ICAC v P.K Jugnauth

2015 INT 210

IN THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Division)

In the matter of :- **C.No. 265/2014**

Independent Commission Against Corruption ["ICAC"]

v

Pravind Kumar JUGNAUTH

J U D G M E N T

Accused stands charged for having on 23 December 2010 "…*whilst being then a public official whose relative had a personal interest in a decision which a public body had to take …. took part in the proceedings of that public body relating to such decision …"* in breach of section 13(2) &(3) Prevention of Corruption Act [hereinafter referred to as "POCA" or "the Act"] as amended by section 4(b) of Act No.1/2006.

After a plea in bar, Accused pleaded **Not Guilty** and was assisted at Trial stage by Mr.R.Chetty SC, Mr.R.Gulbul, Mr R.Dawreeawoo and Ms.Ramdharry.

The Prosecution was led by Mr K.Goburdhun who appeared together with Mr Roopchand.

As per Particulars of information, Accused had been acting in his capacity as Vice Prime Minister and Minister of the Ministry of Finance and Economic Development [hereinafter referred to as *"MOFED"* & MOFED is also referred to as Ministry of Finance and Economic Empowerment [*"MOFEE"*]] when he *" …. approved the re allocation of funds amounting to Rs.144,701,300.- to pay Med-point Ltd – in which company Accused's sister, Mrs Malhotra held 86,983 shares out of 368,683."*

We have duly considered all the evidence on record as well as the written and oral submissions from both parties together with the authorities submitted.

Before the Court embarks on consideration of the evidence on record, the mooted issue of whether there has been an **unfair enquiry** in this matter will be first considered. This question needs to be addressed at the outset since there has been substantive submissions from the Defence on this issue as well as in the light of the following extract from **P.K Jugnauth v Secretary to the Cabinet and Head of Civil Service Affairs & Ors [2013 SCJ 273]:-**

…In the eventuality that a criminal charge is lodged against the plaintiff, he will enjoy all the safeguards under Section10 in the course of the trial process. He can raise any alleged breach of the Constitution, including breach of Section 10, before the trial court. He will have a ***means of redress during the normal trial process.*** *He will have* ***full opportunity for instance in the course of a trial, if any, to raise any of the issues that he is presently invoking namely that he has not been afforded adequate time and facilities for the preparation of his defence or that he has been in any manner deprived of a fair trial according to law in conformity with the provisions of the Constitution.***

The safeguard of a fair trial in fact includes and encompasses the methods of investigation by the prosecuting authorities. It will be open to the plaintiff to aver, if such is his contention, that the investigation has not been fairly conducted and, if need be, to move for a stay of the proceedings against him, on that account. The following extract from the case of ***The State v. Velvindron [2003 SCJ 319]*** *is explicit on this issue :-*

"Although in practice the most common ground on which abuse of process is invoked is that based on delay, the alleged abuse may arise in various different forms. It may involve complaints about the methods used to investigate an offence ***(R. v. Hector & François [1984 1 AER 785])****. It is significant to note, however, that it was stressed in that case 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)*

*The Learned Judge in the case of **Velvindron** also cited the following cases which deal with the issue of a stay of proceedings on the ground of abuse of process –*

***"In D.P.P. v. Hussain, The Times June 1 1994**, 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.*

*Further, in determining abuse of process, the Court in **R. v. Derby Crown Court ex p. Brooks [1985 80 Cr. App. R. P. 164]**, after quoting with approval the statement of Lord Diplock in **Sang [1979 2 AER 1222 p. 1230]** pointed out that **"the ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution.**"*

- **Has the Enquiry been handled so Unfairly that No Fair Trial is possible?**

A. Decision to arrest

One of the submissions of the Defence that the decision to arrest the Accused is flawed and in breach of C.P's Circular No.29/2003 [hereinafter referred to as " *CP's Circular*".

That Circular, which is no more than an **administrative guidance** to police officers seconded to ICAC - as borne out by its heading, was produced in Court by D.I Ghoorah during his cross examination *(Doc AB refers)* and we find that the relevant paragraph 3 therein reads as follows:

....

3. Police officers posted to ICAC are to take all necessary precautions so as to ensure that they do not unduly encroach on the fundamental rights of the citizen as enshrined in the Constitution. Moreover, they must

scrupulously observe the Judges Rule. Under no circumstances should they effect any arrest unless same has been ordered by the Commissioner of Police after perusal of the relevant case file and assessment of the evidence on hand

The Defence's contention is to the effect that it was not the Commissioner of Police ["CP"] who ordered the arrest but rather it was ACP Vudamalay who did so. The Defence also contends that since the Accused had not yet given his defence statement on 22-09-11 at 09.00 hrs, the CP could not have given a proper decision since he did not have Accused's statement to assess the evidence on hand.

However, it is clear from the defence's written submission *(page 48 of the written submissions from the Defence)*) that ASP Coret arrested the Accused. Furthermore, the Defence did not dispute that D.I Ghoora wrote a report to the CP on 21-09-11, which he remitted to ASP Coret to convey to CP *(page 44 of the written submissions from the Defence).* This is also borne out from the evidence of DI Ghoora *(vide proceedings of 12-02-15, page 38).* The latter however added that the report was addressed to the CP requesting assistance to arrest the Accused. He nevertheless admitted having received a correspondence from ACP Vudamalay on 22-09-11 at about 09.00 hrs authorizing the arrest of Accused. D.I Ghoorah also stated that ACP Vudamalay signed the said letter but could not say who took the decision. As regards the fact that the authorization to arrest the Accused was given by the CP *prior* to the Accused having even given a defence statement, D.I Ghoora stated that whilst clearance may have been obtained from CP, the decision to arrest would still be taken by the most senior police officer at ICAC.

