

STRENGTHENING DEMOCRACY THROUGH INVESTIGATING, PROSECUTING AND PUNISHING CORRUPTION IN MAURITIUS

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ABSTRACT

There is a close relationship between democracy and corruption. Corruption has a negative effect on the functioning of political and democratic institutions. It affects the delivery of services such as education and healthcare. In order to consolidate democracy, Mauritius has adopted different measures to prevent and combat corruption. These have included the ratification of international treaties such as the United Nations (UN) Convention against Corruption, the signing of the African Union Convention on Preventing and Combating Corruption and the enactment of domestic law, Prevention of Corruption Act, which criminalises different corrupt activities. The purpose of this article is to discuss the jurisprudence that has emerged from courts in Mauritius interpreting and applying the different sections of the Prevention of Corruption Act and to recommend ways through which the Act could be amended or interpreted to strengthen the fight against corruption.

I. INTRODUCTION

There is a close relationship between democracy and corruption.¹ Corruption has a negative effect on the functioning of political and democratic institutions.² It affects the delivery of services such as education and healthcare.³ In order to consolidate democracy, Mauritius has adopted different measures to prevent and combat corruption. These have included the ratification of international treaties such as the UN Convention against Corruption (in December 2004), the signing of the African Union Convention

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1. M.T. Rock, Corruption and Democracy (2007) DESA Working Paper No. 55, ST/ESA/2007/DWP/55. Available at <http://www.un.org/esa/desa/papers/2007/wp55_2007.pdf>, (accessed 01 September 2015).

2. D.D. Porta and Y. Mény, *Introduction: Democracy and Corruption*, in DEMOCRACY AND CORRUPTION IN EUROPE (D.D. Porta & Y. Mény, 1997), at 1 – 2.

3. S. Gupta, H.R. Davoodi and E. Tiongson, Corruption and the Provision of Health Care and Education Services (2000) IMF Working Paper, WP/00/116, available at <<http://www.imf.org/external/pubs/ft/wp/2000/wp00116.pdf>>, (accessed 01 September 2015).

on Preventing and Combating Corruption (in July 2004) and the enactment of domestic law which criminalizes different corrupt activities.

In April 2002, the Prevention of Corruption Act⁴ (POCA) came into force. Its long title is to the effect that the aims of the Act are ‘[t]o provide for the prevention and punishment of corruption and fraud and for the establishment of an Independent Commission Against Corruption.’ Since the coming into force of the Act, courts have handed down several judgments dealing with its various sections. The Supreme Court of Mauritius has held that Mauritius has an international obligation to combat transnational crimes.⁵ However, the Supreme Court has also warned:

That the country has to improve its national and international image in the corruption perception index, of that there can be no doubt. However, it should not in the process impair its national and international image on the human rights perception index. The two indexes are not mutually exclusive.⁶

The purpose of this article is to discuss the jurisprudence that has emerged from courts in Mauritius interpreting and applying the different sections of the Prevention of Corruption Act and to recommend ways through which the Act could be amended or interpreted to strengthen the fight against corruption. This article deals with the following issues: the application of the Act, offences under the Act and how they have been interpreted by courts, reporting, investigating and prosecuting corruption, some of the challenges faced in prosecuting corruption and the sentences imposed for the offenders. The author will start by highlighting cases in which courts have dealt with the issue of the application of the Act.

II. APPLICATION OF THE ACT

Section 3 of the Act provides that: ‘A person shall commit an offence under this Act where— (a) the act or omission constituting the offence occurs in Mauritius or outside Mauritius; or (b) the act constituting the offence is done by that person, or for him, by

4. Prevention of Corruption Act 2002, Act 5/2002, Proclaimed by [Proclamation No. 18 of 2002] w. e. f 1st April 2002.

5. *The Independent Commission against Corruption* 2005 SCJ 72 in which the Court emphasised Mauritius’ obligation under the United Nations Convention Against Transnational Organized Crime to fight organised crime.

6. *Manraj & Ors v. ICAC* 2003 SCJ 75; 2003 MR 41, at 24.

another person.’ Section 3(a) thus makes it very clear the Act is applicable to corrupt activities committed in Mauritius and outside Mauritius. In simple terms, it has territorial and extra-territorial application. Before 2006, section 3(a) provided that ‘[a] person shall commit an offence under this Act where - (a) the act or omission constituting the offence occurs outside Mauritius.’

In 2006, section 3(a) was amended to provide expressly that it was applicable to offences committed in Mauritius. Courts had to deal with the issue of whether section 3(a) before it was amended in 2006 was applicable to offences committed in Mauritius. For example, in *Independent Commission Against Corruption v. Peermamode M.R.A.F.E. and The Director Of Public Prosecutions v. Peermamode M.R.A.F.E.*,⁷ the accused were prosecuted under section 10(4) of POCA and the issue on appeal was whether ‘the legislator had created a valid criminal offence in respect of which the accused could be convicted for the offences alleged to have been committed within Mauritius’ before POCA was amended in 2006. The Supreme Court referred to the drafting history of POCA and that of the 2006 amendment Act and to various rules of statutory interpretation to hold that the offence of which the accused were prosecuted were known in Mauritian law before the 2006 amendment.

In *Joomer N v. State*⁸ in which the Supreme Court also dealt with the question of whether section 3 was applicable to offences committed in Mauritius, it was held that:

If domestic jurisdiction was to be excluded, it could not have been done without express provisions such as: “This Act shall not apply to acts and omissions occurring in Mauritius.” There was in fact no need for the legislature to amend section 3. A proper interpretation of section 3 in its 2002 version meant that where the act or omission constituting the offence occurs elsewhere than in Mauritius, the author shall commit an offence under the Act. There is no exclusion of territorial jurisdiction. This is what the clarification which the amendment of 2006 sought to bring.⁹

7. *Independent Commission against Corruption v. Peermamode M.R.A.F.E.*; and *The Director of Public Prosecutions v. Peermamode M.R.A.F.E.* 2012 SCJ 104. See also, *ICAC v. Ng Sui Wa* 2012 INT 148; *ICAC v. Satyawan Kutwaroo & Iswaraj Ghallu* 2010 INT 61; *ICAC v. Suresh Mahadeo* 2010 INT 257; *ICAC v. Ng Sui Wa Christophe* 2012 INT 74; *Noormamode v. ICAC & Anor* 2015 SCJ 93.

8. *Joomer v. State* 2013 SCJ 413.

9. *Id.*, para 33.

Another issue that courts have had to deal with is whether POCA is applicable to offences that were committed before it was enacted. In *Somauroo & Ors v. Independent Commission against Corruption*,¹⁰ the applicants argued, inter alia, that ‘in the absence of retrospective and retroactive provisions, the respondent is precluded from enquiring and investigating into alleged offences [in this case money laundering] which might have been committed before the coming into operation of’ POCA.¹¹

In dismissing the applicants’ application, the Supreme Court held that section 90 of POCA empowered the police to investigate offences that were committed before POCA was enacted. The full bench of the Supreme Court held that ‘the principle of non-retroactivity of criminal law...is in no way infringed by the investigation of facts prior to the enactment creating a specific offence so long as those facts tend to establish the commission of the offence not prior to the enactment but subsequent to the enactment.’¹² Therefore, in the light of those judgements, the questions of whether it is applicable to offences committed in Mauritius or to offences committed before it was enacted, have now been settled.

A. Offences under the Act

As mentioned earlier, the Act criminalizes several corrupt activities. These include: bribery by public official; bribery of public official; taking gratification to screen offender from punishment; public official using his office for gratification; bribery of or by a public official to influence the decision of a public body; influencing public official; “trafic d’influence”; public official taking gratification; bribery for procuring contracts; conflict of interests; treating of public official; receiving gift for a corrupt purpose; corruption of agent; and corruption to provoke a serious offence. The author deals with the jurisprudence in which courts in Mauritius have interpreted the elements of some of the offences and the evidence that has to be adduced to prove that an offender committed an offence in question. Most of the offences refer to a ‘public official.’ It is imperative to first have a look at the definition of a public official and how a person’s status as a public official has been or may be proved in court.

