OSHI v Marine Biotechnology Products Ltd

2024 IND 47

Cause Number 83/2022

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Marine Biotechnology Products Ltd

Ruling

Accused stands charged with having unlawfully failed on or about 11.11.2012 to ensure, so far as is reasonably practicable, the safety and health of its employees at work whereby one Alex Philippe Marie sustained crush injury with fracture at his bilateral tibia and fibula in breach *inter alia* of sections 5(1) and 94(1)(i) (vi) of the Occupational Safety and Health Act 2005.

The Accused represented by Mr. Dinesh Ramchurn also known as Mr. Misranand Ramchurn in his capacity as Health & Safety Manager pleaded not guilty to the charge after the information was read over to him in a language he understands and it also retained the services of Counsel at its trial.

After the case has been fixed for trial in 2022, on the second subsequent Court sitting, only 3 witnesses out of 7 were present. Learned Defence Counsel has raised a preliminary point moving that the information against the Accused be permanently stayed forthwith on the following ground-

1. abuse of process-

   (i) in view of the fact that the Prosecution has lodged the present information against Accused again in 2022 after first lodging a similar information in 2015. Proceedings were started in 2015 and discontinued in 2018 after the Defence has raised an issue pertaining to a breach of the Constitutional Rights of Accused;

   (ii) the Prosecution is now trying to cure a fundamental defect in its enquiry and is prosecuting the accused company again in 2022.

   (iii) because of inordinate delay, since the alleged incident occurred in 2012 and proceedings have still not started against the Accused and now witnesses are not available namely Witness No.4 being untraceable and Witness No.5 being seemingly unavailable.

The matter was fixed for arguments on 23.7.24 and for that purpose, Prosecution Witness no.1, Mr. M. F. Joomun in his capacity as Principal Health and Safety officer, solemnly affirmed an affidavit underlining a chronology of events in the present matter and produced same as per Doc. A upon no objection from learned Counsel for the Defence. He was not cross-examined.

The affidavit recites the following-

(a) On 11.11.2012, one Mr. Alex Philipe Marie, Mechanic at Marine Biotechnology Products Ltd (Accused Company), sustained crush injury with fracture bilateral tibia and fibula, when his legs were caught between the housing and the moving screw of an inclined screw conveyor while he was removing a metallic cover on a screw conveyor.

(b) After the Occupational Safety and Health Inspectorate was notified of same on 11.11.2012, an enquiry was instituted on 12.11.2012 and photographs were taken at the locus of the accident.

(c) On 15, 16, 21 and 27 November 2012, statements were recorded from the respective witnesses namely: Mr. Steve Denis Arokium, Mr. Avinash Rungoo, Mr. Vincent Merven, Electrical & Automation Manager, Mr. Louis Desire Ben Pierrus.

(d) On 5.12.2012, statements were recorded from Mr. Laval Sans Facon, Supervisor Maintenance and from Mr. Gary Brian Sylvain Jean, Electrician.

(e) On 19.12.2012, the management of the Accused Company was convened for its views. However, the management through its legal representative, requested for a postponement and the meeting was then scheduled for 8.1.2013.

(f) On 8.1.2013, the statements of Mr. Alex Philippe Marie (injured person) and the Defence statement of the Accused Company, represented by Mr. Terence Calvin Brown were recorded.

(g) Due to the heavy workload at the Ministry regarding other work accidents, the report with respect to the present accident was finalized and submitted on 29.4.2015.

(h) The information against the Accused Company was lodged before the Industrial Court on 30.9.2015 (CN. 154/15) whereby the Accused company was prosecuted for 'Failing to ensure the safety, health and welfare at work of its employees'.

(i) On 5.11.2015, case bearing CN. 154/15 was called *proforma* and the Accused Company, through its representative Mr. Misranand Ramchurn, Safety and Health Officer, pleaded not guilty and filed a letter from its Counsel. The case was then fixed for Trial on 17.5.2016.

(j) On 26.4.2016, a letter was filed from Witness No.2 requesting for a postponement as he will not be in the country. The case was then fixed *proforma* on 17.5.2016 to suggest new trial dates.