As regards the view taken by the Defence in respect of the decision for Arrest taken by a person other than the CP, the Court finds that: -

(a) *ACP Vuddamalay held the post of Assistant Commissioner of Police,*

(b) *there is nothing to say that ACP Vuddamalay did not consult the CP before reaching such decision,*

(c) *there is nothing on record to show that that ACP Vudamalay, subordinate of CP, was not in fact complying with orders from the CP when he signed on the said letter;*

(d) *there is furthermore nothing to suggest that ACP Vudamalay in fact did not sign on behalf of the CP and;*

(e) *the decision to arrest or not to arrest would not necessarily be influenced by the contents of an Accused's defence statement (be it in whole or in part) particularly when the Prosecution already has in its possession documentation/statements pointing to a prima facie case.*

We also find that under paragraph 2 of the CP's Circular, police officers on attachment to ICAC would still retain their powers of arrest. This power of arrest by police officers seconded for duty at ICAC pursuant to ***section 24(5)(b) POCA*** was recognized by the Supreme Court in ***Ha Yeung v ICAC & Ors*** ***[2003 SCJ 273]*** and recently by the Judicial Committee of the Privy Council in ***Peerthum v ICAC & ors [2014 UKPC 42].***

We further find that pursuant to paragraph 5 of the CP's Circular, it is the senior most police officer posted at ICAC who should effect the arrest. It is clear from Defence's written submission that it is not disputed that the arrest of Accused was effected by ASP Coret and there is evidence from D.I Ghoora *(page 13 of proceedings of 12-02-15)* that ASP Coret was the most senior police officer posted to ICAC.

Thus, whether one would measure from the standards of the CP's Circular *(Doc AB refers)* or the general powers of arrest of a police officer seconded to ICAC as recognized by our Courts, the same result is reached, namely, that there is nothing which affects or taints the legality of such an arrest.

True, there might be some question marks raised as to whether it was the CP himself who gave the consent or whether such consent was given after due assessment of all the evidence on record. But this would not be sufficient to cast any shadow of illegality on the arrest.

We here refer to **paragraph 9 of the CP's Circular** which reads as follows:-

….

9. Police officers posted to ICAC are hereby reminded that any departure from the above directives will entail severe disciplinary actions.

Thus should there have been any non-compliance to the said Circular, this would only result in *disciplinary action* and would not in itself render such arrest illegal.

We therefore find that there is nothing unlawful in respect of the decision to arrest the Accused by ASP Coret.

B. Statements not recorded from the persons mentioned in Accused's defence statement

The Court is in agreement with the Prosecution's argument that the enquiry was not based on Disclosure of Interest at Cabinet level and recording of such statements from the persons mentioned in Accused's defence statement would have been of no consequence in as much as they had no direct or indirect bearing to the present charge.

The issue is **not** one of conflict of interest arising in respect of the selection of Medpoint Ltd as being the site for the National Geriatric Hospital ["NGH"] as decided by the Cabinet. The decision which is the subject matter before this Court is the ***re-allocation of funds as regards the payment to Medpoint Ltd for the purchase of the land and building for the NGH project***. It cannot be emphasized enough that statements from the two witnesses mentioned would have served no useful purpose in view of the present charge preferred by the Prosecution against the Accused.

C. "CAB 250"

Whilst the Court agrees that the exact contents of CAB 250 has remained shrouded in mystery, it is evident from a perusal of the evidence on record as well as the references made to it, that CAB 250 was the Government's Initial Clearance to proceed with the NGH Project. We find therefore it cannot have been of such vital importance to the Accused in his defence to the present charge that its non-communication has irretrievably flawed his defence and prevented him from discharging any evidential burden that might have accrued upon him.

And more fundamentally, there is nothing to rebut the Prosecution's statement in Court to the effect that CAB 250 is not in their possession and they are therefore not in a position to communicate a document which they do not themselves possess.

It is highly relevant to cite the following extract from ***Maigrot v The District Magistrate of Riviere du Rempart & Ors*** ***[2005 SCJ 106]***, as regards the duty of disclosure:-

"Section 10(2)(c) of the Constitution provides that every person charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence. Section 10(2)(e) further provides that the person charged shall be afforded facilities to examine, in person or by his legal representative, the witnesses who are called by the prosecution. ***It would, therefore, be normally incumbent on the prosecution, only in the eventuality of a trial, to furnish the defence with copies of statements and documents and to disclose all relevant material in their possession so long***

as the material is not privileged or is not protected from disclosure on any other ground."

Thus, it is clear from the above extract that the duty to communicate/disclose documents arises only in circumstances where the prosecution is itself in possession of such documents. It goes without saying that there is no such duty incumbent on the Prosecution when it does not have possession of such documents, and since there is no evidence that the Prosecution was in possession of such documents, it cannot be said that there has been any *mala fides* on its part.

Consequently, no such duty to disclose arises and there is no breach of Accused's constitutional rights under section 10(2)(e) of the Constitution.

D. Financial Management Manual ('FMM') & Financial Instructions ('FI') 2008 & 2009 -

The Prosecution does not dispute that the FMM is outdated or that it is complemented by FI 2008 & 2009.

The Prosecution seems nevertheless to favour the testimony of Mr Jhugroo (who relies on the outdated FMM) to say that MOFED approval was required in order to proceed with Re Allocation Exercise - a stand which is consistent with the outdated FMM.

Yet, the Prosecution also brings forward Mr Jeewooth who relies on FI 2009 to say that Ministry of Health & Quality Life ["MOHQL"] could have proceeded with the re allocation transaction without MOFED's approval.

We note that Mr Jeewooth refers to the FI 2009 in his statement given to the ICAC so that it cannot be said that the DPP was unaware of same, all the

more so since all these documents are freely available from the MOFED website as stated by Mr Yip, Budget Director at MOFED.

Be that as it may, in the light of an analysis of the evidence adduced and the present charge (see below), it is obvious that these documents as well as the aspect as to whether approval of MOFED was required is definitely of little or no relevance to the present charge.

E. The Charge

The rationale of the principle of the *"charge being put to an Accused'* is to appraise him of the case he has to meet in order to put forward an appropriate defence.

