OSHI v Air Mauritius Limited (under administration)

2022 IND 36

Cause Number 85/17

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Air Mauritius Limited (under administration)

Ruling

Accused is charged under Sections 5(1), 85(1)(a), 85(1)(b) and 94(1) (i) (vi) of the Occupational Safety and Health Act 2005 – Act No.28 of 2005 with failing to ensure, so far as is reasonably practicable , the safety, health and welfare at work of all its employees, failing to notify an accident by the quickest practicable means and failing to send to the Director, Occupational Safety and Health within seven days a report in the form set out in the Thirteenth Schedule of the Occupational Safety and Health Act 2005 – Act No.28 of 2005.

The accused company represented by Mr. Jackdeep Jhurry in his capacity as Safety & Health Officer pleaded not guilty to all 3 counts to the information and was assisted by Counsel.

Learned Counsel for the Defence prior to the trial being taken has moved that part of the defence statement of accused company be edited because it is irrelevant to the charges proffered against it and allowing such evidence to be adduced would be highly prejudicial and would deny the Accused of a fair trial.

Should there be an argument on that matter, learned Counsel for the Defence, is not agreeable to have the statement produced for the purposes of the arguments as per the stand of the Prosecution inasmuch as the editing pertains to extracts of the defence statement which refer to exchanges between parties who are neither the maker of the statement nor *ex facie* witnesses for the Prosecution.

In the circumstances, he is moving to put certain questions to the prosecutor in order "*to be in a position to offer arguments as to whether the defence statement will have to be produced before the parties can argue on a motion of editing"*.

Learned Counsel for the Prosecution has objected to the motion of the Defence to put questions to the prosecutor in order *"to be in a position to offer arguments as to whether the defence statement will have to be produced before the parties can argue on the motion for editing."*

The grounds of objection are as follows –

(a) The prosecutor is not involved in the enquiry and does not have the charge of the file.
(b) The prosecutor is not a witness for the Prosecution and a whole brief has already been communicated to the Accused.
(c) Ultimately, the test that has to be applied to determine whether the statement of the Accused should be edited is whether the prejudicial effect outweighs the probative value and whether not editing those parts of the statement would result in an unfair trial.

Arguments were accordingly heard.

The main thrust of the arguments of learned Counsel for the Defence is that we are concerned at this stage with the objection raised to the Defence putting questions to the prosecutor. We are not at the stage of arguments on the editing of

statements yet as that would come later. He has only been communicated with statements of prosecution witnesses that are going to depone.

It is well settled that it is a matter of practice that the prosecutor can only give answers pertaining to matters that is to the file of the Prosecution. The Prosecution is the one sustaining the charge against the Accused and will have a full copy of the Prosecution's file. He is entitled as Defence Counsel to elicit certain information which according to his instructions should be in the file of the Prosecution on the basis of which the charges have been levelled against his client. Thus, he is seeking to cross-examine the one who will sustain the charges against the Accused and the cross-examination of the prosecutor will be only in relation to such information by limiting himself to matters which are within his or her file. If it is in his file, he will give to the Court the information and if not, he states to the Court that he cannot answer and that was all he was asking.

The main contention of learned Counsel for the Prosecution is that it is a matter of practice only to put questions to the prosecutor. The Defence is not entitled to do so as it is not a right embedded in the law. She relied on the Supreme Court case of **Sunassee Pierre v The State [1998 SCJ 324]**.

The test to determine whether the Court should allow the practice of putting questions to the prosecutor is that of relevance. Whether it is relevant is something which the Defence should enlighten the Court on as to what is the purport to put questions to the prosecutor and what relevance would those questions have to the case. This Court cannot as a matter of course allow questions to be put to the prosecutor as this practice is not meant to be a fishing expedition for evidence to be obtained by the Defence. There can be no assumption that a full copy of the brief has not been forwarded to the Defence.

Learned Counsel for the Defence has replied that he has not come across any authority making mention of the test to be applied as to on what the Defence can put questions to the prosecutor. If ever his question is irrelevant, his learned Friend can object and the Court will rule on it.

