CN 393/2016

THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

POLICE

V

1. NAVINCHANDRA RAMGOOLAM
2. RAMPERSAD SOOROOJEBALLY
3. PREMNATHSING JOKHOO

RULING (Submission of no case to answer)

All three accused stand charged with wilfully and unlawfully agreeing with one Doomeswarsing Gooljaury to do an act which is unlawful, to wit: effecting public mischief in breach of **Section 109(1) of the Criminal Code (Supplementary) Act coupled with Section 298 of the Criminal Code Act.**

Accused 1 is represented by Sir Hamid Moollan QC, Messrs G. Glover SC, N. Ramburn SC, S. Oozeer, H. Oozeer and A. Moollan.

Accused 2 is represented by Mrs N. Bundhun SC and Mrs V. Bunwaree.

Accused 3 is represented by Messrs M. Gujadhur, S. Servansingh, S. Servansingh and K. Luckeeram.

Prosecution was led by Miss M. Naidoo, Senior Assistant DPP, as she then was, Mr J.M. Ah-Sen and Miss K. Soochit, State Counsel assisted by CI Hurree.

Widely known as the "*Roches Noires case*", the present matter was extensively publicised and made the subject of innumerable comments. Accused 1 is the former Prime Minister of the country, Accused 2 and 3 were then Deputy Commissioners of Police, in charge of the Anti-Drug and Smuggling Unit (ADSU) and the National Security Service (NSS) respectively.

The charge is particularised in the information and is as follows: that Accused 1, 2 and 3 did agree with the said Doomeswarsing Gooljaury that he would give a false statement in writing to a police officer concerning an imaginary offence of larceny committed to his prejudice at Roches Noires on the 3rd of July 2011.

The list of witnesses as amended contained 32 witnesses out of which only 18 witnesses have been called by the prosecution and the case spanned over three years. Various points in law have been raised and ruled upon.

At the sitting of 11th of June 2019, the prosecution decided to close its case without calling the remaining 14 witnesses.

Mr G. Glover SC came up with a motion of submission of no case to answer, whilst reserving his rights to call evidence, if necessary thereafter. Taking the prosecution's case at its best, he submitted that Accused 1 has no case to answer. Learned leading Counsel appearing for Accused 2 and 3 joined in the motion as well. The prosecution objected to the motion raised. The matter was scheduled for argument and was accordingly argued.

Before we embark on our analysis of the point raised we commend the valuable input of all parties which have been very helpful for the determination of this ruling.

Submission on behalf of the defence

Two points were highlighted, namely, that the prosecution has elected to prosecute for the charge of conspiracy to do an unlawful act as opposed to a wrongful act; and, the second point is that the imaginary offence as stated in the information is one of larceny simpliciter.

Mr G. Glover SC submitted that they are not concerned here with the offence of conspiracy, but with one of the elements of the offence which is the unlawful act, being the act of effecting public mischief under **Section 298 of the Criminal Code Act**. He elaborated on the elements of the public mischief and referred to the cases of **Procureur General v Tincoory [1949] MR 143**, **C. Ramputh v The Queen [1952] MR 317, R. Ramtohul v The Queen [1974] SCJ 1, Leste M.G. v The State [1999] SCJ 266**, **The Director of Public Prosecutions v M. L. Savriacooty [2012] SCJ 100** which distinguish between **Sections 297 and 298 of the Criminal Code Act**.

With regard to submission of no case to answer, he referred to the case of **The Director of Public Prosecutions v A.A.A. Ebrahim [2017] SCJ 334**, which case made application of the English decision of **Chief Constable of Police Service of Northern Ireland v LO [2006] NICA 3**, citing **R v Galbraith [1981] 2 All E R 1060** setting the test to be applied where a submission of no case to answer is made as being: -

"(2) The exercise on which a magistrate or judge sitting without a jury at the direction stage had to embark, in order to decide that a case should not be allowed to proceed, was to consider whether the prosecution evidence, taken at its highest, was such that he was convinced that there were no circumstances in which he could properly convict. Where evidence of the offence charge had been given, the judge could only reach the conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict. Such a consideration was unlikely to occur other than at the direction stage when an assessment of the strength of the evidence against the accused would most conveniently be made."