The importance of this procedure is fully explained in **Jhootoo v The State [2013 SCJ 373]** as follows:-

While whatever the learned magistrate has stated is true from the point of view of proposition of law, the fact remains that a charge of section 42(1)(a) was never put to the appellant at the enquiry stage so that he could, unless he elected to exercise his right of silence, rebut the allegation. The statement on which Count 2 is based and on which the learned Magistrate relied to convict him was a part of a defence statement which appellant had given in response to a charge of possession of 50 packets of cannabis under section 30(1)(f)(i), 41(1)(i) (2), 45(1), 47(5)(a) and 48 of the Dangerous Drugs Act 41 of 2000 as amended by Act 29 of 2003 ("the Act"). There is no defence statement for, and indeed, a complaint of giving false statements in relation to the drug dealing offence, in breach of sections 42(1)(a)(4) of the Act was never put to him.

[14] It is our view, therefore, that the appellant did not have a fair hearing in the circumstances. The same thing would apply to the charge under Count 3. For the same reason, we take the view that the conviction cannot stand

…

The appellant had a right to know in the first place the details of the case regarding the false statement. Nothing shows that it was ever put to him that he would be charged for an offence of giving a false statement in connection with a drug offence. Section 10 (2) 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." *That constitutional imperative has been breached in this case and a conviction cannot be based on that core irreducible minimum of fairness.*

[17] As was stated by the Privy Council in the civil case of ***Kanda v Government of Malaya [1962] AC 322, 337*** *by Lord Denning:*

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

[18] Trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance.

However, the situation in the present matter is clearly distinguishable from ***Jhootoo (supra)***.

Whilst the charge might not have been *stricto sensu* formally put to Accused, the latter cannot in fairness plead that he or his legal advisers were unaware of the charge he had to meet.

It is true that both D.I Ghoora and C.I Allear conceded that the charge was not put to the Accused whilst his defence statement was being recorded. But this does not reflect the real picture. There is a need to look at the chronology of events.

Counsel for Accused addressed a correspondence to ICAC dated 12-09-2011 *(Doc D6 refers)* wherein amongst others, he made a request to be communicated with the charge to be put against Accused. It is also relevant to note that defence counsel was already aware that the enquiry as regards his client was in respect of Medpoint Ltd for the setting up of the NGH and this is evident from the heading of his correspondence.

It is also of interest to note that on 12-09-11 itself, the same Counsel had sent a correspondence to the Secretary of the Cabinet *(Doc D refers).* The contents of this letter is most relevant to assess whether the Accused was aware of the charge against him or otherwise. The relevant part of the said correspondence reads as follows:-

….

4. My client has instructed me to the effect that his defence rests entirely on what took place at Cabinet meetings as regards the setting up of a National Geriatric Hospital.

5. For the purposes of his statement in his defence my client shall avail himself of all legal provisions to secure protection of law and the Judges Rules. My client has instructed me that in giving his statement he shall be under an obligation to disclose to ICAC matters relating to what took place at meetings of Cabinet.

Defence counsel then requested for communication of several Cabinet papers.

Thus whilst there had been a request from ICAC as regards the *nature* of the charge against the Accused, simultaneously on the same day, defence counsel had already started preparing Accused's defence to the said charge by requesting from the Secretary to Cabinet documents and approval to refer to them

What follows is of even more interest. The ICAC had replied to Defence Counsel on 15-09-11 *(Doc D5 refers)* who was informed therein that the statement which the Accused was invited to give was in respect of *" …. more specifically* ***offences relating to conflict of interest*** *and/ or unlawful use of office or position ….".*

Therefore, even before the Accused gave his first defence statement on 22-09-11, he was already aware of the charge to be put against him and had even already started to prepare his defence.

The Accused decided to personally write his statement on 22-09-11 *(Doc C refers)* after he was duly cautioned and explained his constitutional rights. He was even told that he would be interviewed in relation to the Medpoint case *(Doc C refers, folio 100101, 5th line)*. At a certain stage, he sought authority from D.I Ghoora *(Doc C refers, folio 100104, 3rd and 4th lines)* to refer to Cabinet matters for the purpose of defending himself against the offences of conflict of interest and/or unlawful use of office or position. This is in itself pieces of evidence that complete the picture that Accused knew fully well the charge against which he had to provide a defence.

Accused then went on to explain that during the 18th Meeting of Cabinet on 18-06-10, he immediately declared his interest in Medpoint Ltd in relation to the NGH and was then allowed to withdraw from the meeting by the then Prime Minister. When he was informed by Mr. Gaonjur, Clerk to the Cabinet, that the discussion on NGH was over, he resumed his seat in Cabinet. He was then shown the Red File entitled National Geriatric Hospital (*Doc E refers – hereinafter referred to as "Red File"*) and more specifically *Minutes (6) and (7).* The Accused admitted having recognized his signature and the word "Approved" at Minute (7). The statement was then stopped.

We have to state here that the present matter is based on those Minutes and the signature of Accused affixed at Minute (7) after having endorsed "Approved". It was never based on the Cabinet decision as regards the NGH Project or the choice of Medpoint Ltd as being the site where the NGH Project would be implemented. We might here question how any reference to Cabinet meetings decisions would have assisted the Accused in his defence.

Accused's second defence statement dated 26-09-11 *(Doc C1 refers)* is even more revealing as to whether the Accused was aware of the charge against him. It should also be noted that the Accused once again chose to write out his statement after being duly cautioned and explained his constitutional rights.

It is found that at a certain stage (*Doc C1, folio 100111, 100112 refer*), Accused was shown the Red File particularly, Annex 5(a) and his comments in relation to Minute (6) of the said file. It is then that Accused stated that he was charged with an offence under section 13(2) of the Prevention of Corruption Act and that he had a defence to that charge. He again added that his defence rested entirely on Cabinet matters and chose voluntarily to halt all explanations as to his defence until he would be communicated with the Cabinet meetings papers so as to mount his defence.

By that time, it was abundantly clear that Accused was fully aware of the charge against him since he had already been provisionally charged before the District Court of Port Louis so that he knew perfectly well which case he had to meet.

The offence & particulars in the provisional charge before District Court P.Louis is similar to the information before us – *Doc AD refers;* so that by the time when Accused went to ICAC for the second defence statement, he could not plead ignorance of the nature of charge and nature of case against him.

