SEERUTTUN S C v THE ICAC & ANOR

2023 SCJ 321

Record No. 9100

THE SUPREME COURT OF MAURITIUS

In the matter of:

SEERUTTUN Mr Subhas Chandra

Appellant

v.

1. **The Independent Commission Against Corruption (ICAC)**
2. **The State**

Respondents

JUDGMENT

The appellant is appealing against his conviction for the offence of using his office for gratification for another person in breach of section 7(1) of the Prevention of Corruption Act 2002 ("POCA").

It is not disputed that the appellant, who was at the relevant time the General Manager of the Beach Authority, authorised the transfer of a beach trader's licence of Mr. M. J. Joomun to operate as an ice cream seller from one public beach to another.

The learned magistrate found that this act was done by the appellant contrary to established procedures. There is no evidence that there was any monetary payment for this act which the appellant carried out whilst he was a public official.

The information avers that the appellant, '*whilst being a public official, wilfully, unlawfully, and criminally, made use of his position for a gratification for another person'*. The other person in the present case being Mr. M. J. Joomun who enjoyed a benefit. The particulars provided in the present matter state that this transfer was done without the approval of the Beach Authority and that Mr. M. J. Joomun was allowed to operate at Saint Felix public beach where normally such operations were not allowed.

The above offence is one created under section 7(1) of the POCA which is set out below:

> **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 underlining is ours.

This appeal has raised seven grounds, grounds 1 to 3 concern the definition of gratification, an element of the offence in the present matter, as well as the related evidence. Grounds 4 to 6 relate to the relevant procedure within the Beach Authority and whether the appellant had complied with it as well as the evidence relied upon by the learned magistrate. Ground 1 was dropped subsequently.

We find it appropriate to deal with grounds 2 and 3 together and which are reproduced:

> *2. The Learned Magistrate was wrong to find the element of "gratification" proved in the light of the case of* ***Joomeer v The State*** *[2013 SCJ 413] referred to by him in his judgment.*
>
> *3, The Learned Magistrate was wrong to find the element of 'gratification' proved in the absence of any evidence to that effect and in view of the clear definition of the word "gratification" in s(2)(sic) of the Prevention of Corruption Act.*

We are grateful for the additional submissions provided to us and we have considered the extensive submissions offered by learned counsel for the appellant and respondents.

Learned counsel for the appellant especially drew our attention to the necessary *mens rea* required for the act under these grounds and submitted that an offence would not lie in respect of any innocuous act.

The submissions offered by learned counsel for the appellant as to the procedure in force at the Beach Authority, is that there was nothing in the law which stated that it was for the

Board to approve the location of a trade licence. She emphasised that in the present matter it was a relocation of a trade licence.

She also submitted that the element of gratification has not been proved because of the context in which the transfer of the location of trade was made and that it was signed by the appellant after he obtained the authorisation of the Chairman of the Board.

The definition of gratification as found under section 2 of the POCA is a gift, reward, discount, premium, or other advantage, other than lawful remuneration. Here the case of **Joomeer v The State** [2013 SCJ 413] which has been relied upon by both learned counsel, and with which we agree, explains there is no requirement of monetary benefit or a gift or reward.

> *[42] … In fact, under the 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.*
>
> *[43] The opprobrium lies in the abuse or misuse of the office, or the position as a public officer for a gratification. Whether the gratification is received or accepted, is not part of the elements of the offence, even if the reception or the acceptance adds further evidential weight to prove that the abuse of office was "for gratification".*

It is clear from an application of the above statement that for an offence to be committed under section 7(1) of POCA, the fact that Mr Joomun was the person who benefitted from the transfer of the licence, is sufficient to bring the acts of the appellant within the offence. We therefore find that these two grounds of appeal cannot succeed and are dismissed.

We now turn to grounds of appeal 4, 5 and 6 which are as follows:

> *4. The Learned Magistrate was wrong to find that the Appellant "wilfully and criminally made use of his position for a gratification for another person" since the evidence reveals that it was the chairman of the Authority who approved the transfer after contacting the Tuck owners at St Felix public beach and there being no objection or revocation of such licence by the Board or any other Authority.*

5. The Learned Magistrate was wrong to base himself on a so called policy decision to find that the approval of the Board was necessary in the case of the transfer of a licence in the absence of any provision to that effect in the Beach Authority Act or Regulation.

6. The Learned Magistrate was wrong to reject the version of the Appellant that he had been authorised to sign the transfer of licence by the Chairman of the Authority although his evidence was corroborated by the latter and the minutes dated 22/10/12.

The evidence adduced at the trial clearly demonstrated that neither the appellant nor the Chairman of the Board had authority to grant a transfer of the licence in question. The letter dated the 26th of July 2012 and received by the Beach Authority on the 26th of July 2012 from the Ministry of Local Government and Outer Islands was addressed to the appellant[1] and his signature is found on the letter with the word "Noted" and the date "26/7". On 29th August 2012, the Board was apprised about this policy decision taken by the parent Ministry. The Appellant was present during that meeting. The latter signed the transfer of Mr Joomun on 28th of December 2012[2], some five months after the receipt of this letter.

The "improper motive" of the appellant can be inferred from the fact that he knew that it was the policy for the Board to agree to any decision relating to a licence, and that he was not empowered to take the decision by himself.