It is the contention of the defence that they are not asking the Court to make a value judgment as to the credibility of witnesses. What the court should decide is that taking the Prosecution's evidence at its highest, whether an offence as averred in the information has been disclosed or not. And if it has not been disclosed in the sense that one element has not been proved and that there is no prima facie evidence that this element has been proved, then, the court will have no difficulty in finding that it cannot go any further and the submission of no case to answer must succeed.

In that respect, Mr G. Glover SC, went on to add, the testimony of witness 7, D. Gooljaury, is relevant to the extent of determining whether it proved all the elements of the offence. In a nutshell, he considered the testimony of witness 7, D. Gooljaury, together with those of PS Bhujun and SP Cally, from which it can be conclusively said that a larceny occurred. Witness 7 simply lied when he said that he was present at the bungalow at Roches Noires and the larceny occurred to his prejudice when in fact it occurred to the prejudice of Accused 1. Simply lying to the police when giving a statement is not an offence in our law. Mr G. Glover SC highlighted that the fact that witness 7 lied is totally irrelevant for the purposes of the present case. There is to the mind of the defence, no imaginary offence reported. Hence, no public mischief. He further considered the elements of the offence of larceny and stated that there is no necessity on a charge of larceny to aver that the property belonged to another person. He referred to the cases of **DPP v Kissoona [1983] MR 50 and Ramkarran U. v The State [1992] SCJ 156** with regard to the elements of larceny which the prosecution needs to prove. The fact that the larceny was not to the prejudice of witness 7 is irrelevant since there is

evidence that the perpetrator wilfully, unlawfully and with intent to defraud carried away articles (here 20,000 rupees) not belonging to him. Despite there are lies, it is not a false statement concerning an imaginary offence.

The prosecution has therefore failed to prove the element of unlawful act as particularised in the information.

Submission for the prosecution

The prosecution laid emphasis on the charge with which the accused parties are concerned, which is basically that of conspiracy under **Section 109(1) of the Criminal Code (Supplementary) Act**. Despite agreeing with the submission of the defence in law as far as the offence under **Section 298 of the Criminal Code Act** is concerned on the elements of the offence, the prosecution submitted that these elements do not go to prove the offence of conspiracy for which all the accused parties are being charged today.

Miss K. Soochit, State Counsel, stated that the prosecution has only to prove the object of the conspiracy and not the unlawful act. She added that true it is that the unlawful act is one of effecting public mischief, but as clearly spelt out in the case of **The Queen v M. Shummoogum and Others,** which was fully endorsed in **Deedaran v The Queen [1981] MR 169**, the prosecution has to prove the agreement made by the parties, the criminal intent and the object of the conspiracy, which is here an unlawful act, that is, the public mischief.

She then went on to say that whether there was a larceny or any other offence on the 3rd of July, 2011 has to be assessed in the light of all the evidence adduced.

With regard as to when the Court should uphold a motion of submission of no case to answer, she referred to the test laid down by Lord Lane in **R v Galbraith**, applied in **G and F and Regina [2012] EWCA Crim 1756**, at paragraph 36.

"36. We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the "classic" or "traditional" test set out by Lord Lane CJ in Galbraith. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether ***a*** *reasonable jury, not* ***all*** *reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."*

Secondly, with regard to the standard of review in a submission of no case to answer, it is clear from **Chief Constable of Police Service of Northern Ireland v LO**, endorsed in **The Director of Public Prosecutions v A.A.A. Ebrahim [2017] SCJ 334**, that the standard is one of prima facie assessment of the prosecution case.

She agreed that the test is whether taking the prosecution case at its highest, there is evidence upon which the Court as trial of fact properly directed could infer a conspiracy to effect public mischief.

Learned Counsel for the prosecution then made an analysis of the facts available by the prosecution, more specifically, the testimony of witness 7 D. Gooljaury who deposed to the effect that in the month of January, 2015, he gave a statement to the police in connection with

his declaration of July, 2011 with regards to the alleged larceny to his prejudice. He stated that in truth, he was not the victim of any larceny because he was not at the bungalow of Roches Noires at the material time. In fact, it was Accused 1, the owner, who was present with one Mrs Nandanee Soornack. He testified to the effect that during that night, he left the bungalow after a party and returned to his place at St Pierre. In the early hours of 3rd of July, 2011, he received a phone call from the landline of the bungalow from the said Mrs Nandanee Soornack requesting him to come back. Reaching the bungalow, he noticed a Brinks Security vehicle at the entrance. He then proceeded into the living room where he saw Accused 1 and Mrs N. Soornack. Some minutes later Accused 2 and 3 also came to the bungalow. All the accused parties then asked him to report the matter to the police as a victim himself.