Furthermore, the numerous correspondences from ICAC as from 24.4.2012 (see Doc F1, F2 etc) to 28.3.2013 addressed to Accused show clearly that ICAC was requesting the latter to come and give his statement. We find however that Accused has persistently delayed and postponed the giving of his defence statement to ICAC on grounds that he had not yet obtained the documents he requested for and this despite having been before the Supreme Court for such application and after having obtained communication of certain documents.

We can only observe here how could those documents requested for could have assisted Accused in his defence *ex facie* the provisional charge which was already known to him. This is definitely not a case where Accused can aver that his right to silence has been breached and/or where he can say that he was compelled to give evidence under oath in order to put forward his defence in court.

Thus, when all the above are considered, particularly the letters as well as both statements to ICAC, it is found that the Accused was aware that he would be charged with an offence under section 13(2) POCA; he was in fact charged with such an offence as per his own admission in his second statement; he was invited to comment on Minute (6) of the Red File on which the case against him rested and he was duly shown Minutes (6) and (7) of the Red File.

Therefore, it cannot be said otherwise that Accused was fully aware of both the charge against him as well as the nature of the case against him. Accused was referred to the evidence on which the case against him was based and he stated that he had a defence to the said charge. We find that a suspect would only be able to avail himself of a defence once he is aware of the charge against him and the evidence against him.

It is clear that the present Accused was at all times fully aware of the charge against him, the nature of the offence as well as evidence available against him.

In fact, before ending on this aspect of *"alleged unfairness due to the charge not being put to the Accused"*, we need to highlight the fact that the Accused was at all times treated so fairly by ICAC that none other than the Director of Investigations at ICAC, D.I Ghoora apologised to the Accused for having to investigate the present charge. It would be hard to find any fairer treatment on the part of ICAC *vis a vis* an Accused.

In the light of above, we find that there is ***nothing on record to even suggest the remotest inkling of unfair enquiry in this matter. We are of the opinion that a fair trial according to law, which involves fairness both to the defendant and the prosecution is fully ensured and there is no reason whatsoever to exercise our discretion to stay the present proceedings.***

We shall now consider the present charge against the Accused in the light of evidence adduced.

ANALYSIS OF THE CHARGE IN THE LIGHT OF EVIDENCE ADDUCED

The Court wishes to clarify the utter confusion arising from the sweeping manner in which the Prosecution conducted its case, the terms used and the

evidence that ensued. Indeed, a lot of, might we say - irrelevant - evidence was adduced by the Prosecution. This observation is even more justified when the Court finds that the Prosecution's case is based on an "Unchallenged Admission made by Accused".

Most of the evidence ushered in by the Prosecution as regards approval of re allocation of funds by Minister/MOFED, FMM, FI 2008 & 2009, Approval by Minister or not, Capital Budget, Project Based Budgeting, Project Value, NGH, Medpoint Ltd is considered as irrelevant to the actual matter before the Court.

The Court furthermore notes the sly, underhand insertion on the part of the Prosecution of a new aggravating factor/new case as per its *4th paragraph of para 4.3.6.2 of its Written Submissions* which has absolutely nothing to do with the present matter. Despite observations made by the Court during the course of the proceedings when this issue was raised namely, that that this is an aspect that did not form part of the information and could have been the subject of another prosecution under another section of POCA, the Prosecution has nevertheless strongly and wrongly persisted in this vein and included same as part of its Witten Submissions. Needless to say that it has been disregarded by this Court.

In fact, the decision *in lite* as per the information and particulars provided is whether the Accused ***'approved the re-allocation of funds amounting to Rs.144, 701, 300.- to pay Medpoint Ltd'***.

There has been ample evidence adduced as regards **'virement'** which according to the testimony of Mr. Yip as well as the FI 2008 & 2009 produced (*Docs V & V1 refer*) is the technical term for ***the re-allocation of funds from one item of expenditure to another item of expenditure.*** The full definition of 'Virement' is given as per FI 2008/ *FI No.1 of 2008* and reproduced below:

"***Virement" –***

(a) means a reallocation of funds within a Ministry/Department -

(i) from an item of expenditure to another item of expenditure within a Sub-Programme or Programme; or

(ii) from an item of expenditure in respect of a Sub-Programme or Programme to another item of expenditure in respect of another Sub-Programme or Programme; and

(b) includes a reallocation of funds-

(i) from a Ministry/Department to another Ministry/Department in respect of items of expenditure relating to acquisition of assets (Expenditure Categories 31 and 32); and

(ii) from Programme 989 "Contingencies and Reserves".[1]

In fact, this was what Mr. Jeewooth was referring to during the course of his testimony when he stated that the *re-allocation of funds ('Virement') may be effected without seeking the prior approval of MOFED.* And this statement of fact is consistent with the FI 2008 and 2009 however subject to certain conditions specified therein.

The re-allocation of funds which is the subject matter of the present information before this Court and in respect of which decision was allegedly taken by the Accused is in relation to the **source of funds from which payment to Medpoint Ltd would be effected.**

This is clear from Mr. Jeewooth himself when he gave the following answers at the end of his cross examination, as follows :-**:**

Q. And in fact once the Ministry of Health has been informed that it has unused funds the correct procedure would have been that the Ministry of Health itself does the re-allocation?

A. Yes

Q. And there was no need to refer the matter to the Ministry of Finance?

A. Yes

Q. You mean that yes there was no need to refer the matter to the Ministry of Finance?

[1] http://mof.govmu.org/English/Pages/Presentation/Financial-Instruction-1.aspx, last accessed on 20 June 2015.

A. No, I wish to point out one thing why we refer to the Ministry firstly because it was – the funds were identified from the Lotto fund so that's why we wrote to the Ministry of Finance to release funds.[2]

Thus, it is seen that that because there was initially *another* source of funds from which the NGH Project would have been financed, namely the 'Lotto funds', there was therefore a need to request the MOFED for the release of funds from the said 'Lotto Fund'.

