellant's admission that he was close to the Minister;

b) the appellant had easy access to the Minister's office at Moorgate House;

c) the appellant was the first to contact Mr Nemchand regarding BASE"s hotel project;

d) the appellant voluntarily arranged for an appointment in December 2005 between the Minister and the Chief Executive Officer of BASE for the latter to discuss BASE project with the Minister and was present during the meeting;

e) Mr Nemchand's several conversations with the appellant and his sincere belief that the appellant's proximity to the Minister and his intervention would lead to a fruitful outcome regarding the application of BASE;

f) the appellant's own admission that Mr Nemchand discussed in great details BASE's project with him and even went to the extent of writing down the details and the site plan of the project on 2 A4 sheets for his benefit; and

g) the testimony of Mr Nemchand, whose version the learned Magistrate believed, regarding the solicitation of a gratification in the sums of 1 million euros and Rs 50 million respectively on 1 and 23 March 2006 by the appellant.

As we have already stated under ground 1, it was immaterial whether the influence was real or fictitious. Suffice it to say that there was ample evidence on record before the learned Magistrate namely in the acts and doings of the appellant, which we have highlighted above and under ground 3, from which could be inferred that the appellant had peddled the belief that he could use his influence to get a favour for BASE. We must also point out that notwithstanding the appellant's denial of Mr Nemchand's version that he had solicited a gratification from Mr Nemchand, however, from the line of the cross-examination of Mr Nemchand it is clear that the appellant's case was that he was an ordinary messenger and was only relaying the Minister's messages to Mr Nemchand.

Ground 5 also fails.

Ground 6

Ground 6 reads:

"The sentence imposed is, in the circumstances, wrong in principle and manifestly excessive."

It was contended under that ground that the sentence of 18 months was on "the high side" in view of the delay of about 13 years which had elapsed between the time of the commission of the offence and the hearing of the appeal. We were referred to the decision in **A.Y. Boodoo v The State** [2016 SCJ 525] and **Boolell v The State (Mauritius) [2006] UKPC 46**.

We have considered the submissions of learned Senior Counsel for the appellant from which we have understood that the custodial sentence ought to be reduced on account of delay.

In sentencing the appellant, the learned Magistrate took into account the following: section 10(4) of the Act which provides for a penalty of penal servitude not exceeding 10 years; the seriousness of the offence; the substantial amount of money solicited on each occasion; the delay of 10 years; the pronouncement of the Supreme Court in the case of **C. Malloo v The State** [2010 MR 130] on breach of the reasonable time guarantee; the appellant had no previous convictions for cognate offences and that his previous conviction for the offence of assault which dated back to 2008 should be disregarded.

She then considered whether a non custodial sentence or the desirability of imposing a community service order under section 3 of the Community Service Order Act 2002 would meet the ends of justice but took the view that in sentencing the appellant to a non custodial sentence the court would be sending the wrong signal to like-minded offenders, the more so as the State is waging a fight against corruption and has enacted specific laws to combat the proliferation of such illicit acts. She was also of the view that it would not be appropriate for her to exercise her discretion and impose a Community Service Order having regard to the gravity of the offence of which the appellant had been convicted.

She then applied section 151 of the Criminal Procedure Act which empowers the sentencing court to impose imprisonment in lieu of penal servitude and sentenced the appellant to undergo 18 months' imprisonment under each count as in her view *"…there is an overriding public interest that offenders like the Accused should be given an appropriate custodial sentence commensurate with his involvement and the gravity of the offence"* after having given the appellant a discount for the 10 years delay which had elapsed since the commission of the offence.

We agree with the learned Magistrate that on the facts and circumstances of the case the appellant richly deserved a custodial sentence. We are satisfied that in sentencing the appellant, the learned Magistrate addressed her mind to all the necessary elements which a sentencing court has a duty to take when passing a custodial sentence, in particular the issue of delay. We, accordingly, see no reason justifying our intervention in reducing the custodial sentence of the appellant.

Ground 6 also fails.

All the grounds of appeal having failed, we dismiss the appeal with costs.

N. Devat
Senior Puisne Judge

R. Seetohul-Toolsee
Judge

19 January 2022

Judgment delivered by Hon. N. Devat, Senior Puisne Judge

For Appellant	**:**	**Mrs D. Ghose-Radhakeessoon, Attorney at Law** **Mr A. Domingue, Senior Counsel**
For Respondents Nos. 1 and 2	**:**	**Mrs D. Dabeesing-Ramlugun, Ag. Chief State Attorney** **Mr R. Ahmine, Deputy Director of Public Prosecutions** **Mrs R.K. Gowry-Bhurrut, Ag. Assistant Director of Public Prosecutions**
For Respondent No. 3	**:**	**Mr S. Sohawon, Attorney at Law** **Mr M. Roopchand, of Counsel** **Mr K. Beeharry, of Counsel**