1. *Public official*—Section 2 of the Act defines a public official in the following terms:

(a) means a Minister, a member of the National Assembly, a public officer, a local

10. *Somauroo & Ors v. Independent Commission against Corruption* 2008 SCJ 307.

11. *Id.*, at 2.

12. *ICAC v. Somauroo & Ors* 2011 SCJ 299, at 4.

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.

Case law shows that courts have relied on different sources to conclude that a person is a public official. These have included the fact the accused is a senior employee of a local government,¹³ is a manager of a government corporation,¹⁴ is the chairperson of the committee of a statutory body,¹⁵ has admitted that he is a public official, for example, and that he is a police official.¹⁶ The circumstances of the case have led to the court's conclusion that there is no dispute that a witness¹⁷ or the accused¹⁸ is a public official because he or she was a cabinet minister (the accused);¹⁹ a police official;²⁰ an employed official at the Ministry of Training Skills, Development and Productivity;²¹ or a road traffic inspector.²²

In some cases, evidence has been led to prove that the accused is a public official. These have included cases where the accused is an agricultural machinery operator at the Sugar Planters Mechanical Pool Corporation;²³ the prosecution

13. *Independent Commission Against Corruption v. Sicharam* 2008 INT 436 (the complainant was the head of the Planning Department at one district council).

14. *ICAC v. Soobrah* 2013 INT 311, at 9.

15. *ICAC v. Bidianand Jhurry* 2010 INT 145 (the accused was the Chairman of the Sugar Industry Labour Welfare Fund Committee).

16. *Police v. Rambans Salick & Anor* 2008 INT 239, at 5.

17. *Police v. Parmanand Bundhoo* 2012 INT 80 (the court held that there was no dispute that the witness, whom the accused was attempting to bribe, was a police officer and therefore a public official). In *ICAC v. Roussety*, the Court held that 'It is not disputed that the complainant was a public official, being the Island Chief Executive of Rodrigues.' See *ICAC v. Roussety* 2012 INT 199, at 8.

18. *Police v. Joymungul Ambar Kumar* 2010 INT 12 (the court observed that it was not seriously disputed that the accused was a public official); *ICAC v. Jacques Roger Rousseau and Ors* 2014 INT 315, at 2.

19. *Police v. Jugnauth Pravind Kumar* 2011 PL3 213.

20. *Police v. Kiran Kumar Burhoo* 2010 INT 263; *Police v. Venkatakestmen Rangasananda* 2009 INT 91; *Police v. Soobaroo Rama* 2009 INT 152; *ICAC v. Dowlut Imtiaz Khan* 2011 INT 84; *ICAC v. Gowry Suraj* 2013 INT 1; *ICAC v. Lutchmeenaraidoo Harishchandrah* 2009 INT 266.

21. *Police v. Veeria Hasokumar* 2009 INT 177.

22. *ICAC v. Seedeer* 2012 INT 92.

23. In *Police v. Ramchurn Shri Krishnaduth Jee*, the Court observed that 'it is not disputed that the accused was a public official within section 2 of the POCA. Witness Mungroo [Field Manager at SPMPC] confirmed that the accused was at the material time employed as Agricultural Machinery Operator by the SPMPC, no doubt a Statutory Corporation, governed by the Sugar Planters Mechanical Pool Corporation Act 1974.' See *Police v. Ramchurn Shri Krishnaduth Jee* 2012 INT 114, at 3.

producing a document or adducing evidence to show the accused's official status as a police officer;²⁴ a witness²⁵ or the prosecution²⁶ producing a letter from the Commissioner of Police to prove that the accused was a police officer or employed by the Road Development Agency.²⁷

However, in some cases courts do not mention that the accused is a public official and the basis for that conclusion. This could be attributed to the fact that courts take judicial notice, without expressly stating so, that a police officer,²⁸ a probation officer²⁹ or land surveyor,³⁰ are public officials. A police officer will be prosecuted as a public official even if the gratification was solicited when he was off duty.³¹

2. *Bribery by public official*—Section 4 of the Act provides that:

(1) Any public official who solicits, accepts or obtains from another person, for himself or for any other person, a gratification for - (a) doing or abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties; (b) doing or abstaining from doing, or having done or abstained from doing, an act which is facilitated by his functions or duties; (c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties; (d) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official, in the execution of the latter's functions or duties; (e) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, another person in the transaction of a business with a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence, it is proved that the public official solicited, accepted or obtained a gratification, it shall be presumed, until the contrary is proved, that the gratification was solicited, accepted or obtained for any of the purposes set out in subsection (1)(a) to (e).

24. *ICAC v. Baboolall* 2012 INT 77, at 2; *ICAC v. Seeruttun Leckram* 2009 INT 200.

25. *ICAC v. Gerard Phillippe Rayepa* 2011 INT 142, at 1.

26. *ICAC v. Hamtohul Balakrishna* 2008 INT 46, at 6; *ICAC v. Cangy* 2013 INT 287, at 2; *Independent Commission Against Corruption v. Chinnarassen* 2012 INT 229, at 1;

27. *ICAC v. Mohess* 2011 INT 14, at 2 and 7.

28. See for example, *ICAC v. Doyal* 2013 INT 62; *ICAC v. Soobrun Shivanand* 2006 INT 427; *Independent Commission Against Corruption v. Curpen Murday* 2013 INT 299.

29. *ICAC v. Pursoty* 2013 INT 134.

30. *Police v. Ghunowa Shalendrea* 2009 INT 51.

31. *ICAC v. Seeruttun Leckram* 2009 INT 200.

In *Hanumunthadu Rajen v. The State & Anor*,³² in which the appellant, a town engineer, was convicted of soliciting a bribe from one of the contractors in order to certify and process a claim for the work the contractor had done, the Supreme Court held that:

[I]n order to establish its case on a charge under section 4(1) of the POCA, what the prosecution had to establish, was that the appellant being a public official did solicit from the complainant a gratification for doing an act in the execution of his functions. It had to establish that the solicitation of the gratification was in relation to an act which falls within the execution of the officer's functions and that processing and certification of claims averred in the information formed part of the duties of the appellant. It was however not an element of the offence and it was not necessary for the prosecution to establish that the appellant had indeed processed or certified the claims. Indeed...section 4(1)(a) creates a distinct offence of a public official soliciting a gratification for having done an act in the execution of his duties. It is under that offence that it becomes necessary for the prosecution to prove that the act in respect of which the gratification was solicited, was in fact carried out by the public official.³³

The Court appears to be of the view that section 4(1) creates an offence distinct from those under subsections (1)(a) – (1)(e). This reasoning is further supported by the Court's holding that '[a]n offence under section 4(1) of the POCA is committed the moment that the solicitation is made...'³⁴ In the author's opinion, that holding is debatable. This is because section 4(1) contains words that are meant to apply to all the paragraphs that follow it as each paragraph creates distinct offences. For the accused to be convicted under section 4(1)(a), the prosecution must prove, inter alia, the purpose for which the gratification was allegedly sought otherwise the accused will be acquitted.³⁵ If the prosecution alleges that the accused received a gratification for himself but the person who gave the said gratification testifies in evidence that he gave it to the accused for the accused to give it to another person, the accused will be

32. *Hanumunthadu Rajen v. The State & Anor* 2010 SCJ 288.

33. *Id.*, at 5.

34. *Id.*, at 16.