This is the consistent understanding when the letter dated 09-07-10 (*Doc Y2 refers)* by Mrs. Maya Hanoomanjee, then Minister of MOHQL is considered. In fact, she addressed a ministerial correspondence to the Accused requesting the latter to re-allocate amount earmarked for her Ministry under the 'Lottery Fund' to the projects as listed at the Annex and that the said request was as a result of meeting with Mr. S.Dowarkasing Senior Adviser. When the Annex is perused, it is found that in fact Rs.150 million had been earmarked from the Lottery Scheme for the NGH Project.

It is also found that on 22-12-10, Mr. Jeewooth of MOHQL had addressed a correspondence to the Financial Secretary (attention Mr. C Ramchurn of MOFED) so as to submit to the MOHQL a *departmental warrant* for the sum of Rs. 144, 701,300.- to enable payment to be effected within fiscal year 2010 for the acquisition of land and building for the setting up of a NGH *(Doc E refers)*. It is also relevant to note that reference was clearly made to Medpoint Hospital.

Thus, as at 22-12-10, there was no reference to 'Virement' but to *'Departmental Warrant'* since originally, the NGH Project would have been financed from the 'Lottery Fund'. It is here relevant to note that in fact when reference is made to 'Lottery funds', it actually referred to the Consolidated Fund and this was fully explained by Mr. Yip.

It is following Minutes (6) and (7) that there has been a change in the source of financing of the NGH Project i.e, from 'Lottery Fund' to 'MOHQL's identified savings'. **This is the re-allocation of funds subject matter of the present information.**

[2] Transcript of proceedings dated 02-02-15, pages 46-47.

This is also obvious from the evidence of Mr. Ramchurn who stated the following in Court:-

Q. (By Court) What does it imply?

A. This implies that the Ministry of Finance will not give money because for the financing of the project was that Ministry of Finance. Now, we are asking Ministry of Health to use your fund to finance the project but the question is whether it was approved by Parliament … at the time of national budget approved, it was not in the budget, it was in the Ministry of Finance budget to finance the geriatric hospital from the lottery funds. There is a change of financing.[3]

Thus, the original contemplated source of funds for the NGH Project was from the 'Lotto Funds' from MOFED. However, as per Mr. Ramchurn, there were instructions from Mr. Yip ***not*** to use the Lotto Fund but to instead finance same through the use of

MOHQL's Identified Savings.[4]

Accordingly, Minute (6) in the Red File was drafted by Mr. Ramchurn and same was referred to the MOFED officials as well as to the Accused, as the then Minister of MOFED for their consideration and Approval in writing. **It is this decision which is the subject matter of the present matter.**

This is particularly emphasised when Minute (6) is duly considered. In fact, the following is found mentioned in the said Minute:-

'…the Ministry of Health and Quality of life (MOH&QL) is requesting that funds … be made available, by way of a Departmental Warrant, from the proceed of the lottery funds to finance the acquisition of land and building for the setting up of a geriatric Hospital.

3. The project was initially earmarked to be funded under Expenditure item 28221006-Projects/scheme financed under National Lottery…

4. …It is ***therefore proposed that Ministry of Health and Quality of Life be requested to re-allocate funds from identified savings.***

[3] Transcript of proceedings dated 29-01-2015, page 85.

[4] Ibid, page 85-86.

From the above, it is obvious that the re-allocation of funds in question is in fact in respect of **change of source of funds for the acquisition of land and building for the setting up of NGH.**

It should also be borne in mind that it was never part of the Prosecution's case that Accused was in any way involved in any cabinet decision as regards the NGH project or as to the choice of the site for the NGH Project. The Prosecution's case is solely based on the *decision making process under Minute (6) as regards the re-allocation of funds so as to pay Medpoint Ltd for the acquisition of land and building for the setting up of NGH.*

Thus, the Re Allocation of funds as per the particulars of the information is - ***the Decision taken by Accused as the Minister of MOFED as regards the Approval which was given so as to Change from the originally Approved Source and Mode of Funding (from MOFED's Lottery Fund by way of Departmental Warrant) to make use of MOHQL's Identified Savings in order to enable MOHQL to use same for NGH's purchase by way of a re allocation of funds ('Virement') exercise.***

ELEMENTS OF THE OFFENCE

The real issue is therefore whether Accused whilst being a *public official* took part in a decision of MOFED, APPROVING the re allocation of funds to pay Medpoint (as explained above) in which company his sister had a personal interest.

The offence is provided under **section 13(2) POCA** which reads as follows:

(2) Where a public official or a relative or associate of his has a personal interest in a decision which a public body is to take, that public official shall not vote or take part in any proceedings of that public body relating to such decision.

Our first observation in respect of the present offence as provided by law is that by using the words ***"shall not"***, the Legislature has, in its wisdom, imposed

an absolute prohibition on the *public official* to *either vote or take part*. It goes without saying that such absolute prohibition destroys the possibility of an Accused party availing himself of the defence that he acted in *good faith.* The Court also notes that section 13(2) POCA mentions **"ANY"** proceedings of that public body relating to such decision so that such ***a public official therefore cannot and shall not take part in any proceedings, whether a major or minor one, administrative or otherwise, relating to such decision. In short, there is absolute prohibition to take part in any way whatsoever in any decision making process.***

The reason for such an absolute prohibition is to preserve the integrity of the decision making process so that there may not be any perception of bias in the mind of a fair minded and informed observer. This is consistent with the dicta of the Supreme Court in ***Baboolall v Farmers Service Corporation & ors [2010 SCJ 313],*** the relevant extract of which reads as follows:

*Indeed, in the case of **Anne (supra)**, the Supreme Court endorsed the test for apparent bias laid down in **Porter v Magill [2002] 2 AC 357 at p 494**, in line with the test applied by the Strasbourg Court. It is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". The same test applies to an administrative body – vide **T. Khedun-Sewgobind v The Public Service Commission [2010 SCJ 6a].***

*In **Hossany v R. & Ors v The Public Service Commission [2008 SCJ 4]** the Court*
observed that although there may not have been any effective bias, the perception of a
likelihood of bias in respect of the selection could not be discarded. We take the view that a reasonable and well-informed observer who is 'neither complacent nor unduly sensitive or suspicious' would conclude that there was a real possibility of bias on the factual circumstances of the present case, bearing in mind the appearance that these facts give rise to…

Be that as it may, the elements to be considered by the Court are -

(i) public official whose

(ii) relative has a personal interest in a Decision

(iii) which a public body is to take &

(iv) public official taking part in any proceedings of that public body relating to such Decision.

