OSHI v Gamma Civic Construction Ltd

2022 IND 7

Cause Number 99/09

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Gamma Civic Construction Ltd

Ruling

Accused stands charged with the offence of having willfully and unlawfully failed to ensure so far as is reasonably practicable, the safety, health and welfare at work of two of its employees on or about 24 June 2004.

Both Late Narajh Hurchand and one Louis Herrisson Matombe sustained injury when they fell down from the lorry box of a moving vehicle. However, the former consequently passed away on 25 June 2004.

The Accused represented by Mr. Feroze Abdool Emamboccus in his capacity as Health & Safety Officer pleaded not guilty to both counts and was assisted by Counsel.

His learned Counsel made a motion to the effect that the present matter be permanently stayed forthwith on the ground of abuse of process for unreasonable delay as the offence subject matter of the information has taken place more than 16

years ago and that the present case has been lasting for multiple reasons for more than 11 years and in the meantime witnesses for the representative of the accused company have passed away. The Court cannot condone such an abusive approach on the part of the Prosecution. The matter was fixed for arguments.

Subsequently, learned State Counsel appearing for the Prosecution after having amended the list of witnesses in the information to add Mrs. Poomalay Poinen- Sohoraye, in her capacity as Acting Divisional Occupational Safety and Health Officer, called her to depone for the purposes of the arguments.

In the course of her examination in chief, she stated that she was not the enquiring officer but only took cognizance of the present Prosecution file as Prosecutor in the year 2019. She was duly authorised to solemnly affirm an affidavit dated 26 June 2019 after having perused the file of the Prosecution and the Court record. While she was being asked to identify the affidavit and to produce it in Court, when learned Counsel for the Accused objected to its production on the basis that it did not satisfy the requirements of the law. He particularised his ground of objection by stating that the affidavit which has been communicated to him and which was intended to be produced by the Prosecution does not indicate which are the statements therein are from the deponent's own knowledge, which matters are of information or belief and it does not indicate the source of any matters of information or belief. Hence, arguments were heard on that issue.

The main thrust of the argument of learned Counsel for the Accused is that as per the Osborn's Concise Law Dictionary 12th Ed., an affidavit has been defined as *"a written sworn statement of evidence". "The person making the statement is called the deponent. The affidavit must indicate which of the statements made in it are made from the deponent's own knowledge, which are matters of information or belief, and the source for any matters of information or belief."* Such requirements are in line with the Civil Procedure Rules 1998 obtained in England namely Practice Direction 32 which was applied in the case of **Lady Christine Brownlie (Widow and Executrix of the Estate of Professor Sir Ian Brownlie CBE QC) v Four Seasons Holdings Incorporated [2014] EWHC 273 (QB), 2014 WL 517788**. Therefore, on that basis, the affidavit in question ought not be produced by the deponent until and unless those requirements of Practice Direction 32 are satisfied. In other words, given that the affidavit intended to be produced by the Prosecution contained facts

which are not to the personal knowledge of the deponent, it has to satisfy the requirements of the law.

The main thrust of the argument of learned Counsel for the Prosecution is that since Independence of Mauritius in 1968, the Law governing the Country is the law made in Mauritius by the Mauritian Parliament. However, Common Law pre-1968 is applicable in Mauritius. There are no such provisions in the local laws where there are such rules requiring that the form of an affidavit has to specify which part is in the personal knowledge of the person or a belief or of her information and the source has to be added to the affidavit. So, an affidavit can either be contained in personal knowledge or which is to the belief of the person or upon information received. It was never the contention of the Prosecution that the witness had any personal knowledge of the contents therein. The affidavit was meant to be produced upon a motion for abuse of process to assist the Court for ease of reference and for all intents and purposes is of a formal character. Thus, the witness swearing the affidavit did not have any personal knowledge thereof. She has relied on Section 189A of the Courts Act where it says that evidence of a formal character sworn in an affidavit shall be sufficient evidence, unless the parties ask that the affiant be called to testify with regard to the contents thereof. She also relied on the Supreme Court case of **Headmaster, Raoul Rivet Government School & Anor. v Nuckcheddy P. & Anor.** [2013 SCJ 153] where an Inspector swore an affidavit containing facts which are to the best of his knowledge and belief. There was no issue of it having to be to the personal knowledge of that person. The witness in the present case is going to be cross- examined as to the facts stated therein. We are not in a situation where an affidavit is being used without calling the person who has sworn it. Any issue as regards the contents of the affidavit, it can be clarified. There is no need as per the Law in Mauritius meaning there is no legal requirement that it has to be specified in an affidavit, that X fact is within the deponent's personal knowledge, Y fact is an information or a belief and the source of the information or belief. It would be going too far to go and import directly and without more the practice in the U.K. An affidavit is an admissible document.