35. *Curpen v. Independent Commission Against Corruption & Anor* 2015 SCJ 66, at 3; *ICAC v. Doyal*, *supra* note 28, at 2.

acquitted.³⁶

In *Sunechara v. The State*,³⁷ the Supreme Court held ‘that section 4(1)(a) sets down a number of permutations and possible ways whereby the offence of bribery by a public official can be committed.’³⁸ For a public official to be convicted under section 4(1)(a) for obtaining a gratification for ‘doing...an act in the execution of his functions or duties’ the prosecution must prove that the act he did was in the execution of his duties.³⁹

In *Independent Commission Against Corruption v. Seeneevassen*,⁴⁰ the accused, a police official, was prosecuted under section 4(1)(b) because he, inter alia, collected, for his colleague’s business, an outstanding debt. The Supreme Court in acquitting him held that ‘paying a debt to CIM cannot form part of the duties of a police officer; nor can it be an act done by a police officer in the execution of his duties.’⁴¹ For the accused to be convicted of soliciting a gratification for ‘himself’, the prosecution does not have to prove that the gratification was indeed for the accused. The court can infer from the circumstances of the case to conclude that ‘the money would have been for the accused himself.’⁴²

A person prosecuted for soliciting a gratification under section 4(1)(a) will be convicted even if he does not accept the money from the person from whom he solicited it because ‘the charge is one of *soliciting* and not of accepting a gratification.’⁴³ This is because ‘If ever there was no solicitation whatsoever, one would have expected the accused to report the complainant for offering bribe.’⁴⁴ For a person to be convicted of soliciting a gratification, the prosecution must prove that the words he used indeed meant that he was soliciting a bribe. A court will not take judicial notice of the fact that some words mean that the person is soliciting a bribe.⁴⁵ For a person to be convicted under section 4(1)(b) the prosecution must prove, inter alia, that the solicitation of the

36. ICAC v. Doyal, *id.*, at 5.

37. *Sunechara v. The State* 2007 SCJ 131.

38. *Id.*, at 16.

39. *ICAC v. Soobrun Shivanand*, *supra* note 28. See also, *ICAC v. Soobrun* 2007 SCJ 318 in which the Supreme Court did not question the holding that for a person to be convicted he must have obtained the gratification in the execution of his duties.

40. *Independent Commission against Corruption v. Seeneevassen* 2012 SCJ 328.

41. *Id.*, at 7.

42. *Independent Commission against Corruption v. Chinnarassen* 2012 INT 229, at 7.

43. *Independent Commission against Corruption v. Curpen Murday* 2013 INT 299, at 9. Emphasis in original.

44. *Id.*, at 9. The accused, suspecting that he had been trapped by ICAC officials, refused to accept money from the witness although he attempted several times to give it to him.

45. *ICAC v. Dowlut Intiaz Khan* 2011 INT 84, at 3.

gratification was in 'relation to an act which was facilitated by the accused's functions [or duties]'.⁴⁶ In *ICAC v. Gowry Suraj*,⁴⁷ the accused, a police official, was convicted under section 4(1)(b) of accepting an offer of money to facilitate an offender's escape from lawful custody. Where the accused, a police officer, fined the witnesses for contravening traffic rules, the prosecution could not argue that he had 'solicited from another person, for himself, a gratification for abstaining from doing an act in the execution of his duties'.⁴⁸

Another issue relates to the burden that is imposed on the accused under section 4(2). Is it a burden of proof, in that the accused must prove his innocence if he is to escape a conviction, or it is an evidential burden. In *Suneechara v. The State*,⁴⁹ one of the issues that the Supreme Court dealt with was whether section 4(2) of POCA 'is compliant...with the presumption of innocence [under section 10 of the Constitution] which places an onus upon the prosecution to prove all the elements of the offence with which an accused is charged'.⁵⁰ Relying on the relevant jurisprudence from England and Mauritius on the presumption of innocence, the Court observed that '[t]he presumption of innocence has long been a governing principle of criminal law' and that '[i]t is nothing new in our concept of criminal law and section 10(2)(a) of our Constitution but affirms that principle'.⁵¹ The Court added that '[b]ut that principle though regarded as supremely important was stated [in a 1935 English court decision] not to be absolute'.⁵² The Court referred to several cases from England on the issue of the presumption of innocence⁵³ and held that:

There is no doubt that the underlying rationale of the presumption of innocence is a simple one: that it is repugnant to ordinary norms of fairness for the prosecution to accuse a defendant of crime and for the latter to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. However, any sovereign state has the full powers to legislate and to define the constituent elements of an offence. It may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it

46. *ICAC v. Suresh Mahadeo*, *supra* note 7, at 13.

47. *ICAC v. Gowry Suraj*, *supra* note 20.

48. *ICAC v. Cangy* 2013 INT 287.

49. *Suneechara v. The State*, *supra* note 37.

50. *Id.*, at 26.

51. *Id.*

52. *Id.*

53. *Id.*, at 27.

results from criminal intent or from negligence. Indeed presumptions of fact or of law operate in every legal system and our Constitution does not prohibit such presumptions in principle. However, the State must remain within certain limits in this respect as regards Criminal law. Otherwise, the legislature would be free to strip the trial Court of any effective power of assessment and deprive the presumption of innocence of its substance. A balancing exercise must be carried out and section 10(2) of the Constitution would require the legislature to confine itself within reasonable limits which take into account the importance of what is at stake while maintaining the rights of the defence. The question in any case must be whether, on the facts, the reasonable limits to which a presumption must be subjected have been exceeded.⁵⁴

The Court then referred to jurisprudence from the European Court of Human Rights and the European Commission of Human Rights on the issue of reasonableness⁵⁵ and held that ‘section 4(2) of the POCA does not infringe the principle of fair trial and more specially [sic] that of presumption of innocence enshrined in section 10(2) of the Constitution.’⁵⁶ The Court seems to be of the view that the offender’s right to be presumed innocent is not absolute and that there are certain circumstances under which he had to challenge the prosecution’s case if he is to escape a conviction. It is argued that this holding threatens the accused’s right to remain silent at his trial. The author is of the view that the preferred approach is not to interpret the presumption under section 4(2) as imposing a burden of proof on the accused, however exceptional the circumstances may be, but rather to interpret it as an evidential burden. The latter approach was taken by the Supreme Court in a later decision. In *Hanumunthadu Rajen v. The State & Anor*,⁵⁷ the Court also referred to section 4(2) and held that:

[T]he prosecution had established... that the appellant had solicited the gratification, there was accordingly a presumption that this gratification was solicited for one of the purposes set out in the subsection which in this case is under sub section (1)(a), namely, for

54. *Id.*, at 28.

55. *Id.*, at 29 – 30.

56. *Id.*, at 30. See also, *Parayag v. The Independent Commission against Corruption* 2011 SCJ 309, at 16.

57. *Hanumunthadu case*, *supra* note 32.

performing an act in the execution of his functions, and which is particularised in the information as being the processing of the claims of the respondent. There was thereafter an evidential burden upon the appellant to prove the contrary and on the evidence, he has clearly failed to discharge this burden.⁵⁸

The Supreme Court thus makes it very clear that the burden imposed on the accused under section 4(2) is an evidential burden. It is not a burden of proof. He does not have to prove his innocence. For the accused to escape a conviction, the burden imposed on him has to be discharged on a balance of probabilities.⁵⁹ Section 4 criminalises a wide range of activities and many public officials have been prosecuted and convicted in terms of this section for conduct such as soliciting for a bribe so as not to fine a person driving a vehicle without a valid licence,⁶⁰ soliciting for a bribe on behalf of his superior,⁶¹ and soliciting a bribe for himself and for another police official so as not to fine the complainant for driving a vehicle without a licence.⁶²

3. *Bribery of a public official*—Section 5 provides that:

(1) Any person who gives, agrees to give, or offers a gratification to a public official for—(a) doing, or for abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties; (b) doing or abstaining from doing, or for having done or abstained from doing, an act which is facilitated by his functions or duties; (c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties; (d) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official in the execution of the latter's functions or duties; (e) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed another person in the transaction of a business with a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence under subsection (1) it is proved that the accused gave, agreed to give or offered

58. *Id.*, at 9.

59. *ICAC v. Hamtohul Balakrishna*, *supra* note 26, at 10 (the court was referring to section 83 of POCA). See also, *Independent Commission Against Corruption v. Balluck* 2009 INT 101, at 9.

60. *Police v. Rambans Salick & Anor* 2008 INT 239 (this was in terms of section 4(1)(b)).

61. *Police v. Joymungul Ambar Kumar*, *supra* note 18.

62. *Bissessur v. The State & Anor* 2012 SCJ 16 (contrary to section 4(1)(b)).

gratification, it shall be presumed, until the contrary is proved, that the accused gave, agreed to give or offered the gratification for any of the purposes set out in subsection (1)(a) to (e).