(k) On 17.5.2016, the case was called and fixed for trial on 15.2.2017.

(l) On 15.2.2017, the case was called for Trial and learned Counsel for the Accused Company submitted that the evidence in support of the charge was not put to the Accused Company. In the light of the motion made, the matter was fixed *proforma* for stand on 23.3.2017.

(m) On 23.3.2017, the case was called *proforma* and was then fixed for arguments on 30.10.2017 following advice sought from the Office of the Director of Public Prosecutions.

(n) The matter was removed from the cause list of 30.10.2017 and was put *proforma* on 16.11.2017.

(o) On 16.11.2017, the case was called and fixed for arguments on 31.7.2018.

(p) On 31.7.2018, when the case was called for arguments, the State Counsel from the Office of the D.P.P. informed the Court that the Prosecution will require more time to consider its stand in the light of the motion made by the learned Counsel for the Accused Company. The case was fixed for stand on 3.9.2018.

(q) On 3.9.2018, the Prosecution filed a Discontinuance of Proceedings dated 28.8.2018.

(r) On 15.11.2018, a further Defence statement was recorded from Accused Company represented by Mr. Misranand Ramchurn and on 4.1.2019, the case was referred to the Office of the D.P.P for advice. Following the said advice, further Defence statements were recorded from the same representative on 4 and 24 September 2019 respectively.

(s) On 13.2.2021, Mr. Misranand Ramchurn submitted a letter of authorization mandating him to represent the Accused Company and to give a Defence statement.

(t) On 2.3.2021, the case was submitted to the Office of the D.P.P for advice and on 27.6.2022, the Office of the D.P.P. advised prosecution to be initiated against the Accused Company.

(u) An information was accordingly lodged against the Accused Company on 30.6.2022 (CN.83/22) whereby the Accused Company was prosecuted for 'Failing to ensure, so far as is reasonably practicable, the safety, health and welfare at work of its employees'.

(v) On 19 January 2023, the case bearing CN. 83/22 was called *proforma* and the Accused Company, represented by Mr. M. Ramchurn, pleaded not guilty and filed a letter from its Counsel. The case was then fixed for trial on 3.7.2023.

(w) On 3.7.2023, in the absence of the Accused's representative, the matter was fixed for trial anew on 18.9.2023. On the latter day, learned Counsel for the Accused Company informed the Court that she was awaiting the Court proceedings of the previous case bearing CN. 154/15 to take a stand in the present matter. The matter was fixed *proforma* on 9.11.2023.

(x) On 9.11.2023, learned Counsel for the Accused Company moved for a permanent stay of the proceedings on the ground of abuse of process and inordinate delay. In the light of the motion made, Prosecution moved for a postponement to take a stand and the matter was fixed accordingly on 29.2.2024.

(y) On 29.2.2024, Prosecution informed the Court that the motion for abuse of process was being resisted and the matter was then fixed for arguments on 5.6.2024 and thereafter postponed to 23.7.2024.

The main thrust of the argument of learned Counsel for the Prosecution is that under the authorities of **The State v Bissessur & Ors** [2001 SCJ 50] and **Director**

of Public Prosecutions v Chetty V.S. [2023 SCJ 245], as per the affidavit on record, the delay has been explained. Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule. In the present case given that the delay has been explained, there is no serious prejudice caused to the Defence. A fair trial can still be held and also in the interests of justice, this case does not warrant a stay of execution in view of the serious charge against the accused company. She has also relied on Section 72(3) of the Constitution.

The main thrust of the argument of learned Counsel for the Defence is that although the D.P.P. has a right to discontinue proceedings as per Section 72(3)(c) of the Constitution, in the light of the landmark decision of **The State v Velvindron R.** [2003 SCJ 319], the Court also has a jurisdiction to stay proceedings and to prevent anything which savours of abuse of process. She has relied on the case of **The State v Bissessur & Ors** [2001 SCJ 50] as regards the 4 factors identified as to whether the Accused has been deprived of its Constitutional Rights under Section 10(1) of the Constitution:

(i) Length of the delay;
(ii) The reasons given by the Prosecution to justify the delay;
(iii) The responsibility of the Accused for asserting its rights;
(iv) Prejudice to the Accused.