Learned Counsel for the Accused replied that we can still go back and rely on English law in the absence of any law in our Country. In fact, the Supreme Court always does it. It is fundamental that an affidavit must satisfy minimum requirements. The source must be stated from where one gets it. The fundamental basic requirements need to be satisfied or otherwise we can call it a self - serving

statement or an *"aide mémoire"* but it is not an affidavit. How can the contents be tested if we do not know where they came from. If England has adopted such a practice there must be a good reason.

Learned Counsel for the Prosecution further replied that the procedure in the U.K. is in 1998 and that there are laws being made in Mauritius post 1968 by the Mauritian Parliament and the witness who swore the affidavit will be in the box and she will face the test of cross-examination.

I have given due consideration to the arguments of both learned Counsel. A useful starting point is to reproduce Section 189A of the **Courts Act** as follows:

> *"**189A. Evidence of formal character***
> *(1) In all criminal proceedings before any Court, an affidavit sworn by a person whose evidence is of a formal character shall be sufficient evidence of the facts stated therein.*
> *(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit".* (**emphasis added**)

I find it significant to quote an extract from the Privy Council case of **Bissoon Mungroo v The Queen [1991] UKPC 37** where the Board of the Judicial Committee had this to say:

"Their lordships consider that, in any future case in which excessive delay is alleged, the prosecution should place before the Court an affidavit which sets out the history of the case and the reasons (if any) for the relevant periods of delay". (**emphasis added**)

Therefore, the affidavit must set out the history of the case and the reasons (if any) for the relevant periods of delay.

Then, it follows that the sources of information or belief for the statements solemnly affirmed by a deponent to establish the history of the case with the relevant periods of delay leading to the grounds for that belief (if any) to explain the delay are imperative in that affidavit.

Rightly so, it will cover the situation where there is no enquiring officer to give the reasons (if any) why the relevant periods of delay like in the present case and where reliance is being placed on a Prosecutor whose affidavit would contain hearsay evidence as regards the interval prior to the information being lodged after the commission of the 2 offences. In the same breath, the Accused cannot be debarred the opportunity to challenge and question that Prosecutor being a witness against him on the contents of that affidavit as regards their source of information or belief, as holding otherwise would mean that the Court is encouraging insufficient counter-balancing measures which will not render the proceedings fair. Equally important is the risk of unreliability as regards the delay prior to the information being lodged. Therefore, the affidavit cannot be drafted in such a manner so that the Accused is deprived of the material there is to test or assess the hearsay evidence.

At this particular juncture, I find it appropriate to quote an extract from the Supreme Court case of **Maurice P. Pitot & Others v E. W. Evans & Others [1933 MR 150]**:

"In such affidavits it is only stated that the Applicants have every reason to believe that the facts which have been brought to their knowledge by persons, who are not even named, are true and correct. In the case of J. L. Young Manufacturing Co. Ltd., (1900, 2Ch., at page 753), the Court of Appeal in England expressed itself very forcibly on the subject of affidavits based on "information and belief" which do not state the source of belief. In the course of his judgment, LORD ALVERTONE, C.J., stated: -

"In my opinion so-called evidence on information and belief ought not to be looked at at all, not only unless the Court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge. If such affidavits are made in future it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice."

While RIGBY, L. J., said: -

"I will add a few words to what the Lord Chief Justice has said with regard to affidavits and the way in which they are often framed. In the present day, in utter defiance of the order (Rules of the Supreme Court, 1883, Order XXX-VIII, r. 3(1)),

solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows but also of what he believes without giving the slightest intimation with regard to what his belief is founded on. Or he says, "I am informed", without giving the slightest intimation where he has got his information. Now, every affidavit of that kind is utterly irregular…….. .I never pay the slightest attention myself to affidavit of that kind, whether they be used on interlocutory applications or on final ones, because the Rule is perfectly general - that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief."."