The person contemplated in section 5 could be a public official bribing another public official or a person not being a public official bribing a public official. The prosecution must prove that the person being bribed is a public official and that the ‘accused wilfully and unlawfully offered a gratification’ to a public official.⁶³ Both natural and juristic persons may be prosecuted under section 5. The challenge though is that should a juristic person, for example, a company be convicted of an offence under section 5, there is no penalty prescribed for it. This rather unfortunate situation was evident in *Police v. Boskalis International bv and anor*⁶⁴ where the two companies pleaded guilty and were convicted of bribing public officials. However, the court could not impose a sentence on them as no sentence is provided for under section 5 for corporations. The Court held that ‘i]n view of the impossibility to apply the sentence provided by section 5 of the POCA to corporate bodies, the legislator may consider taking legislative action so that there is no more the perception that corrupt corporate bodies can get away scot-free in Mauritius.’⁶⁵

All the cases that the author is aware of have included non-public officials attempting to bribe public officials. For example, in *Police v. Parmanand Bundhoo*,⁶⁶ the accused who was driving under the influence of alcohol, was convicted of offering a gratification to a police officer to abstain from doing an alcohol test on him. In *Police v. Mohammad Ziad Aumeer*,⁶⁷ the accused was convicted on his plea of guilty for bribing a police official so as not to issue him fines for contravening a number of traffic laws. In *Police v Soobarao Rama*⁶⁸ the accused was convicted of bribing a police officer so as not to fine him for dangerous driving.

4. *Public official using his office for gratification*—Section 7 of the Act provides that:

(1) Subject to subsection (3), any public official who makes use of his office or position for a gratification for himself or another person shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

63. *Police v. Parmanand Bundhoo* 2012 INT 80, at 3.

64. *Police v. Boskalis International bv & Anor* 2013 INT 288.

65. *Id.*, at 15.

66. See *Police v. Parmanand Bundhoo*, *supra* note 63.

67. *Police v. Mohammad Ziad Aumeer* 2014 INT 233.

68. *Police v. Soobarao Rama*, *supra* note 20.

(2) For the purposes of subsection (1), a public official shall be presumed, until the contrary is proved, to have made use of his office or position for a gratification where he has taken any decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or indirect interest.

(3) This section shall not apply to a public official who - (a) holds office in a public body as a representative of a body corporate which holds shares or interests in that public body; and (b) acts in that capacity in the interest of that body corporate.

For a public official to be convicted of an offence under section 7, the prosecution has to prove one or a combination of the following elements: that he made use of his office for a gratification for himself; that he made use of his position for gratification for another person.⁶⁹ In *Independent Commission Against Corruption v. Seeneevassen*⁷⁰ in which a police official was accused of obtaining a gratification under section 7, the Supreme Court, in acquitting him, held that there was ‘no evidence... that [he] obtained the money because he was a police officer.’⁷¹ The Court added that section 7(2) is applicable in a situation ‘where a public official uses his position, for example, to award a contract to a company in which he and his spouse own all the shares.’⁷²

In *ICAC v. Soobrah*,⁷³ the accused was prosecuted under section 7(1) for failure to follow conventional practice in selling the corporation’s unserviceable assets when he sold the said property to his work colleague and for appointing the same colleague as an employee of the corporation without the necessary qualifications. The court in acquitting him held that at the time he approved the sale there were no regulations that he should have followed and that the appointment of the employee had been approved by the board at a later stage. For the accused to be convicted under section 7(1), there is no need for the prosecution to prove that he obtained a gratification.⁷⁴ The Supreme Court held that:

The opprobrium lies in the abuse or misuse of the office or the position as a public officer for a gratification. Whether the gratification is

69. In addition to the above elements, the prosecution has to prove that the accused is a public official. See *ICAC v. Topsy* 2014 INT 223, at 1. See also, *Police v. Charlot* 2008 INT 440 where the Court in acquitting the accused held, inter alia, that there was no evidence that he had solicited for a gratification for himself.

70. Seeneevassen case, *supra* note 40.

71. *Id.*, at 7.

72. *Id.*

73. *ICAC v. Soobrah* 2013 INT 311.

74. *ICAC v. Topsy*, *supra* note 69, at 1.

received or accepted is not part of the elements of the offence even if the reception or the acceptance adds further evidential weight to prove that the abuse of office was “for gratification.”⁷⁵

In *Joomeer v. State*,⁷⁶ the Supreme Court held that:

The section that creates the offence is section 7(1) of the Act. Section 7(2) is only an evidential section. It creates a presumption. But the presumption operates not in all the cases falling under the purview of section 7(1) but only in those situations where the public official “has taken [a] decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or indirect interest.”⁷⁷

Those who have been convicted under section 7(1) have included a police official who accepted a bribe from a driver for not reporting road traffic offences against him (he had used his position),⁷⁸ an agricultural machinery operator who used the Sugar Planters Mechanical Pool Corporation’s tractor to plough people’s land and pocket the money,⁷⁹ and the chairperson of the committee of a statutory body who used his position to appoint his relatives to different vacant posts.⁸⁰

5. *Influencing public official*—Section 9 provides that:

Any person who exercises any form of violence, or pressure by means of threat, upon a public official, with a view to the performance, by that public official, of any act in the execution of his functions or duties, or the non-performance, by that public official, of any such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

For a person to be prosecuted in terms of section 9, he does not have to be a public official. What matters is that he or she threatens or commits any of the prohibited acts against a public official. In *Independent Commission against Corruption v Sicharam*,⁸¹ the accused, a councillor at the district council, used abusive language against an official whom he though was responsible for his friends’ company’s

75. *Joomeer v. State*, *supra* note 8, para 43.

76. *Id.*

77. *Id.*, para 47. Emphasis removed.

78. *Police v. Kiran Kumar Burhoo*, *supra* note 20.

79. *Police v. Ramchurn Shri Krishnaduth Jee*, *supra* note 23.

80. *ICAC v. Bidianand Jhurry*, *supra* note 15.

81. *Independent Commission Against Corruption v. Sicharam*, *supra* note 13.

unsuccessful application for a development permit, threatened her and also verbally harassed her during the Planning Committee meetings. The Court held that there was evidence that the accused threatened the complainant and he was convicted accordingly. The Court observed that:

I am satisfied that [the complainant] was a Public Official since she was the Head of the Planning Department at the Black River District Council. I am satisfied that in that capacity she had to make recommendations in respect of the granting of development permits, whether the recommendations were binding or not. I find that it was her duty to act in a professional and in an objective manner without interference in the execution of her duties. Since the accused came to her office and shouted at her... I find that the conduct of the accused clearly shows that the accused did exercise pressure by means of threat upon witness...so that the latter made a favourable recommendation to the Planning Committee in respect of the application of [the accused's friend's company] for a development permit.⁸²

Although section 9 punishes 'any person' including a public official who commits any of the prohibited acts, the author is not aware of any case in which people who are not public officials have been convicted of violating section 9. It is also important to note that in all cases where people have been convicted under section 9, it was a senior or influential public official threatening a relatively junior public official. This means that section 9 could be an effective tool to prevent senior public officials from coercing junior public officials to make decisions that further the former's personal interests.

A public official who discloses confidential official documents to a corruption investigating body for that body to investigate an allegation that he had been threatened by another public official to perform or refrain from performing an act does not commit an offence.⁸³ This is because the POCA imposes a duty on public officials to report acts of corruption and the ICAC has a duty to keep such information as confidential.⁸⁴

In *ICAC v. Roussety*,⁸⁵ the accused, the Chief Commissioner of the Rodrigues Regional Assembly, was convicted of exercising pressure by means of a threat on the Chief Executive of the Rodrigues Regional Assembly to set up a board, made up of

82. *Id.*, at 6.

83. *Police v. Roussety* 2011 INT 130.

84. *Id.*, at 5 – 7.

85. *ICAC v. Roussety*, *supra* note 17.

people chosen by the accused, to appoint temporary employees. Evidence showed that the accused had threatened the Island Chief Executive of the Rodrigues Regional Assembly that if he did not appoint the said board, he would recommend to the Prime Minister to dismiss him from his post.⁸⁶

6. '*Trafic d'influence*'—Section 10 creates different offences and section 10(4) provides that:

Any person who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

The person referred to in section 10 who uses his influence does not have to be a public official. What matters is that the benefit is to be obtained from a public body. In *ICAC v. Bumma*,⁸⁷ the accused, 'a very influential political person who had contacts at the Public Service Commission',⁸⁸ was prosecuted of soliciting a gratification from the complainant to use his influence for her to be offered a teaching job by the Public Service Commission. He had allegedly promised to use his 'political influence' to that end.⁸⁹ A public body is defined in section 2 of the POCA to mean: '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.'

