PLIRO v Pamplemousses Investment Ltd

2022 IND 37

CN142/17

THE INDUSTRIAL COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Principal Labour And Industrial Relations Officer

v/s

Pamplemousses Investment Ltd

RULING (NO. 1) (Permanent Stay Of Proceedings On Grounds Of Abuse Of Process)

As per the amended Information, the Accused Company is charged with one Count of **Failing To Comply With The Requirements Of A Written Notice Issued By The Permanent Secretary, Ministry Of Labour, Industrial Relations And Employment, contrary to ss. 62(2)(a) and 67(2) of the Employment Rights Act 2008 [Act No. 33 of 2008] (hereinafter referred to as ERA) as amended, coupled with s. 44(2) of the Interpretation And General Clauses Act (hereinafter referred to as IGCA)**.

The Accused Company pleaded Not Guilty to the charge, and was assisted by Learned Defence Counsel throughout the Proceedings.

Learned State Counsel conducted the case for the Prosecution for the purposes of the present Arguments.

The Proceedings were held in English for the purposes of the present Arguments.

Learned Defence Counsel renewed his Motion made on 30-04-18, for the present Proceedings to be stayed on the Grounds of Abuse Of Process, inasmuch as the Accused Company will not be able to benefit from a Fair Trial inasmuch as no charge was put to the Accused Company at the Enquiry stage, and the Accused Company's Constitutional Right to Silence has been breached.

Case For The Defence

At the outset, Learned Defence Counsel moved to cross-examine the Prosecutor, and no objection was taken thereto by Learned State Counsel.

The Prosecutor thereafter confirmed that no charge had ever been put to the Accused Company in relation to the present matter, and that the Accused Company was never interviewed in relation to the present matter.

Learned Defence Counsel put in his Written Submissions and the Authorities relied upon in support of his Submissions, and then proceeded to submit to the effect that the Accused Company was never interviewed in relation to the present matter so that no charge was ever put to the Accused Company, and therefore there is no unsworn version of the Accused Company in possession of the Prosecution, such that the version of the Accused Company is non-existent.

And there were therefore two choices open to the Accused Company:

1) To make a statement from the Dock, bearing in mind the weight which can be attached to such a statement; or
2) To elect to depone under solemn Affirmation.

And by not affording the opportunity to the Accused Company to have its unsworn version prior to lodging the case, the Prosecution is in effect compelling the Accused Company to depone under solemn Affirmation, which in turn would breach **s. 5 of the Constitution** as to its Right to Silence.

Learned Defence Counsel further submitted that given the answers of the Prosecutor, in light of **s. 10 of the Constitution**, and the principles enunciated in the Authorities of **The Queen v**

Boyjoo [1991 SCJ 379] and **Shanto & Ors v The State** [2001 SCJ 176], the fact that the version of the Accused Company was not placed before the Court was a sufficient reason for the conviction to be quashed.

Learned Defence Counsel went on to rely on the Authorities of **Kanda v The Government of Malaya** and **Jhootoo v The State** [2013 SCJ 373] to submit that even when a statement is recorded, if the statement was recorded in relation to a charge which is not the charge as eventually contained in the Information, and which was not put to the Accused, the Accused could not have a Fair Hearing in the circumstances, such that the Conviction could not stand.

Learned Defence Counsel submitted that the Authority of **Jhootoo (supra)** had been qualified in the Authorities of **DPP v Lagesse** [2018 SCJ 257] and **Maiharaub v District Council Of Black River** [2018 SCJ 284], and highlighted that in the present matter, no Enquiry was conducted.

Learned Defence Counsel went on to submit that when it is established before a Court of Law that an Accused cannot have a Fair Trial, because he is compelled to give evidence, based on the Authorities of **Babet v The Queen** [1979 MR 222] and **Madelon v The State** [2009 SCJ 208], the only solution is a permanent Stay of Proceedings.