She further relied on the case of **The State v Wasson S.J. & Ors** [2008 SCJ 209] in that there may be an abuse of process if either the Prosecution has misused the process of the Court to take unfair advantage of a technicality or on a balance of probabilities, the Accused will be prejudiced in the conduct of its defence by delay on the part of the Prosecution which is unjustifiable. She referred to the case of **Gungaram B. & Anor v The State** [2009 SCJ 351] where a delay of 15 or 16 years was inferred to be prejudicial to the Accused.

She went on to say that the alleged incident occurred on 11.11.2012 and there was only an alleged crush injury and the charge is not very serious. The first information was lodged on 30.9.2015. There is no justification by the Prosecution to explain the delay of 3 years to lodge the first information. On 15.2.2017, the Defence made a motion to the effect that the charge and the evidence in support of the charge were not put to the Accused. That already revealed a fundamental defect in the enquiry of the Prosecution. To cure that defect, the Prosecution filed a

discontinuance of proceedings against the Accused in September 2018. Three years to lodge the case, 3 years to file a discontinuance of proceedings so that it is 6 years and then we add 4 years to 2018 because the second information was lodged in 2022. We are now in 2024, 12 years after the alleged incident and the Accused has still not been tried. The Prosecution has only set out a chronology of events and has not explained the delay. Thus, the Prosecution has not justified the delay of 12 years. When the second information was lodged in 2022, the case came for trial on 18.9.23. Then, it was recorded that witness no.4 is untraceable (the complainant) and Witness no.5's address is unknown. The circumstances already show that time has impacted on the Prosecution witnesses' availability. If ever the trial takes place in this matter, there will have to be postponements for the Prosecution to trace those 2 witnesses and there is no guarantee that even if there is an attempt to trace them out, they will be found. There is a reasonable question which arises, is whether a fair trial can take place with Prosecution witnesses who may be unavailable with passing of time which may affect the memory of witnesses and with those 12 years, the accused company may be prejudiced in finding witnesses to prepare its defence. Therefore, there is prejudice to the Accused and one should not forget that the company is still standing trial in this matter after 12 years and a criminal charge on a business is a blot to its profit-making ability.

I have given due consideration to the arguments of both learned Counsel appearing for the Prosecution and the Defence respectively in the light of all the evidence brought forward before me.

True it is that as per the affidavit which remained unrebutted in its form and tenor, the accident at work reported occurred in 2012 and the formal charge was lodged 3 years after in 2015 due to heavy workload in relation to other work accidents at the Ministry. The evidence in relation to the charge was not put to the Accused at enquiry stage as per motion made by learned Defence Counsel following which a discontinuance of proceedings [hereinafter referred to as "D.O.P."] was filed by the Director of Public Prosecutions (D.P.P.). However, in Court, she stated that the charge and the evidence in relation to the charge were not put to the Accused at enquiry stage. Be it as it may, the Defence has conceded that such defect has been cured by way of a D.O.P. which means that there was no formal charge on which the Accused stood trial then.

Subsequently, 3 further statements were recorded from Mr. M. Ramchurn and a letter of authorization to represent the Accused company was obtained from him. Another formal charge on which the Accused stands trial was lodged in relation to the same accident, which was 4 years after the D.O.P. had been filed. Mr. M. Ramchurn was representing Accused prior to the filing of the D.O.P. and also after the formal charge was lodged again in 2022.

At this particular juncture, I deem it appropriate to quote an extract from the Supreme Court case of **The State v Bissessur & Ors** [2001 SCJ 50] at pages 11,12,13 which reads as follows:

"In ex Parte Bellsham [1992] 1 ALL ER 394 – it was held that, "a stay of criminal proceedings should not be ordered simply as a form of disciplinary disapproval of the Crown prosecution."

The principles propounded in the above authorities can be summed up as follows: -

(1) The court should exercise its discretionary power to order a stay of the proceedings only in exceptional cases and a staying order is an exception rather than the rule.