The Court went on to say the following: *"It is quite clear that it is our duty to ignore anything in the affidavits which is in the nature of hearsay evidence."*

Now, the authority submitted by learned Counsel for the Prosecution is the Supreme Court case of **Headmaster, Raoul Rivet Government School & Anor v Nuckcheddy P. & Anor** [2013 SCJ 153] an extract of which is reproduced below:

"I also find that the Inspector was perfectly entitled to impart by way of affidavit information which he has gathered in his capacity as a responsible officer of the Ministry and which he has stated to be to "the best of his knowledge and belief" and coming from official sources".

Indeed, this authority can be reconciled with Section 189A of the Courts Act in relation to evidence of a formal character.

However, an excerpt from the Supreme Court case of **François v R** [1988 SCJ 41] is also directly in point which reads as follows:

*"We could observe in this connection that section 189A of the Courts Act permits the giving of such evidence on affidavit in non-contentious matters."(**emphasis added**)*

Thus, I agree with learned Counsel for the Accused that the affidavit which in the present circumstance contains hearsay evidence will have to be in conformity with the law and here it is our own case law namely **Maurice P. Pitot & Others**(supra) which is in line with the Practice Direction 32 applied in **Lady Christine Brownlie (Widow and Executrix of the Estate of Professor Sir Ian**

Brownlie CBE QC)(supra) as obtained in the U.K. as per the Civil Procedure Rules 1998. The importance of this affidavit evidence is that it will have a direct bearing on the present motion of the Defence for a permanent stay of proceedings and the reliability of that evidence will depend on whether it can be properly tested and assessed or not.

True it is that in some instances, such precision was not required in an affidavit as regards its source of information or belief where there are interlocutory decisions to be taken, the Court has looked at the deponents' personal non-acquaintance of such source viz. **Chaverny Pierre & Ors v Central Water Authority** **[1995 SCJ 146]** which in that case was scientific, as in those instances the Court is only concerned with maintaining the *status quo* of the parties without deciding on their rights yet.

There are also instances where such requirements as regards the source of information or belief in an affidavit have been done away with by virtue of a text of law as illustrated in the Supreme Court case **Sheik Yacoob Ramjan v Ayoob Hossen Rahimbaccus and Ors.**[1936 MR 53] an extract of which reads as follows:

"The principle laid down in the case of Pitot v. Evans, [1933 MR 150], that anything in the affidavits which was in the nature of hearsay evidence should be ignored by the Court, cannot apply to a case like the present one, where a text of law expressly empowers a litigant to make an affidavit as to his belief, touching facts with which he may or may not be personally acquainted."

It is apposite to reproduce below the provisions of Section 162 of the Courts Act which read as follows:

> ***"162. English law of evidence to be followed***
>
> *Except where it is otherwise provided by special laws, now in force in Mauritius or hereafter to be enacted, the English law of evidence for the time being shall prevail and be applied in all Courts of Mauritius."*

It is interesting to note that although the affidavits could be irregular to some extent, they have not been robbed of the appellation *"affidavit"* be it in **Maurice P. Pitot & Others** (supra), **Chaverny Pierre & Ors** (supra) **and Sheik Yacoob Ramjan(**supra).

For all the reasons given above, an affidavit is allowed in the present case which will be used for a final purpose and not an interlocutory one namely in relation to a motion for a permanent stay of the proceedings.

However, it will be used as regards the *non-contentious matters* only as per the Court record and it will cover the pre-trial delay in relation to the time interval after the information has been lodged (see- **François**(supra)). It will be of a formal nature pursuant to Section 189A of the **Courts Act** to set out the history of the case and the reasons (if any) for the relevant periods of delay, for instance, the number of postponements at the request of the Prosecution or Defence as per the Court record (see- **Bissoon Mungroo** (supra). The affidavit should mention the source of the information or belief which is the Court record pursuant to **Maurice P. Pitot & Others**(supra).

As regards the delay prior to the lodging of the information, the Prosecution will have to rely on the testimonies of Prosecution witnesses only.

The matter is accordingly fixed *proforma* to 7 February 2022 for both learned Counsel to suggest common dates for continuation and an affidavit to be filed in due course as per the ruling of the Court.

S.D. Bonomally (Mrs.) *(Vice President)*
31.1.22