(i) Public official

It is not disputed that the Accused was a Minister of the Government of the day at the material time. In fact, Accused concedes in his defence statement *(Doc C refers)* that he was appointed Minister of Finance and Economic Development in the then government.

The enabling Act has defined the term *'public official'* as follows under section 2 of the Act:

"public official" –

(a) means a ***Minister****, a member of the National Assembly, a public officer, a local government officer, an employee or member of a local authority, a member of a Commission set up under the Constitution, an employee or member of a statutory corporation, or an employee or director of any Government company;*
(b) includes a Judge, an arbitrator, an assessor or a member of a jury;
(c) includes an official of the International Criminal Court referred to in the International Criminal Court Act 2011;.

Therefore, it goes without saying that for all intents and purposes of the Act, the Accused, a minister, is a 'public official', within the parameters laid down by the Act.

(ii) …relative has a personal interest in a decision …

The nature and scope of the "decision" has already been fully discussed above, suffice it only to repeat that the said "decision" was in respect of the re

allocation of funds so as to enable payment for acquisition of Medpoint Ltd, in which company, Mrs Shalini Devi Malhotra, sister of Accused, held 23.59 % of shares.

The definition of *"relative"* as per section 2 of the Act:-

"relative", in relation to a person, means -

(a) a spouse or conjugal partner of that person;
(b) a brother or sister of that person;
(c) a brother or sister of the spouse of that person; or
(d) any lineal ascendant or descendant of that person;

It is part of the Prosecution's case that the relative in question in this matter is the Accused's sister/Mrs Shalini Devi Malhotra. The Accused has clearly admitted in his statement *(Doc C refers, folio 100108)* that Shalini Devi Jugnauth is his sister who is civilly married to one Dr. K. Malhotra, hence now Mrs Shalini Devi Malhotra. This is an undeniable fact which in any event has also been proved through the production of certified extract of birth entries of the Accused and his sister as well as the certified extract of the marriage certificate of the latter *(Docs A, A1 and B refer)*. Thus, it is undisputed that the said Mrs. Shalini Devi Malhotra is a "relative" of the Accused for the purposes of this Act.

The document from the Registrar of Companies produced by Mr. Moneebarun makes it explicitly clear that Accused's sister held some 86, 983 shares out of 368, 693 shares in Medpoint Ltd as well as being a director in the said company at the material time *(Doc U refers)*. It is also noted that Accused himself owned some 50 shares in the said company at the material time, a fact confirmed by the Accused under oath in Court.

Be that as it may, the question that arises here is whether the Accused's *"sister"* has a *"personal interest"* in the *"decision" in lite.*

The Court has duly considered the Written Submissions of the defence at *pg 2-3, paragraphs 3 - 9.*

First and foremost, the Court would like to emphasise that the present offence is not solely committed where an Accused actually takes a decision in favour of his relative.

The offence is committed merely by taking part in ANY proceedings which leads to a decision in which the relative has a personal interest. The offence is committed in fact when the Accused places himself in a situation of conflict of interest.

The Court is fully aware that the decision is in relation of a "company" and that section 13(2) POCA has not specified *"company"* but rather where *the public official, an associate or relative has a personal interest.*

However, even if the Prosecution has adduced evidence as regards the extent of Mrs Malhotra's shareholding in Medpoint, this does not mean that the Prosecution had opted to proceed under the aspect of *"associate", " company"* or was confused as regards its charge. It means simply that *Accused's relative/sister held shares in Medpoint Ltd and that was the extent of her "personal interest*".

The Prosecution has chosen to proceed under the aspect of *"relative"* as per section 13(2) POCA - as it is entitled to do - all the more so as *"relative"* is specifically mentioned therein and section *2* of the interpretation of *"relative"* is listed as a *"brother and sister"* relationship - which relationship is not disputed. And it is furthermore not disputed that Accused's sister has a stake in Medpoint ltd.

It is undisputed that the decision was in respect of Medpoint Ltd. However, as a shareholder with not less than 23% of the total shares as well as being a director (Doc U refers), it goes without saying that ***Accused's sister has a direct personal interest in whatever decision affecting Medpoint Ltd.*** The Ministerial decision to find funds so as to pay Medpoint Ltd unavoidably has a direct effect on her financial situation and therefore definitely ***her personal interest.***

We therefore find there is no substance in this part of defence's submission and that this element of the offence also proved beyond reasonable doubt.

(iii) " which a public body is to take …"

The *public body* in question here in the light of the evidence adduced is undoubtedly MOFED The Act has given the following definition to “public body” under section 2 of the POCA:

"public body" –

(a) means a Ministry or Government department, *a Commission set up under the Constitution or under the authority of any other law, a local authority, or a statutory corporation; and*
(b) includes a Government company;

Thus, it is clear that the Ministry in question in this matter as per evidence adduced is a public body.

We also have no doubt that MOFED had to decide on the issue of re-allocation of funds following the correspondence from Mr. Jeewooth on 22-12-10 so as to identify the funds to enable payment to Medpoint Ltd for the acquisition of land and building for the NGH Project.

It is also essential here to highlight the fact that this was by no means a simple decision. Firstly, the substantial sum involved is reflective of the nature and substance of *the decision*; secondly, the urgency of *the decision* since Mr. Jeewooth had clearly specified in his correspondence dated 22-12-10 *(Doc E refers) ‘ ... to enable payment to be effected within fiscal year 2010/* 1 Jan 2010 to 31 December 2010 ...*’* and it was already 23-12-10; lastly, the importance of this decision is evident from the Memorandum attached to the Virement Certificate dated 27-12-10 *(Doc N refers)*. The relevant paragraph in the Memorandum reads as follows:-

... this was necessary to enable the disbursement of funds under the appropriate item of expenditure to settle the land acquisition deal for the setting up of a National Geriatric Hospital....