(2) There is no mathematical calculation for how long is too long, it differs from jurisdiction to jurisdiction and each case has to be decided on its own facts.

(3) A stay of criminal proceedings should not be ordered simply as a form of disciplinary disapproval of the DPP's office.

(4) The Court ought to carry out a balancing exercise which requires an examination of the length of the delay in the light of other factors, namely: (1) the seriousness of the offence; (2) limits on our institutional resources; (3) reasons for the delay and (4) trial-related prejudice, in order to determine where the attainment of justice lies.

(…)

With regard to the question of prejudice, any accused party who has the shadow of a criminal case hanging over his head will inevitably suffer some sort of prejudice and the longer the delay the greater would be the prejudice. However, it is just not any prejudice, which will avail an accused party. The court must be satisfied that the accused has suffered trial-related prejudice. Taking into account, the nature of the charges, I find that the accused have failed to show that they would suffer trial-related prejudice namely that their defence would, in any way, be impaired. (…) In

other words the public interest that the accused should stand trial outweighs any prejudice which might have been caused by the lapse of time between their arrest and the start of the trial.

To conclude, I find that the time that has elapsed is not, in the circumstances, such as to amount to an infringement of the provisions of section 10(1) of our Constitution, given the seriousness of the charges, the more so when we bear in mind that section 10(1) could not have been provided for in a vacuum, but within the economic, social and cultural set up of Mauritius." (**emphasis added**)

It is apposite to note that the powers of the D.P.P under Section 72(3) of the Constitution, one of them being the filing of a D.O.P. for which the Court will not intervene except when the Director decides to prosecute, that the matter falls automatically under the control of the Courts by virtue of Section 10 of the Constitution (see- **Lagesse v Director of Public Prosecutions [1990 MR 194]** applied in **The State v Marie François Bernard Maigrot [2023 SCJ 437]**). Further, unjustified delay cannot on its own be a sufficient reason for a stay (see -**The State v Rudolf Derek Jean Jacques & Anor [2022 SCJ 408]**).

Although, the delay of 12 years could have impacted on the memory of the witnesses be it for the Prosecution or the Defence and their traceability, there is only a pre-emption on the part of the Defence that the Accused will be denied of a fair trial and more importantly section 10(1) of our Constitution *"could not have been provided for in a vacuum, but within the economic, social and cultural set up of Mauritius"*. As was clearly pointed out in **Director of Public Prosecutions v Chetty V.S. [2023 SCJ 245]** at pages 9 and 11**:**

"It follows from all the above caselaw that even where delay in preferring the charge against the accused party is unjustifiable, a permanent stay should be the exception rather than the rule. The trial Court must exercise its inherent power to stay proceedings in exceptional circumstances, and preferably, after evidence has been heard. The Court must ensure that there is a fair trial according to law, which involves fairness to both the accused party and the prosecution.

(…)

The Court, at this stage of the proceedings, could only have acted on mere speculation by staying the proceedings prematurely, for none of the witnesses, either for the prosecution or for the defence for that matter, had deposed. It is only after all

the witnesses have deposed that the court can examine critically how important the missing evidence is in the context of the case as a whole." (**emphasis added)**

Equally of relevance is an excerpt from the case of **The State v Wasson SJ & Ors [2008 SCJ 209]** where the Supreme Court had this to say:

*"Every Court has thus undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and constitute an abuse of the process of the Court. And in **Hui Chin Ming v R. [1992 1 A.C. 340]**, an abuse of process was defined as "something so unfair and wrong that the Court should not allow a prosecutor to proceed with what is in all respects a regular proceeding.""* (**emphasis added**)

The State v Wasson(supra) made particular reference to **D.P.P. v Hussain 1 June 1994 Times** where the Court *"reiterated the exceptional nature of an order staying proceedings on the ground of abuse of process and stated that such an order should never be made where there were other ways of achieving a fair hearing of the case, still less where there was no evidence of prejudice to the defendant".* (**emphasis added**)