In the above circumstances, she submitted, the present case **falls** under the second limb of the **Galbraith test** that is where the strength or weakness of the prosecution case depends on the view to be taken of the witness's reliability. Secondly, a prima facie assessment of the evidence as elaborated by the prosecution taken at its highest does reveal a conspiracy to effect public mischief such that the questions of facts should legitimately be left to the Court as a trial of fact.

Upon an express invitation by the Court to give further submission on the issue of public mischief she answered that she was of the opinion that those questions of fact should be legitimately addressed by the Court as a trial of fact and that the case should be allowed to proceed, and the motion in hand to be set aside.

We propose to first deal with the issue of submission of no case to answer.

How should the Court approach a submission of "*no case*"?

The principle was laid down in **R v Galbraith [1981] 2 All E R 1060**:

"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

(b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

This principle was further applied in various cases. Of interest is the case of **The Director of Public Prosecutions v A.A.A. Ebrahim [2017] SCJ 334**, where the Supreme Court laid down the standard. The Supreme Court referred to **Chief Constable of Police Service of Northern Ireland v LO [supra]**, at paragraph 14 in the following:

*"The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in **R v Galbraith [1981] 2 All ER 1060**). The exercise that the judge must engage in is the same, suitably adjusted to reflect*

the fact that he is a tribunal of fact. It is important to note that the judge should not ask himself the question at the close of the prosecution case, 'do I have reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances on which he could properly convict."

And then the Supreme Court went on to add that:

"At that stage of the proceedings, it was only required of the Magistrate to consider whether there was a prima facie evidence of the respondent having committed conspiracies to do wrongful acts, as particularised in the information, or whether, upon the evidence adduced, she was "convinced that there are no circumstances in which she could properly convict...

The elements which required consideration on a prima facie basis in the instant case would in effect have been the existence of an agreement between at least two conspirators to do something wrongful to the prejudice of another person."

We are here concerned with an unlawful act.

It is the submission of the prosecution that the issue is one which falls under the second limb of the **Galbraith test**, where the strength or weakness of its case depends on the reliability of witness 7 D. Gooljaury to be assessed together with other evidence which have been adduced. Its submission is one of facts.

The defence is, on the other hand, contending that the situation is one which falls under the first limb. Its submission is one in law where it is saying that the prosecution has not proved one of the element of conspiracy, which is the unlawful act of effecting public mischief.

Whatever be the situation, we are alive that we are not, at this stage, indulging into assessing the credibility of any witness for the prosecution, but we need to see whether there is evidence on which the Court can properly come to the conclusion that the accused parties are guilty.

The Court is now going to assess whether all the elements of the offence as averred in the information has been proved. If the Court finds that, as contended by the defence, one of the elements has not been proved, there will then be no need to examine the evidence adduced by the prosecution to see whether or not there was evidence from which a reasonable court could infer that the accused parties intended to carry out the agreement to do an unlawful act.

The unlawful act of the conspiracy - the public mischief

The offence of Conspiracy is provided for by **Section 109 of the Criminal Code (Supplementary) Act** which defines Conspiracy as being where any person agrees with one or more person to do an act which is unlawful, wrongful or harmful to another person.

Conspiracy may also be the use of unlawful means in the carrying out of an object which is itself lawful – vide: **Juhoor v. R [1983] MR 99**.

In an offence of conspiracy there must be an agreement either to do an unlawful act or to do an act by unlawful means.

The unlawful act is one of the elements of the offence of conspiracy, the two others being (1) an agreement, (2) by two or more persons: **Deedaran v The State [1981] SCJ 152.**

In **R v. Aspinall [1876] 2 QB 48** it was held that the crime of Conspiracy is completed the moment two or more persons have agreed that they will do at once or at some future time certain things. It is not necessary in order to complete the offence that any one thing should

be done beyond the agreement. So, the offence is completed at the moment there is an agreement.

Secondly, there must be the mental element present. It must be proved not only that the agreement between the conspirators as signified by words or other means of communication between them to carry out an unlawful act, but there must be also an intention in the mind of any alleged conspirator to carry out an unlawful purpose – **R v. Tomson Vol. 50 Criminal Appeal Report Pg 1**.