Learned Counsel for the Prosecution has further replied that it is not an entitlement but only a practice and the Court will have to be satisfied as to whether

the questions put are relevant and what purport those questions will have on a motion to edit the statements.

I have given due consideration to the arguments of both learned Counsel. It is common ground that cross-examination of the prosecutor is a rule of practice only, but it is also significant to note that such a practice has to be viewed in the context of the presumption of innocence as enshrined in Section 10(2)(a) of the Constitution, the Supreme law, which operates in favour of an Accused party be it an artificial person. In that sense, it is the duty of the Prosecution to put its case fairly before the Court. It is convenient to set out the provisions of Section 10(2)(a) of the Constitution as follows:

> *"(2) Every person who is charged with a criminal offence –*
> *(a) shall be presumed to be innocent until he is proved or has pleaded guilty;"*

Having said that, it is further important to note that in Mauritius, our law of evidence is governed by the adversarial system and not the inquisitorial one. Hence, a balance has to be struck between the presumption of innocence and the adversarial system.

Thus, I find it apt to quote an extract from the Supreme Court case of **Begué v The Queen** [1973 MR 278] where the Accused was *"inops consilii"* and which reads as follows:

"The prosecutor who sustains the charge is not properly speaking a witness. No doubt he may be questioned but it is not imperative that he should be cross-examined nor has the Magistrate the duty of informing an accused party that he may cross-examine the prosecutor. The persons whom it is the duty of the Magistrate to warn the accused of his right to cross-examine them are those witnesses which appearing on the back of the information are called by the prosecution to depone or tendered for cross-examination and also additional witnesses that the prosecution may call."

Indeed, the Supreme Court case of **Sunassee P. v The State** [1998 SCJ 324], has reaffirmed that position in that the Defence cannot just cross-examine the

prosecutor as a matter of right as he is not a witness properly speaking and which reads as follows:

"The so-called "cross-examination of the prosecutor" is a practice which has developed in Mauritius whereby the prosecutor is requested by the defence to provide certain particulars concerning the stand of the prosecution or certain details as to the procedural aspects of the enquiry. In Begué v R [1973 MR 278], it was held that there was no duty on the court to inform the accused that he could put questions to the prosecutor who was not properly speaking a witness in the case."

Thus, it is clear enough that in **Begué**(supra) and **Sunassee**(supra), the impact of our adversarial system has been highlighted namely that *"there was no duty on the court to inform the accused that he could put questions to the prosecutor who was not properly speaking a witness in the case. The persons whom it is the duty of the Magistrate to warn the accused of his right to cross-examine them are those witnesses which appearing on the back of the information (…)."*

Now, although true it is that the prosecutor who sustains the charge is not a witness properly speaking for the Prosecution because of our adversarial system, but viewed from the perspective of presumption of innocence, it is a rule of practice that he may be questioned meaning cross-examined by the Defence.

Thus, questioning of the sort on relevant matters by the Defence namely " *to be provided with certain details as to the procedural aspects of the enquiry"* (see-**Sunassee**(supra)) found in the file of the prosecutor by way of oral evidence will not only be in turn relevant to the motion on the purported arguments of whether to edit the defence statement prior to it being produced or not but also, more importantly it will have a bearing on an eventual potential motion of a submission of no case to answer at the close of the case for the Prosecution by the Defence because of the deficiency or inadequacy of the evidence in certain respects.

In the same breath, the Court is alive to the fact that such a rule of practice will have to be exercised by the Court within reasonable limits in the sense that a balance must be struck between the rights of the Accused not to be prejudiced in his defence because of presumption of innocence on the one hand and on the other, the adversarial system prevailing in our country.

For all the reasons given above, I accede to the motion of having the prosecutor cross-examined by the Defence as regards relevant information found in the file of the Prosecution pertaining to certain aspects of the enquiry by way of oral evidence and the Court will see to it that questions are not being put outside the bounds of reasonable limits and that his answers will be final as he is not properly speaking a competent and compellable witness.

The matter is accordingly fixed *proforma* to 28.7.22 for both learned Counsel to suggest common dates for trial as the motion can only be entertained after the prosecutor has sworn and sustained the charges against the Accused.

S.D. Bonomally (Mrs.)
(Vice President)
22.7.22