The State v Wasson(supra) also referred to ***R. v. Hector & François [1984 1 AER 785]*** *where it was stressed that "the trial process itself is equipped to deal with the bulk of complaints on which applications for stay of proceedings are founded"."* (**emphasis added**)

Therefore, it is abundantly clear that the motion for stay for abuse of process is in relation to trial-related prejudice as pertinently illustrated in **The State v A.B. Mudhoo & Anor [2024 SCJ 224]** at page 14:

*"In so far as the "lacunas and shortcomings in the enquiry", as contended by learned Counsel for the accused parties are concerned, I note on the basis of the legal principles in **Mertz S B v State [2012 SCJ 382]** that the allegation of incomplete enquiry is not relevant as there is nothing for the accused parties to prove but "…The police had to prove the case against him".*

(…)

*In respect of the charge under Count II not being put to accused No.1, in **Seetahul V v The State [2015 SCJ 328]**, the Court stated that "…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."". (**emphasis added**)

In the same breath, in **State v Ludovic Sebastien Potage** [2022 SCJ 220] at pages 4,5 and 6 the following extract is relevant:

"In these circumstances, I can hardly tax the prosecution of bad faith when it discontinued the first proceedings against the accused. This course of action was, most probably, adopted by the prosecution to ensure that Articles 6(1) and 6(3) of the European Convention on Human Rights which are in essence like Section 10(2)(e) of our Constitution, are upheld in the course of the trial of this accused. The relevant part of the Articles read as follows:

"6(1) In the determination of…any criminal charge against him,

everyone is entitled to a fair …hearing…"

(3) Everyone charged with a criminal offence has the following minimum rights…to have examined witnesses against him…"

(…)

In addition, I am not satisfied, on a balance of probabilities, that as a result of the new proceedings, the accused will suffer genuine and serious prejudice to the extent that no fair trial can be held. Prejudice is not to be presumed, there must be serious and actual prejudice.

(…) It is only in the course of the trial proper, after witnesses have been heard and this point fully canvassed in cross-examination, that the court will be able to evaluate the sum total of evidence and assess whether the prosecution has proved all elements of the offence on one hand and whether the accused has suffered any actual prejudice because of this state of affairs on the other. As stated in the case of ***The State v. Velvindron R.*** *[2003 SCJ 319], "the trial process itself is equipped to deal with the bulk of complaints on which applications for stay of proceedings are founded." (…) The trial process is equipped to ensure that the defence is not actually prejudiced. (…) Again, I fail to apprehend the serious and actual prejudice to the accused. I note that if the accused has given statements to the police, his version is already known."* (**emphasis added**)

In the same sense, in **Gungaram B.& Anor v The State** [2009 SCJ 351], it was held that to amount to an abuse of process, delay has to produce *"genuine prejudice and unfairness"*.

In the present case, the charge on which the Accused stands trial, is in relation to health and safety at work and it assumes all its seriousness. Further, there has not been serious and actual prejudice but only pre-empted prejudice because of delay and the trial process is sufficiently equipped to ensure that the Accused is not actually prejudiced bearing in mind that the Accused has given its version to the police and its said version is already known.

As regards the blot to the profit-making ability of Accused's business, because of the delay of 12 years, such prejudice has not been vouched by any sort of documentary evidence let alone that motions for postponements had also been made by the Defence as per the unrebutted affidavit namely Doc. A.

For all the reasons given above, the Defence has not discharged its burden on a balance of probabilities in establishing that, in continuing with the present trial as per the present information, because of the delay and because of the fact that the said defect at the stage of enquiry has been cured at the pre-trial level, amounts to a misuse or an abuse of process of the Court, in being so oppressive or prejudicial to the Accused that a fair trial is rendered impossible.

I take the view that the conduct of the Prosecution is not of such a kind that will debar the Accused from being tried fairly by this Court commensurate with the Fair Trial Principle as envisaged and enshrined in section 10 of the Constitution in the local context of the prevailing harsh economic realities and the social and cultural conditions.

The motion of the Defence to have the proceedings permanently stayed on the ground of abuse of process is accordingly set aside.

S.D. Bonomally (Mrs.) *(Vice President)*
13.9.24