Therefore, before a person can be convicted of conspiracy he must at least know the essential matters which constitute the offence. The intention consists of the knowledge on the part of the conspirator that he was embarking on the unlawful design – **Churchill v. Warlton [1967] 2 Appeal Cases Pg 224**.

It is clear from the present information that the prosecution has laid the charge against the accused parties as being an unlawful act, defined as an act which is "*prohibited by law, irrespective of whether or not any damage or harm resulted to anyone*": **Kessoownath and Ors vs. R [1986] SCJ 383.**

That prohibited act is particularised in the information as being effecting public mischief under **Section 298 of the Criminal Code Act** which reads as follows: "*Any person who knowingly makes to an officer of Police a false statement in writing concerning an imaginary offence shall be guilty of the offence of effecting a public mischief…*"

The elements constituting the offence of public mischief as laid down in **Procureur General v Tincoory [1949] MR 143** as being simply:

- a statement in writing knowingly made to an Officer of Police
- which statement is false and
- concerns an imaginary offence.

This was applied in **R. Ramtohul vs The Queen [1974] SCJ 1** where the Court stated that besides these three elements, the Court has to see whether the Police has been misled by the statement made by the accused and whether they have wasted their time investigating false allegations and following false clues, thereby depriving the public of their services for proper purposes and subjecting members of the public to suspension and arrest.

In **The Director of Public Prosecutions v M. L. Savriacooty [2012] SCJ 100,** the Supreme Court made a distinction between Sections 297 and 298 of the Criminal Code Act, stating that:

"*The nature of the charges under which the investigation started was neither here nor there. The characteristic feature of the offence of public mischief is whether the investigating authorities, following the false statement made to them in writing, deployed public resources which could have been put to better use.*"

The Court went on to conclude that: "*As rightly stated in the case of **Ramtohul v The Queen [supra]**, 'in a case of effecting public mischief the Police must have made an enquiry as a result of a false statement made by the party charged concerning an imaginary offence.' This is the long and the short of it.*"

What is an imaginary offence?

The imaginary offence in the present case, is referred to as being a larceny to the prejudice of witness 7, D. Gooljaury. What the prosecution is contending is that the larceny occurred to the prejudice of Accused 1 and not to witness 7 D. Gooljaury.

The defence referred to the case of **Ramkarran U. v The State [1992] SCJ 156** to support its proposition that in a case of larceny, there is no need to mention to whose prejudice the larceny was committed or even that the article belonged to another person. Suffice it to say that the article stolen did not belong to the one who took it away.

The same philosophy can be gathered from the case of **The Director of Public Prosecutions v. Kissoonah [1983] MR 50**, where the offence was one of larceny by finding. The court considered the circumstances surrounding the case, indicating that the watch in question must have been dropped accidentally by one of the tourists, who visited Flat Island on the 14th August 1981. It could not therefore be considered as a "*res nullius*" or a "*res derelicta*". Despite the fact that the owner remained unknown, the Court reversed the decision of trial court to acquit the respondent.

We, therefore, agree with the proposition of the defence that it is not imperative in a case of larceny to state to whose prejudice the larceny occurred. It is sufficient to say that the article did not belong to the one who took it away.

It is an essential element of the offence under **Section 298 of the Criminal Code Act** that the prosecution proves that the offence has not taken place, the offence here being one of larceny.

The record shows that as per the evidence adduced by witness 7, D. Gooljaury, witness 2, DI Goinden and witness 1, PS Bhujun it is beyond dispute that a larceny did occur in the night of the 2nd to 3rd of July 2011 at the bungalow of Accused 1 at Roches Noires where a sum of Rs. 20,000 was stolen, resulting in a full-fledged police enquiry.

We gather from the testimony of witness 7 that he gave a first statement to the police on the 3rd of July 2011 at Roches Noires stating firstly that he was present at the Bungalow when the larceny occurred and that the larceny occurred to his prejudice. That first statement has not been produced by the prosecution. In a second statement given in January 2015, he stated that he initially lied and that his lie was that he was not present when the larceny was committed and the larceny was not committed to his prejudice. He was later prosecuted and pleaded guilty to the offence of effecting public mischief following which he was sentenced.

We have it from his testimony in Court that during that night, he was called back to the bungalow at Roches Noires where he had been previously and where he was told by Accused 1 and Mrs Nandanee Soornack that a larceny had occurred and the sum of Rs. 20,000 was taken away and that there was a need to report the matter to the Police.