In *ICAC v. Dauhoo Mohammad Iqbal*,⁹⁰ the accused was charged with obtaining a gratification from one A for the Master and Registrar of the Supreme Court for the cancellation of the sale of a plot. The accused's lawyer argued that the office of the Master and Registrar of the Supreme Court was not a public body within the meaning of section 2 of the Act. The Court in acquitting the accused held that:

Can the court give a wide interpretation to public body to include the office of the Master and Registrar in the present information? The legislator made the distinction within the POCA itself between the

86. *Id.*, at 4.

87. *ICAC v. Bumma* 2010 INT 227.

88. *Id.*, at 2. The accused was acquitted because of the inconsistencies in the state witnesses' evidence.

89. *Id.*, at 4.

90. *ICAC v Dauhoo Mohammad Iqbal* 2008 INT 267.

corruption of a public official and a public body and took pains to define it in the definition section. True it is that one section is headed “Bribery of public official” and the other “traffic d’influence”. However, we find that there is no ambiguity to resolve in the present matter because the definitions are clear. The definition of Master and Registrar cannot be stretched to be brought within the definition of “a public body” as the information [charge sheet] is presently worded.⁹¹

The Court concluded that:

The fact that the accused is alleged to have played an intermediary role, has prevented the prosecution in the present case from making full use of either section 5 or of section 10. The fact that the POCA does not cater for this particular scenario does not mean that the court can substitute itself for the legislator.⁹²

Therefore, the mere fact that a person is a public official does not mean that he works for a public body. However, it is also possible for the accused to be a public official who is also working for a public body.⁹³ In *ICAC v. Gerard Phillippe Rayepa*,⁹⁴ the accused, a police officer, was convicted under section 10(4) for soliciting a bribe from one of the witnesses to help him obtain a driving licence. He informed him that the money was ‘for the “Boss” and others involved in the operation.’⁹⁵ In his defence, he argued that he had borrowed the money from the witness because he was ‘in financial difficulty and used that money to pay his electricity bill.’⁹⁶ In convicting the accused, the court held, inter alia, that ‘the way the money was used is immaterial so long that accused has taken it for himself. An accused may chose to spent [sic] the money as he so wishes and it may a mitigating factor but not an excuse.’⁹⁷

91. *Id.*, at 4.

92. *Id.*

93. In *ICAC v. Satyawan Kutwaroo & Anor*, the Court observed that ‘Accused No.1 is a draughtsman and Accused no.2 is an Inspector of Works. Both are posted at the Pamplemousses and Riviere du Rempart District Council. The District Council is a public body and both accused are public officials within the meaning of s. 2 of the Prevention of Corruption Act 2002.’ See *ICAC v. Satyawan Kutwaroo & Anor* 2015 INT 24, at 1. See also, *Mungree v. The State & Ors* 2013 SCJ 468, where the district official allegedly solicited a gratification to remit to other district officials).

94. *ICAC v. Gerard Phillippe Rayepa* 2011 INT 142.

95. *Id.*, at 2.

96. *Id.*, at 3.

97. *Id.*

In *ICAC v. Dauhoo Mohammad Iqbal*,⁹⁸ the Court referred to section 10 of POCA and held that ‘the word “benefit” is meant to be all encompassing. It is not possible to legislate or define all possible situations which may arise and we are of the view that “benefit” should not be interpreted restrictively...’⁹⁹

For the accused to be convicted under section 10, the prosecution must prove the purpose for which the gratification was solicited otherwise the accused will be acquitted.¹⁰⁰ If the prosecution alleges that the accused obtained a gratification in order to use his influence, it must prove that there was such remittance to the accused otherwise the accused will be acquitted.¹⁰¹ The identity or existence of the person at the public body to whom the gratification was to be remitted must also be proved if the accused is to be convicted.¹⁰² In *Mungree v. The State & Ors*¹⁰³ in which the accused was prosecuted for soliciting a gratification for another person, the Supreme Court in allowing his appeal held ‘that the evidence on record fell short of establishing to the required standard of proof who was or were to be the recipient(s) of the gratification solicited by the accused.’¹⁰⁴ Proving the existence of such recipients is in line with the accused’s right to a fair trial to be informed in detail of the charge against him.¹⁰⁵

7. *Public official taking gratification*—Section 11 provides for the offence of a public official taking gratification. It is to the effect that: Any public official who accepts or receives a gratification, for himself or for any other person—(a) for doing or having done an act which he alleges, or induces any person to believe, he is empowered to do in the exercise of his functions or duties, although as a fact such act does not form part of his functions or duties; or (b) for abstaining from doing or having abstained from doing an act which he alleges, or induces any person to believe, he is empowered not to do or bound to do in the ordinary course of his function or duty, although as a fact such act does not form part of his functions or duties, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Section 11 deals with a situation where a public official does or induces another person to believe that he is empowered to do something ‘although as a fact such act

98. *ICAC v. Dauhoo Mohammad Iqbal*, *supra* note 90.

99. *Id.*, at 5.

100. *ICAC v. Mohungur* 2014 INT 114; *ICAC v. Satyawon Kutwaroo & Anor*, *supra* note 93.

101. *Independent Commission Against Corruption v. Buddoo* 2012 INT 176, at 3.

102. *Id.*, at 4.

103. *Mungree v. The State & Ors*, *supra* note 93.

104. *Id.*, at 7.

105. *Id.*, at 9.

does not form part of his functions or duties.’ In *ICAC v. Hamtohul Balakrishna*,¹⁰⁶ the accused, a police sergeant, was prosecuted under section 11 for receiving for himself a certain amount of money from a member of the public by inducing him to believe that he could cause him ‘to secure a provisional driving licence whereas in truth and in fact this was not the case.’¹⁰⁷ The prosecution proved that the accused ‘was not employed at the licensing section, the sole body responsible for issuing competent driving licence.’¹⁰⁸ The Court, on the basis of the accused’s admission that he had received the money from the state witnesses, although as loans, and the state witnesses’ evidence that the money had been for the accused to secure them driving licences, convicted him accordingly.

8. *Conflict of interests*—Section 13 provides for the offence of conflict of interests as follows:

(1) Where (a) a public body in which a public official is a member, director or employee proposes to deal with a company, partnership or other undertaking in which that public official or a relative or associate of his has a direct or indirect interest; and (b) that public official and/or his relative or associate hold more than 10 per cent of the total issued share capital or of the total equity participation in such company, partnership or other undertaking, that public official shall forthwith disclose, in writing, to that public body the nature of such interest.

(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.

(3) Any public official who contravenes subsection (1) or (2) shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Apart from POCA, the Local Government Act creates the offence of conflict of interest.¹⁰⁹ However, unlike POCA which empowers the court to impose a sentence of up to 10 years’ imprisonment on an offender convicted of conflict of interests, the Local Government Act provides for a fine and imprisonment not exceeding two years. In *ICAC v. Chetanand Pursun & Ors*,¹¹⁰ the accused were prosecuted under section 13 of POCA instead of section 99 of the Local Government Act and they argued that this was an abuse of process. The Court in dismissing their applications held that the DPP

106. *ICAC v. Hamtohul Balakrishna*, *supra* note 26.

107. *Id.*, at 1.

108. *Id.*, at 9.

109. Section 99.

110. *ICAC v. Chetanand Pursun & Ors* 2010 INT 104.

had the discretion to determine under which law to prosecute the accused.