Learned Defence Counsel also submitted that a Fair Trial necessarily connotes a fair and impartial Enquiry, as per the Authority of **Mamode v The Queen** [1991 MR 223], and if there is no Enquiry at all, as in the present matter, there is no way to even assess whether there has been a fair and impartial Enquiry, and moved for the present matter to be permanently stayed.

In Reply, Learned Defence Counsel submitted that the point was that no opportunity was given to the Accused Company to exercise its Constitutional Rights, and there is no proviso to **Chapter 2 or s. 10 of the Constitution** in relation to strict liability offences, and Learned Defence Counsel added that the Constitution has precedence over any other Law, and the question may arise as to whether **s. 62 of the ERA** contravenes **Chapter 2 of the Constitution**.

Learned Defence Counsel reiterated that the principles enunciated in the Authority of **Lagesse (supra)** are correct, and cannot be brushed aside with a slap of the Authority of **Maiharaub (supra)**.

Case For The Prosecution

Learned State Counsel put in his Written Submissions together with the Authorities and case in support of his Submissions, and submitted that it was settled Law that there was no need to put the charge to an Accused Party at Enquiry stage, as per the Authority of **Lagesse (supra)**.

Learned State Counsel went on to submit that the main contention of the Accused Company was that its Right to Silence would be breached, as it would be compelled to give evidence, and this point was considered in the Authority of **P v Roheman** [2010 SCJ 415], which was cited in the Authority of **Jaulim v The State & Anor** [2022 SCJ 3], and further submitted that the principles set out in **Roheman (supra)** apply to all categories of cases.

Learned State Counsel also referred to the Authority of **Maiharaub (supra)** and to **Goolamhossen v District Council of Black River** [2018 SCJ 211] and **Muslim Youth Federation v Municipal Council Of Port-Louis & Anor** [2017 SCJ 197] in support of his Submissions.

Learned State Counsel, relying on the case of **OSHI v Appanah** [2009 IND 41], further submitted that the present offence was one akin to **s. 25 of the Occupational Safety & Health Act** (hereinafter referred to as **OSHA**), which is not a truly criminal offence, but rather a strict liability offence designed to ensure that Enquiry in potential offences committed under the **ERA** is not hindered by a person simply choosing to ignore a Notice served on him, so that once the requirement of a Notice has not been followed, the remedy is that a Prosecution is initiated, in light of the principles set out in the Authorities of **Maiharaub (supra**) and **Roheman (supra)**, and there was therefore no Abuse of Process in the present matter.

Analysis

The Court has duly considered the Submissions of both Learned Counsel as well as the Written Submissions, Authorities and case referred to in the course of the present Arguments.

At the outset, the Court places it on Record that the Written Submissions of Learned Defence Counsel refer to the Police (for example last paragraph at page 5), but the present matter is one

initiated by the Principal Labour And Industrial Relations Officer (hereinafter referred to as PLIRO).

Further, Learned Defence Counsel referred in the course of his Submissions to **s. 5 of the Constitution**, that is Protection of right to personal liberty.

The Court fails to see how the said **s. 5 of the Constitution** applies to the present matter, in light of the circumstances as disclosed by the Information.

Be that as it may, it is trite Law that it is only when an Abuse of Process is clearly established, and that there are no other means of ensuring a fair Trial, that the Court should intervene (**R v Hector & Another [1984 All. E. R. 785** referred to in **The State v Velvindron [2003 SCJ 319]**).

As was authoritatively set out in **DPP v Meakin [2006] EWHC 1067**:

> 22. […] The imposition of a stay is now wholly exceptional. A stay should not be imposed unless the defendant shows that he will suffer such prejudice that a fair trial is not possible. The defence did not and do not here allege bad faith or serious misconduct. […]
>
> 23. The concept of a fair trial involves fairness to the prosecution and to the public, as well as fairness to the defendant. […]

This discretionary power to stay Proceedings is therefore to be used most sparingly, as has been set out in **R. v. Horseferry Road Magistrates Court Ex p. Bennett (No.1) [1994] 1 A.C. 42**.