The mental element has been explained in the following manner in the case of **DPP v Jugnauth [2019] UKPC 8:**

"The Board accepts the submission of the prosecution, which once again was not controversial before us, that the resulting obligation is to prove the following mental elements to the criminal standard: (1) That the defendant knew that he was a public official; (2) That the defendant knew, or was reckless as to the fact, that the public body was taking the relevant decision; (3) That the defendant had knowledge of, or was reckless as to the existence of facts giving rise to, his sister's personal interest in the decision; (4) That the defendant

[1] Document E
[2] Document J

intentionally or recklessly carried out the act which amounted to participation in the proceedings of the public body relating to the decision.

Here recklessness connotes subjective recklessness. It should also be emphasised that where knowledge of or recklessness as to factual circumstances is required to be proved, this relates to primary facts and not to their characterisation or their significance as a matter of law. Thus, for example, while a lack of knowledge that a relative owned shares in a company awarded a contract could provide a defence, it would be irrelevant whether a defendant realised that this would constitute a personal interest in law."

The learned magistrate examined in detail the evidence and the "stages" required as per the procedure of the Beach Authority as can be garnered from the following in his judgment:

"The application was processed and the Beach Traders Licence Committee turned down the application of Mr Joomun and suggested that Mr Joomun makes a new application to trade at Le Morne St Felix. The notes of meeting of the Beach Traders Licence Committee dated the 11.10.12 vide document D shows at note 4.3.1 that the committee turn down the application of Mr Joomun.

Thereafter, Mr Latcheman informed the accused that the application was not favourably considered and he would inform the Applicant by way of letter. The minute 15 in the file of Mr Joomun which was produced as document C show that accused was informed of the outcome of the application. Accused knew that the application had been rejected.

Mr Latcheman produced the whole file kept at the Beach Authority for Mr Joomun, document K refers. He explained that at folio 23(b), there is a footnote made by the Chairman of the Beach Authority which reads as "St Felix is not meant licences for traders". He then wrote a letter dated 15.10.12 addressed to Mr Joomun to inform him that his application had not been favourably entertained.

For all intents and purposes, the procedures stopped there as the application was turned down.

Stages 3 and 4

These stages did not even arise as the application was rejected. However, the licence was issued and signed by accused in complete disregard of stages 3 and 4; these acts and doings are precisely what accused is being reproached of."

The above analysis by the learned magistrate taken together with the letter dated 26 July 2012 are enough to show that the appellant knew or was "reckless" when he signed the licence of Mr Joomun.

The further argument of learned counsel for the appellant is that the present case could have called for disciplinary action rather than a criminal prosecution. It can be considered that on the scale of corruption offences, this particular one would seem to be at the lowest end. However a decision was taken to bring a criminal prosecution by the relevant authority. It is not for the court to substitute itself for the authority. Be that as it may, the appellant has been found guilty of the offence in breach of section 7(1) of the POCA.

For the reasons given earlier we do not find fault with the reasoning of the learned magistrate and grounds 4, 5 and 6 are dismissed.

With respect to ground 7, this relates to a finding of fact by the learned magistrate who preferred the testimony of one witness over the other. The learned magistrate was fully entitled to do so, the moreso as there was other evidence apart from oral evidence, namely a footnote at folio 23(b) and Doc E which countered the evidence of Mr Nunkoo. We are loath to intervene in such a finding of fact which does not reveal any perversity especially after the learned magistrate had the advantage of hearing and seeing the two witnesses and to weigh their testimonies. This ground of appeal is also unsuccessful and is dismissed.

We find it appropriate to remark that though the present offence may seem trivial, the legislator has taken the initiative to criminalise the behaviour of public officials. Here it is the case of the law being used to attempt to change the public mores. Sometimes a law is enacted to stimulate a change but more often than not, it is enacted to deal with a situation as a remedy. We have been favoured by learned counsel for ICAC with an extract from the book Bribery and Corruption Law in Hong Kong by Ian Mc Walters 2003 edition and the concluding remarks at page 560 are interesting and are as follows:

Criminalising misconduct by public officers, therefore, manifests the will of society in embedding within the criminal law an ethical standard, applicable only to a particular class of employee. In summary, what are the offence represents is society, saying to public officers:

1) by virtue of your employment as a public official, you enjoy a privileged position, and as a result of that you will be subject to a special law concerning the manner in which you discharge your duties;

2) that special law will reflect the expectations that society has of the ethical standards, which you must apply in the discharge of the duties of your office; and

3) conduct which represents a serious departure from the standards and is deliberate and prompted by an improper motive will not be dealt with as a disciplinary matter, but will attract the full force of the criminal law.

The appeal is dismissed with costs.

R. Teelock
Judge

R. Seetohul-Toolsee
Judge

14 August 2023

Judgment delivered by Hon R. Teelock, Judge

For Appellant:	Mr P Thandarayan, Attorney at Law Ms Y Moonshiram, together with Mr S Veeramundar, of Counsel
For Respondent No. 1:	Mr S Sohawon**,** Attorney at Law Mr K Roopchand, together with Mr H Jeeha, of Counsel
For Respondent No. 2:	State Attorney State Counsel