In *ICAC v. Naushad Maudarbaccus and anor*,¹¹¹ the accused were prosecuted under section 13 for conflict of interest in that ‘whilst being public officials, they took part in the proceedings of a public body whilst their relatives had a personal interest in a decision of the public body.’¹¹² Accused number one chaired an ad hoc committee meeting of the Tobacco Board at which his wife’s application for a tobacco growing licence was considered and approved. Accused number two was charged with having taken part in the said meeting at which his wife’s application for a tobacco growing licence was approved.¹¹³ Evidence was led to show that:

The Committee noted that some of the applicants were related to certain members and/or employees of the Board. The Committee held the view that the Board should take the policy decision as to whether employees of the Tobacco Board and/or close relatives might hold permits to grow tobacco. The Committee recommended to the Board that all applicants be granted a license and to take a policy decision in case of related parties. Accused no 3 was asked to leave the Committee before the application was discussed being given that there was conflict of interest as his wife was one of the applicants and he did so.¹¹⁴

Accused number one ‘admitted that one of the applicants was his wife and that the recommendation of the Ad Hoc Committee was not binding upon the Board.’¹¹⁵ All the accused argued that all the board members were aware of the fact that their relatives had applied for the licences and that they had declared their conflict of interest.¹¹⁶ In convicting the accused, the Court observed that:

The fundamental principle remains that any proceeding before any Board has to be conducted in a fair and just manner and has to be perceived to be fair and just by any onlooker. The fact that accused no 1 was the Chairman of the Board and accused nos 2 and 3 were

111. *ICAC v. Naushad Maudarbaccus & Anor* 2010 INT 197.

112. *Id.*, at 1.

113. *Id.*

114. *Id.*, at 3.

115. *Id.*, at 3 – 4.

116. *Id.*, at 4 – 5.

members of the Board and they remained on the Board when the recommendations of the Ad Hoc Committee in relation to the applications of their relatives were being tabled and ratified before the Board cannot be perceived to be manifestly just and fair in as much as they might have affected the tenor of the debates by their mere presence.¹¹⁷

The Court concluded that ‘it would not be unreasonable, from the vantage point of the fair-minded and informed observer, to come to the conclusion that a real possibility of bias remained in the proceedings before the Board by the mere presence of the accused parties.’¹¹⁸

However, in *ICAC v. Beegoo Kunal*,¹¹⁹ the accused was present during a committee meeting at which the issue of the renewal of his father’s contract to work for a public body, at which the accused was employed in a senior position, was discussed and did not disclose that the applicant was his father although ‘everyone [on the committee] knew that the accused was the son of’ the applicant.¹²⁰ However, the minutes of the meeting show that ‘the accused did not talk at all nor did he intervene in that decision. In fact he stayed mute when the decision for the renewal of the contract of his father was taken.’¹²¹ All the committee members knew that the accused was the applicant’s son but he ‘was not formally asked to momentarily leave the meetings when the decision regarding [his father’s contract] was discussed and taken.’¹²² In acquitting the accused, the court held that he had not taken part in the proceedings of the meeting because ‘[t]he word “take part” should certainly be construed as the accused taking an active part in the decision of the committees as opposed to his mere presence the more so that he did not even opened [sic] his mouth during that particular deliberation.’¹²³

The above cases show that it is not enough for the accused to declare his conflict of interest, in addition to declaring his conflict of interest, he must also not take part in a meeting at which his relative’s application will be considered. The accused also does not have to declare his conflict of interests if everyone knows that there is such conflict as long as he does not participate in the deliberations dealing with the issue in which he has an interest.

117. *Id.*, at 7 – 8.

118. *Id.*, at 9.

119. *ICAC v. Beegoo Kunal* 2009 INT 166.

120. *Id.*, at 2.

121. *Id.*, at 3.

122. *Id.*, at 3.

123. *Id.*, at 4.

In *ICAC v. Jandoo*,¹²⁴ the accused was prosecuted under section 13 because ‘whilst being a member of the Board of the Information and Communications Technology Authority (ICTA) he took part in the proceedings as regards the sale of car...when he was interested in obtaining the car for his personal use.’¹²⁵ Bids were submitted for the cars and the accused knew two of the bidders, a fact he did not disclose because he was not related to them.¹²⁶ He had helped one of the bidders to prepare the bid documents which helped her to win the bid. However, the accused had given money to one of the bidders to disguise as the buyer although the accused was the real buyer. When the car was sold, it was the accused that paid for its insurance and drove it. It was against that background that he was convicted of conflict of interest.

If an accused is prosecuted under section 13(1) for taking part in the proceedings of a public body at which a decision is taken to benefit his relative, the charge sheet must include the word ‘relative’ and not ‘relation.’ In *ICAC v. Moossun*,¹²⁷ the court held that the use of the word ‘relation’ instead of ‘relative’ in the charge sheet in the prosecution of the accused under section 13(1) meant that the accused was prosecuted for an offence that did not exist and the court ordered the stay of the accused’s prosecution. The Court also held that he could not be retried as this would amount to an abuse of process as the Supreme Court had held that the accused had been tried for an offence that did not exist.¹²⁸

9. *Corruption of agent*—Section 16 provides that:

(1) Any agent who, without the consent of his principal, solicits, accepts or obtains from any other person for himself or for any other person, a gratification for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal’s affairs or business, or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Any person who gives or agrees to give or offers, a gratification to an agent for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal’s affairs or business or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude

124. *ICAC v Jandoo* 2013 INT 95.

125. *Id.*, at 1 and 2.

126. *Id.*, at 4.

127. *ICAC v. Moossun* 2014 INT 225.

128. For the Supreme Court reasoning, see *Moossun v. The Independent Commission Against Corruption* 2013 SCJ 70.

for a term not exceeding 10 years.

Section 16(1) deals with an agent who solicits, accepts, obtains a gratification and section 16(2) deals with the person who gives, agrees to give or offers a gratification to an agent. In *ICAC v. Boutanive*,¹²⁹ the accused, a freelance jockey, was prosecuted under section 16(1) for having been paid for riding horses without his principal's consent. The Court observed that the prosecution had to prove the following elements for the offence under section 16(1): 'an agent; without the consent of principal; accept a gratification; for having done an act; in relation to his principal's business.'¹³⁰ The Court found that 'there was no contract of employment between the stable and the accused but merely a gentleman's agreement' and that a senior member from the stable gave evidence that the accused was a freelance jockey who 'could ride for whomsoever he wished.'¹³¹

The Court also found that there was no evidence that the accused had been paid the said commission without the stable's consent. It is against that background that the accused was acquitted. It is therefore important that for a person to be convicted under section 16(1), there is clear evidence that he was an agent for the principal and that one of the ways to prove that is to show that there is a contract of employment between the two.

As mentioned above, in *ICAC v. Boutanive*,¹³² the Court held that the offence in section 16(1) has five ingredients. However, in *ICAC v. Nauzeer*,¹³³ the Court held that the offence under section 16(1) has seven essential ingredients: an agent of his principal; without the consent of his principal; solicits, accepts or obtains; from another person; a gratification; for himself or for any other person; for doing or abstaining from doing an act in the execution of his functions or duties, or for having done or abstained from doing such an act.¹³⁴ In *ICAC v. Nauzeer*,¹³⁵ the accused, a security guard, was prosecuted for obtaining a gratification to recommend the complainants to his employer to employ them as security guards. The Court held that: 'the seven ingredients of the present offence may be committed in two ways, namely for doing an act in the execution of his duties or for having done an act in the execution of his duties.'¹³⁶ After highlighting how courts have interpreted some of the sections creating offences in

129. *ICAC v. Boutanive* 2012 INT 240.

130. *Id.*, at 3.

131. *Id.*, at 4.

132. *ICAC*, *supra* note 129.

133. *ICAC v. Nauzeer* 2013 INT 110.

134. *Id.*, at 1 – 2.

135. *ICAC*, *supra* note 133.

136. *Id.*, at 4.

POCA, it is now imperative to have a look at the jurisprudence in which courts have interpreted the sections relating to the issue of reporting corruption.

10. Reporting corruption—Both public officials and non-public officials are empowered to report corruption. In most of the cases discussed in this article, members of the public reported public officials who allegedly committed corrupt activities to the Independent Commission against Corruption (ICAC). There are also cases where public officials have reported fellow public officials to the ICAC.¹³⁷ Section 48 imposes an obligation on the ICAC to keep as confidential the identity of the person who has reported an act of corruption to it. It provides for what is known as the ‘informer’s privilege’ in the law of evidence.