Abuse of Process has been defined as “something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respect a regular proceeding" (**Hui Chi-Ming v R *[1992] 1 A.C. 34, PC***).

It is settled Law that the decision whether to prosecute or not, is the decision of the Prosecuting Authority alone.

The Court’s role is to assess all the evidence which is placed on Record, in order to give a reasoned decision.

In relation to the present matter, it is not in dispute that no charge was ever put to the Accused Company, and that the Accused Company was never interviewed.

No Charge Put To The Accused Company At Enquiry Stage

The following principles set out in the Authority of **Seetahul v The State** [2015 SCJ 328], which were reiterated in **Grancourt v The State** [2018 SCJ 56], are found to be of particular relevance:

> There is no provision in our law which imposes a duty on the police to actually put the charge to the accused at the enquiry stage. Section 5 of the Constitution relates to the rights of the person who is arrested or detained to be informed of the reasons for his arrest or detention, to be afforded reasonable facilities to consult a legal representative of his own choice and to be brought without undue delay before a Court. Section 10 (2) of the Constitution provides that every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands, and, in detail, of the nature of the offence.
>
> [...]
>
> It was not incumbent at the stage of the enquiry to put each and every element of the offence to the appellant. It suffices that the version of the complainant was put to him so that he was made aware of the case against him and the evidence on which it is based so as to enable him to prepare his defence.

And in the Authority of **Jaulim (supra)**, the Court held as follows:

> Now, Section 10(2)(b) of the Constitution which provides that every person charged with a criminal offence shall be informed of the nature of the charge does not refer to the right of a suspect who has not yet been formally charged but to the right of an accused party at trial. This right is satisfied by the reading of the information to the accused party at the stage of the plea - vide **Police v Roheman** [2010 SCJ 415]**.**

Applying the abovementioned principles to the present matter, the amended Information was duly read to the Accused Company, in English at the request of the Accused Company as duly

represented, and the Accused Company entered a Plea of Not Guilty to the charge, in presence of Learned Defence Counsel (Sitting of 22-10-21).

In light of all the above, the Court is of the considered view that the Accused Company's Constitutional Right to be informed of the charge has been "satisfied by the reading of the information to the accused at the stage of the plea" (**Roheman (supra)**).

Accused Company's Constitutional Right To Silence Has Been Breached

Now, true it is that in the present matter, the Prosecution have conceded that no statement was ever recorded from the Accused Company.

There is therefore no unsworn version of the Accused Company which was obtained at the Enquiry stage.

That being said, the Court finds the following passage from the Authority of **Roheman (supra)** of particular relevance to the determination of the present issue:

> […] in relation to subquestion (3) above, that an accused party who chooses to exercise his right not to give evidence but wishes his unsworn version to be before the court can always state that version in a statement from the dock. [1]

Applying the above principles to the present matter, the Court is of the considered view that the fact that no statement was recorded from the Accused Company in the present matter does not result in the Accused's Constitutional Right having been breached.

Further, the Burden is always on Prosecution to prove its case against an Accused Party beyond reasonable doubt.

Conclusion

[1] *(3) preclude him from freely exercising his right to silence as an accused party under section 10(7) of the Constitution? (***Roheman (supra)**

In light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, the Court is of the considered view that the Defence has failed to establish, on the Balance of Probabilities, that it will “suffer such prejudice that a fair trial is not possible” (**Meakin (supra)**).

The Court therefore finds no justification in exercising its discretionary power to permanently stay Proceedings for Abuse Of Process in the present matter.

The Motion of the Defence is therefore not granted.

The matter is to proceed to Trial and is fixed Pro Forma (Letter) for Defence Counsel to suggest dates for Trial.

[Delivered by: D. Gayan, Ag. President]
[Industrial Court]
[Date: 22 July 2022]