DI Goinden was the officer who was detailed to record the statements of Accused 1. When he deposed on the 20th of November 2018, questions were put to him by learned counsel for Accused 1 in the following:

"Q: So, you agree with me that the police enquiry has revealed that on the 3rd of July 2011 at the bungalow of Accused no 1 at Roches Noires, there was a larceny breaking wherein some money was stolen?

A: Yes, Your Honour.

Q: This is a fact proven by the police enquiry?

A: Yes, Your Honour.

Q: There was even a weapon, a screwdriver which was secured by the police in the course of the enquiry?

A: Yes, Your Honour.

Q: Which was apparently used by the intruder in the course of the larceny?

A: Yes, Your Honour."

During re-examination, the prosecution tried to clarify about the police enquiry to which he gave the following answer: "*What I mean is that there was a larceny which took place on the 3rd of July 2011 at Roches Noires. That a larceny took place there. Eventually an enquiry was conducted into the matter.*"

It also came out from the testimony of PS Bhujun that he attended the case of larceny at the bungalow and there reaching he met witness Gooljaury. The latter led him to a room upstairs. The SOCO people were already examining the room and it was then that he secured a screwdriver which was used by the intruder. He was then instructed by SP Cally to open an entry in the Occurrence Book and made certain diary book entries (**Document T**).

The court has considered the submission of the prosecution and the several reasons given to allow the case to proceed to enable the Court to make an assessment of the strength of the evidence against the accused parties.

Albeit a request by the Court, the prosecution did not give any authority in law which contradicts the proposition of the defence that the imaginary offence of larceny has not been proved. The submission of the prosecution that the Court should stop at **Section 109 of the Criminal Code (Supplementary) Act** and completely obliterate the elements of **Section 298 of the Criminal Code** is untenable. Following the reasoning of the prosecution it will mean that an offence is created once there is an agreement even to do a lawful act.

This takes us back to the issue of whether the statement given to the police concerned an imaginary offence. From the above, the Court considers that the prosecution has failed to prove that the false statement given in writing concerned an imaginary offence. Giving a declaration in respect of the loss of an object cannot be said to be reporting an imaginary offence.

We are comforted in our decision upon referring to the case of **Procureur General v Tincoory [supra],** where J. G. Espitalier-Noel, Ag. C.J opined that:

"*Under our Penal Code, 'effecting a public mischief' is not as under the Common Law of England the doing of 'any act tending to the prejudice of the community' the offence is a statutory one defined by Section 298 of the Code. That section has limited the cases which may come within its language, and in my opinion the section should be construed in its application according to its terms, i.e., 'free from any glosses or interpretations derived from any expositions, however authoritative, of the Common Law of England.*"

After stating the three elements to be proved under **Section 298 of the Criminal Code**, the Supreme Court went on to say:

"*I can find nothing in the wording of the section which could be interpreted as requiring that the statement should, as held by the Magistrate, charge some unknown person; nor can I agree with the contention that if this were not so "all the offences coming within the ambit of section 297 would be included in section 298," and that section 297 would no longer be of any use on our statute book. In my view both sections have their utility and facts which may bring a case within one section may be insufficient for a charge under the other. If, for example, a murder has been actually committed by A and X makes a false and malicious denunciation in writing to an Officer of Police charging B with the commission thereof, the offence may well come within the language of section 297, though not of section 298, because the offence, having been actually committed, would not be imaginary; on the other hand, if no murder has been committed and X knowingly makes a statement in writing to an Officer of Police charging*

A with having committed one, section 298 will find its application as, the offence having no real existence, the statement knowingly made would concern an imaginary offence."

This example given in **Procureur General v Tincoory [Supra]** is on all fours with the present case. The offence of larceny, having been actually committed would, therefore, not be imaginary.

We are of the considered conclusion that the prosecution has failed to establish one of the elements of the offence of conspiracy, that is, that there was unlawful act. Hence, at the close of its case, taken at its highest, the prosecution has not established a prima facie case against the accused parties.

The Court therefore upholds the motion of the defence and dismisses the case against all three accused parties.

Mr. Raj Seebaluck
Vice-President

Mrs. B. R. Jannoo-Jaunbocus
Magistrate

Intermediate Court
Criminal Division
This 13th September 2019.