Under section 49, a person who discloses to the ICAC information that an act of corruption has been committed by another person is immune from civil and criminal liability resulting from that disclosure.¹³⁸ It has been held that section 49 ‘shields those persons who disclose information to the ICAC from civil or criminal liability as a result of such disclosure in order to assist the ICAC in its investigation.’¹³⁹ However, section 49(6) provides that ‘[a] person who makes a false disclosure under subsection (1) or (2) knowing it to be false shall be guilty of an offence and shall, on conviction, be liable to pay a fine...and to imprisonment not exceeding one year.’ The purpose of section 49(6) is to prevent false disclosures.

In *P v. Gobin Hemraz*,¹⁴⁰ the accused was convicted of making a false disclosure to ICAC. It should be noted that for a person to qualify for the immunity under section 49(6), he has to make the disclosure to the officials mentioned in section 49(1) and (2). If the person disclosing an act of corruption is not a public official, he has to disclose it to a member of the ICAC Board or an officer of ICAC. If he is a public official, he has to make the disclosure to ‘his responsible officer or to the Director-General.’

In *ICAC v. Chaundee*,¹⁴¹ the court dealt with the issue of whether a member of the public who had disclosed an act of corruption to a police officer instead of

137. See for example, *Police v. Ramchurn Shri Krishnaduth Jee*, *supra* note 23 (where the General Manager of Sugar Planters Mechanical Pool Corporation reported to ICAC that one of his employees had used the Corporation’s tractor to plough people’s land and take the money); *ICAC v. Suresh Mahadeo*, *supra* note 7 (where the Board of the Rose Belle Sugar Estate reported the accused, the General Manager of the Estate, to ICAC for soliciting a gratification contrary to section 4(1)(b)).

138. See *Parayag v. The Independent Commission Against Corruption*, *supra* note 56, at 12.

139. *Oshi v. Municipal Council of Quatre Bornes* 2015 INT 86, at 3.

140. *P v. Gobin Hemraz* 2013 PL2 10.

141. *ICAC v. Chaundee* 2012 INT 88.

disclosing it to the ICAC officer was immune from prosecution in terms of section 49. The accused was prosecuted for bribery of a public official contrary to section 5(1)(b) of ICAC. He had reported to a police station an act of corruption that had been allegedly committed by another police officer. After the necessary investigations, the police referred the matter to ICAC which found that the accused's allegations were false hence the prosecution. His lawyer argued that his prosecution was an abuse of the process of the court because it was the accused who had reported the alleged act of corruption to the police. The prosecution argued that had the accused reported the allegation to ICAC, section 49 would have been applicable.¹⁴² The Court held that because of the fact that the police reported the allegation to ICAC three days after the accused had reported it to the police, the accused had 'indirectly' reported that allegation to ICAC because 'had the Accused not reported or disclosed the alleged act of corruption to the Police ... , such an act would never have been disclosed to ICAC as well.'¹⁴³ The Court added that:

It is obvious that a very narrow literal reading of section 49(1) of the Act would be in line with the submissions of the Prosecution in this case as the disclosure was made in the first instance to the Police authorities and not directly to the ICAC so that the Accused may not benefit the immunity. However, it is also undisputed that after the matter was referred to ICAC..., the Accused reiterated his allegation of the act of corruption against [the police officer] to ICAC officers...who recorded same in presence of a senior investigator of the Commission... Thus, this time there can be no doubt that the Accused directly disclosed the alleged act of corruption to two officers of the Commission and falls squarely within the four corners of section 49 of the Act.¹⁴⁴

It is against that background that the Court held that it would be an abuse of its process to prosecute the accused under section 5(1). However, it concluded that there was no dispute that 'the Accused might have made up a false allegation against the Police Officer and therefore bearing potentially all elements of an offence under section 49(6) of the Act.'¹⁴⁵ This case highlights the fact that there may be a need to amend POCA

142. *Id.*, at 7.

143. *Id.*, at 8.

144. *Id.*, at 8 – 9.

145. *Id.*, at 9.

so that members of the public can report allegations of corruption to other law enforcement officers in addition to those who work at ICAC. This now takes us to the jurisprudence on the issue investigating corruption.

11. Investigating corruption—Section 46 provides that:

(1) Where...the Commission becomes aware that a corruption offence or a money laundering offence may have been committed, it shall...refer the matter to the Director of the Corruption Investigation Division who shall forthwith make a preliminary investigation of the matter. (b) The Director of the Corruption Investigation Division shall, within 21 days of a referral under paragraph (a) or within such other period as the Commission may direct, report to the Commission on the matter.

(3) Upon receipt of a report under subsection (1)(b) or 2, the Commission shall - (a) proceed with further investigations; or (b) discontinue the investigation.

Section 47 provides that:

(1) Where the Commission proceeds with any further investigation under section 46(3), the investigation shall be carried out under the responsibility of the Director-General.

(3) In carrying out an investigation under this section, the Commission may conduct such hearings as it considers appropriate...

The fact that ICAC decides not to investigate a case of alleged corruption does not mean that it is not in the public interest for such a case to be pursued by another statutory body.¹⁴⁶ One of the questions that the Court had to decide in *ICAC v. Anderson Ross & Ors*¹⁴⁷ was whether the ICAC was obliged to conduct a hearing under section 47(3). The defendants argued that:

[W]henver there is a suspicion that an act of corruption or money laundering offence has been committed, there is a need to follow an established statutory procedure as set out under section 46 of the POCA, as a result of which a preliminary investigation should be the starting point consistent with section 46(1)(a) of POCA. The Commission would then have two options upon completion of the preliminary investigation which are spelt out under section 46(3) of the POCA, namely a discontinuance of the investigation or proceed with further investigation...[S]hould there be further investigation, the Commission would have no other options but to proceed by way of a hearing as per the statutory procedure set out under section 47 of

146. *Intralot (Mtius) Ltd v. Gambling Regulatory Authority & Ors* 2009 SCJ 90, at 4.

147. *ICAC v. Anderson Ross & Ors* 2014 INT 35.

POCA and more particularly under section 47(3) of POCA... He submitted that adherence to this statutory procedure was mandatory despite the fact that section 47(3) of POCA reads ‘...*may conduct such hearings as it considers appropriate...*’ and such a hearing is even more essential when the offence being investigated is one of money laundering.¹⁴⁸

In dismissing the application, the Court held that in Mauritian law, the word ‘shall’ has to be interpreted to be imposing a mandatory requirement and the word ‘may’ gives the decision maker the discretion to decide whether or not to take a particular action.¹⁴⁹ The Court concluded that:

[W]hen section 47 of POCA is read in its proper context and in line with the intention of the Legislator, the only clear mandatory requirement is that such further investigations are to be carried out under the responsibility of the Director General or by delegated powers to the Director of Investigations or any of his officers... As regards the requirement to conduct a hearing during the further investigation, I find that the legislator has not made it a mandatory requirement. A close reading of section 47(3) of POCA shows clearly that the Legislator has left discretion as to how to conduct the investigation and permitted the use of hearing amongst others. The word ‘may’ expressly used by the Legislator gives the Commission the power to also adopt any other mode of investigative process.¹⁵⁰

In the author’s opinion, the Court’s interpretation of the relationship between sections 46 and 47 is correct. Another issue that the Court dealt with was whether ICAC’s application to the banks to disclose confidential information about their clients which information ICAC needed in its investigation of money laundering allegations was not against the bank’s duty to keep its client’s information confidential. The Court referred to section 51 of POCA, to the relevant provisions of the Banking Act and to the relevant case law on the banker’s duty of confidentiality and held that that duty is not absolute and that a banker was required to disclose such information to ICAC if it was

148. *Id.*, at 3 – 4. Emphasis in original.

149. *Id.*, at 5.