It is clear that had no source of funds been identified urgently, the Government would not have been able to pay Medpoint Ltd within fiscal year 2010, hence the importance of this decision.

(iv) "... public official takes part in any proceedings of that public body relating to such decision ..."

The decision in question is to be found at Minute (6) of the Red File.

The Accused does not dispute his signature on Minute 6 and he also agreed with *para 4 of Minute 6* as per his own admission in his statement (*Doc C refers*). He In fact stated that he took cognizance of the contents of Minute (6) before signing same and did clarify that he did **not** take cognizance of the enclosure referred at *paragraph 1 of Minute (6) referring to folio. No.5 and paragraph 2 annex folio 5(a).* He also maintained under oath in Court to having approved the said Minute and affixed his signature thereon.[5] Therefore, in addition to the fact that there has never been any challenge to the admissibility or weight of the defence statement, we find that all throughout the proceedings, Accused confirmed and re affirmed his admission.

Accused even explained in Court that by writing the word *'Approved'* he meant that he agreed with *paragraph 4 of the Minute*.[6] He again admitted in Court under oath that Minute (6) was sent to him with the proposition that the MOHQL be requested to re allocate funds from its Identified Savings and that he gave his approval at minute (7).[7] He further stated that he did consider the contents of Minute (6) when same was referred to him.

There is therefore undisputed evidence on record from Accused's own admission both in his statements to ICAC which he himself wrote down as well as his deposition in Court that:-

(1) *the said Minute was referred to him;*

(2) he then considered the contents of Minute (6) without however taking note of other folios referred to therein and finally,

(3) agreed to the said recommendation at paragraph 4 of the said Minute.

[5] Transcript of proceedings dated 25-02-15, page 21.

[6] Ibid, page 23.

[7] Ibid, page 55.

(4) He thereafter endorsed such agreement by inserting the word 'approved' under Minute (7) and signed it.

It is also evident that Accused took part in the proceedings by considering the Minute which culminated in his decision of agreeing to and approving the said request.

As regards the ***status*** of such decision, Mr. Yip stated that the Accused gave the *final agreement.*[8] This is also consistent with Mr. Ramchurn's evidence to the effect that usually the Financial Secretary would approve files sent to the latter unless the latter decided that the file needed to be sent to the Minister for the latter's approval. It is found in the present matter that the said Minute was forwarded to the Minister since he was one of the persons to whom Minute (6) was clearly addressed, therefore implying that the Minister's approval was ultimately sought.

The Court also notes the status of the five persons in MOFED's hierarchy to whom **Minute 6** is addressed to and the specific wording of *paragraph 5 of Minute 6* which states ***" … subject to your agreement … "*** [*see below*].

Since the said minute was addressed to five persons including the Accused for their consideration and agreement, it could also be construed that such agreement is in the form of a **COLLECTIVE MOFED AGREEMENT** that MOHQL was to be requested to use their funds, and such collective agreement INCLUDES the VPM/Accused's Approval.

Indeed, if only the Minister's/Accused's Approval had been required - as the Prosecution would make the Court believe - then the Court wonders why Minute 6 was circulated amongst MOFED's top officials and why they signified their Agreement.

However, we find that whether the approval by the Accused is to be construed as an individual or collective one is not relevant for the purposes of the present offence. In fact, the explicit wording of the present offence has created an absolute prohibition for a public official to take part in any proceedings when a situation of conflict of interest arises, so that it matters not whether it is a collective or individual decision. The prohibition is in respect of all types of

[8] Vide transcript of proceedings 29-01-15, page 43.

"taking part", whether major or minor, individual or collective which leads to a decision.

As for the Accused's signature on *Minute 6*, the Court notes the specific use of the word *"requested"* in *paragraph 4 of Minute 6* - the relevant sentences are reproduced overleaf for ease of reference :-

4. …. It is therefore proposed that Ministry of Health & Quality of Life be requested to re allocate funds from identified saving…."

5. Subject to your agreement to para 4 above, MOHQL will be informed accordingly

By affixing his signature and approving the above request after having considered the said Minute, the Accused has beyond reasonable doubt taken part in the decision making process which led to the decision of requesting the MOHQL to re allocate funds from identified savings to enable payment to Medpoint Ltd for the acquisition of land and building for the NGH Project.

The defence has submitted that since the Accused had stated that he had considered Minute (6) only without taking into account the other folios/correspondence in the Red File and since Minute (6) did not make any mention of Medpoint Ltd, he could not possibly have had knowledge that Minute (6) was in fact referring to Medpoint Ltd. This Bench finds such reasoning devoid of substance and this for the reasons given below.

The Court notes that **Minute 6** as drawn up by Mr Ramchurn of MOFED indeed makes **no** mention of the word "Medpoint Ltd" and refers only to "NGH". However, albeit the word Medpoint is not mentioned in Minute 6, the Court observes that various correspondences in the Red File in which Minute 6 is found **do** make mention of the word "Medpoint" and it is abundantly clear that the name Medpoint was always mentioned in respect of acquisition of land and building for NGH so that the link between Medpoint Ltd and NGH would and should have been easily and reasonably made by the Accused.

The Court keeps in mind the fact that Accused declared his interest at Cabinet stage as soon as he heard about the NGH project and of the possibility of Medpoint being one of the bidders. He not only declared his interest but

withdrew from Cabinet on the grounds that he did not want to participate in any of the deliberations with regard to that project.[9]

He adopted the same attitude when he was referred to the letter from the then Minister of MOHQL, Mrs. M.Hanoomanjee dated 09-07-10 *(Docs Y, Y2 refer)*. In fact, when the contents of this letter are considered, it is found that there is no mention of Medpoint Ltd at all. The letter was in respect of ***source of funding from the 'Lotto Lottery' scheme of certain projects including NGH*** but without mentioning Medpoint Ltd. Yet, the Accused admitted that when the said letter was brought to his attention, he instructed his adviser, Mr. S. Dowarkasing to deal with it telling him that he did not want to have anything to do with the process and with the setting up of NGH.[10]

It is also of importance to note here that the Accused acknowledged that the sum involved in Minute (6) was a significant one,[11] so that as a responsible minister, he cannot be believed when he stated he did not consider the other folios mentioned therein before affixing his signature and approving the request.

Be that as it may, irrespective of the fact that Minute 6 does not mention the word "Medpoint" directly, Accused's attention ought to have been drawn by the fact that Minute 6 was about NGH and he should have declined to sign/approve the request in order to avoid falling within the situation envisaged by section 13(2) POCA.

We have come to this conclusion in the light of his own previous conduct each and every time Accused was confronted with the NGH project.

The Defence also submitted that the Accused could not have known how many shares his sister held in the said company as he was not on talking terms with the latter since 1994, the same year when he had also distanced himself from the affairs of Medpoint Ltd.

However, whilst it is clear from his deposition that he would want the Court to believe that he did not know the number of shares his sister held in the said

[9] Vide transcript of proceedings dated 25-02-15, page 27.

[10] Ibid, page 53.

[11] Ibid, page 56.

company, he however did not state, in so many clear or unambiguous terms, that he did not know whether his sister was a shareholder in the said company. On the contrary, when he was asked as to why he felt it important to disclose his interest in Medpoint Ltd, he replied the following:

A: Well Medpoint Ltd, my sister and my brother in law were shareholders and it was being managed by my brother in law. When the issue was raised in Cabinet, I declared my interest and I said I don't want to have anything to do with that.[12]

The above answer reveals that the Accused was fully aware that his sister was shareholder in the said company as well as having an interest in the said matter.

However, the Court finds that the Accused despite all the above would not have refused to take part and decide on the said request in Minute (6) duly addressed to him. We find support for the said conclusion in the light of his replies on record. He in fact stated clearly that *he would not have refused to sign the said minute (6) since he was the Minister of Finance and was in the country so that he could not do otherwise than to approve.*[13] He is also on record to have stated in Court that at any rate since he had already declared his interest in Cabinet and had never participated in the decision making process that led to the award, he thought that everything had been decided.[14] He also stated that he had no other choice but to approve.[15]

Unfortunately, Accused's reckless attitude when the decision to reallocate funds so as to enable payment to Medpoint Ltd in which company his sister has a personal interest led to the commission of the present offence.

The Court has already highlighted that the prohibition to take part in **any** proceedings is an absolute one in the light of the provision of the law under section 13(2) of POCA, so that even If the Accused acted in *good faith*, it would

[12] Ibid, pages 51-52.

[13] Ibid, page 25.

[14] Ibid, page 58.

[15] Ibid, page 69.

not constitute any defence. The *defence of necessity* is not in any way available here for obvious reasons as per the submissions from the Prosecution.

The Defence also established from CI Allear that the Accused did not have to make the choice of buying one amongst several clinics. The Defence further clearly submitted that there was no evidence that the Accused had taken a decision in favour of himself or his relative so that there is no offence. *The Court finds that the Defence's interpretation of conflict of interest is flawed.*

- ***What is "conflict of interest"?***

There is no requirement that Accused's sister should have been favoured in such Decision.

The strict wording of the enactment is such that the elements of the offence are proved when **the public official takes part in ANY Decision making process in which his relative has a personal interest.** Having such a substantial shareholding in Medpoint would cause one to have a *"personal interest"* in that company.

As per the **"*Working Papers on Conflict of Interest : Legislators, Ministers and Public Officials" by Gerard Carney, Associate Professor of Law at Bond University Australia*** - which study was commissioned by Transparency International, "*conflict of interest*" is described in its simplest terms as -

" … when the private interests of a politician or official clash or even coincide with the public interest. Such a conflict of interest raises an ethical dilemma when the private interest is sufficient to influence or <u>appear</u> to influence the exercise of official duties."

And as per ***OECD (2005) - Conflict of Interest Policies & Practices in Nine EU Member States " A Comparative Review"*** - *SIGMA Papers No 36, OECD Publishing* ["OECD" stands for *Organisation for Economic Co Operation & Development.*], the OECD's generic definition of ***conflict of interest*** is -

"… a conflict of interest involves a conflict between the public duty and the private interest of a public official, in which the public official's private capacity could improperly influence the performance of his official duties and responsibilities.

We consider - within the broad concept of conflict of interest - not only the situation where in fact there is an unacceptable conflict between a public official's interests as a private citizen and his/her duty as a public official, but also those situations where there is an apparent conflict of interest or a potential conflict of interest.

An apparent conflict of interest refers to a situation where there is a personal interest that might reasonably be considered by others to influence the public official's duties, even though in fact there is no such undue influence or there may not be such influence. The potential for doubt as to the official's integrity and/or the integrity of the official's organization makes it obligatory to consider an apparent conflict of interest as a situation that should be avoided…."

…..

The facts of the present case are such that a fair minded and well informed common man would be reasonably entitled to conclude that Accused had been placed in a situation of *conflict of interest* whereby *he ignored his public duty* and *approved a re allocation of funds* to pay Medpoint Ltd in which company his sister had a *personal interest*.

The offence is committed as soon as an Accused places himself in such situation where his public duty clashes with his personal interest or appears, to a

reasonable man, to so clash. The ***appearance of influence or perception of bias*** is sufficient to constitute the offence of conflict of interest.

The POCA has provided for the offence of *conflict of interest* as a criminal offence. The facts of the present case establish the elements of the offence beyond reasonable doubt and the Court finds the charge proved beyond reasonable doubt against Accused.

Accordingly, for all the reasons given above, we find all the elements of the present offence against the **Accused proved beyond all reasonable doubt.**

The Court therefore finds Accused GUILTY as charged.

Dated this 30th day of June 2015.

…….. ……..
……

N.Ramsoondar,
Ag V.President,
Intermediate Court (Crim)

M.I.A Neerooa,
Magistrate,
Intermediate Court (Crim)