150. *Id.* See also, *Independent Commission Against Corruption v. NG Sui Wa Dick Christopher* 2014 INT 16, at 5.

investigating corruption and money laundering allegations provided that ICAC makes an application to a judge in chambers for the judge to order the bank to disclose that information.¹⁵¹ Therefore, in Mauritius, bank secrecy cannot be invoked to prevent the ICAC from investigating corruption. This is the case although the Supreme Court held in *Drouin & Ors v. Bank of Baroda*¹⁵² that ‘[t]he rock-bed of a sound financial system is banker’s confidentiality.’¹⁵³

This holding is in line with Mauritius’ international human rights obligation.¹⁵⁴ However, for a court to order a bank to disclose confidential information to ICAC, ICAC has to demonstrate that the situation requires the Court to make such an order. In *The Independent Commission Against Corruption*,¹⁵⁵ in which ICAC made an ex parte application for the Court to compel the Bank of Mauritius to disclose information relating to the services rendered to its clients, guidelines issued to commercial banks to combat money laundering, and other important documents, the Court held that it could not make such an order as ICAC’s application appeared ‘more like a fishing expedition than anything else.’¹⁵⁶

In *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*,¹⁵⁷ the Supreme Court held that ‘[t]he general rule is that confidentiality is the very foundation of business, and more specially in the financial services sector’ but that ‘[c]onfidentiality should...not be invoked to shield criminal activities which undermine economic and political stability.’¹⁵⁸

The relationship between sections 47 and 50 of POCA was dealt with in *Dowarkasing v. The Independent Commission against Corruption*¹⁵⁹ in which the applicant argued that ‘following a preliminary investigation’ and, where it is felt that a further investigation is needed, the law compels the ICAC ‘to resort to section 50 of the POCA only’ and that ‘the provisions of section 47 go contrary to section 50 and to

151. *ICAC v. Anderson Ross & Ors*, *supra* note 147, at 10 – 16.

152. *Drouin & Ors v. Bank of Baroda* 2008 SCJ 304.

153. *Id.*, at 5.

154. The UN Convention against Corruption requires states parties to ensure that bank secrecy is not invoked to hinder corruption investigations and prosecutions.

155. *The Independent Commission against Corruption* 2006 SCJ 02. See also *Independent Commission Against Corruption* 2006 SCJ 2; 2006 MR 52.

156. *The Independent Commission against Corruption* 2006 SCJ 02, *id.*, at 5.

157. *Technology Soft Corporation & Ors v Independent Commission Against Corruption* 2005 SCJ 99; 2005 MR 223.

158. *Technology Soft Corporation & Ors v Independent Commission Against Corruption*, *id.*; 2005 MR 223, *id.*, at 6.

159. *Dowarkasing v. The Independent Commission Against Corruption* 2013 SCJ 138A.

the spirit of the POCA and should have no application' in such a situation.¹⁶⁰ It should be recalled that section 50(1) provides that:

Where the Commission decides to proceed with further investigations under section 46 or 47, the Director-General may - (a) order any person to attend before him for the purpose of being examined orally in relation to any matter; (b) order any person to produce before him any book, document, record or article; (c) order that information which is stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, be communicated in a form in which it can be taken away and which is visible and legible; (d) by written notice, order a person to furnish a statement in writing made on oath or affirmation setting out all information which may be required under the notice.

In dismissing the applicant's application, the Supreme Court held that:

Under section 47, the respondent may decide to invite a person to collaborate in its further investigation without any compulsive element underlying the invitation. A person who does not turn up for a hearing in response to the invitation does not commit any offence. If he does turn up, he will commit an offence only if he makes a false or misleading statement in the course of the hearing ... Section 50...covers a different situation which can be qualified as a post-section 47 situation. It is where a person fails to respond to a request under section 47 that section 50 gathers its importance. The respondent is empowered under section 50(1) to direct a number of orders to any person... Non-compliance with any of the orders made under section 50 is an offence punishable by imprisonment not exceeding 5 years pursuant to section 50(6) of the Act.¹⁶¹

In *ICAC v. Joymungul Ambar*,¹⁶² the accused was suspected to have committed an act of corruption and ICAC summoned him in terms of sections 50(1)(a) and (d) to answer some questions. He gave his statement after an oath had been administered to him by

160. *Id.*, at 3.

161. *Id.*, at 3.

162. *ICAC v. Joymungul Ambar* 2009 INT 246.

a senior official of the ICAC who was not present at all during the recording of the statement. The defence argued that the evidence obtained from the accused was inadmissible because the procedure that was followed was irregular. In holding that the evidence was admissible, the court concluded that:

The whole point of administering an oath is to give authenticity and due weight to the statement which comes afterwards. If the person administering the oath was not present during the whole proceedings, then he cannot vouch for the authenticity of whatever was said in his absence. However, the Commissioner who administers the oath under section 50(1)(d) is not supposed to record the evidence himself and transmit it to the authority concerned.¹⁶³

The Court held that in the circumstances of the case, especially in the light of the fact that the accused's lawyer was present when he made the statement, the evidence was admissible. Section 56(1) of POCA provides that:

Notwithstanding any other enactment, where a Judge in Chambers, on an application by the Commission, is satisfied that the Commission has reasonable ground to suspect that a person has committed an offence under this Act or the Financial Intelligence and Anti-Money Laundering Act 2002, he may make an attachment order under this section.

Section 56(2) provides for the effects of an attachment order and section 57 provides for the features of an attachment order. Section 57(2) provides that 'an attachment order shall, unless revoked by a Judge in Chambers, remain in force for 60 days from the date on which it is made.' Section 57(3) provides for the circumstances in which the duration of an attachment order may be extended. In *Fauzee Bros & Co. Ltd. & Ors v. Independent Commission Against Corruption*,¹⁶⁴ the applicant applied to the Supreme Court to rescind and/or vary an attachment order that had been issued by a judge in Chambers pursuant to the respondent's application. In dismissing the application because it had not been made before a judge in chambers, the Court held that 'it is clear

163. *Id.*, at 2. The accused's appeal to the Supreme Court was dismissed. See *Joymungul v. The State & Anor* 2014 SCJ 143.

164. *Fauzee Bros & Co. Ltd. & Ors v. Independent Commission Against Corruption* 2008 SCJ 296.

that the intention of the legislator is that the Judge in Chambers, on account of the special features pertaining to the said jurisdiction ensuring expediency and confidentiality, should be the pre-eminent jurisdiction to be seized for...attachment orders' and other orders under the Act.¹⁶⁵

Likewise, in *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*,¹⁶⁶ the Supreme Court referred to section 56 and held that 'an application for such an attachment order by the Commission can only have any significance if it is made to the Judge in Chambers and granted ex parte.'¹⁶⁷ An attachment order may be issued against any property which the ICAC reasonably suspects to be proceeds of unlawful activity even if the funds or property in question have originated from abroad.¹⁶⁸ However, an attachment order cannot be served on a person who is not in Mauritius.¹⁶⁹ The Supreme Court has held that 'section 56 does not allow for an Attachment Order to be sought against a party who is a suspect in a case or who has been charged.'¹⁷⁰ POCA used to provide for temporary freezing orders but the relevant sections were repealed in 2011.¹⁷¹

Another issue that courts have dealt with is whether a police officer who is seconded to ICAC retains his powers as an ordinary police officer. Section 24(5)(b) of POCA provides that 'the Commission may - for the purpose of this Act, make use of the services of a police officer or other public officer designated for that purpose by the Commissioner of Police or the Head of the Civil Service, as the case may be.' Section 53(1) provides that:

Where the Director-General is satisfied that a person who may assist him in his investigation - (a) is about to leave Mauritius; (b) has interfered with a potential witness; or (c) intends to destroy

165. *Id.*, at 3.

166. *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*, *supra* note 157; 2005 MR *supra* note 157.

167. *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*, *id.*; MR, *id.*, at 2.

168. *The Independent Commission Against Corruption* 2005 SCJ 72.

169. *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*, *supra* note 157; 2005 MR, *supra* note 157, at 4 – 5.

170. *Lesage v. ICAC* 2003 SCJ 101; 2003 MR 204, at 15. See also, *Manraj & Ors v ICAC*, *supra* note 6; 2003 MR 41, at 16

171. See Act 9 of 2011. For a brief mention of the freezing orders under POCA, see *DPP v. A.C.A. Gaffoor* 2010 SCJ 223, at 5; *Air Mauritius v. Tirvengadam* (Sir) 2005 SCJ 161, at 7; *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*, *supra* note 157; 2005 MR, *supra* note 157; *Peerkhan & Ors v. The State* 2008 SCJ 110, at 10.

documentary evidence which is in his possession and which he has refused to give to the Commission, the Commission may, in writing, direct an officer to arrest that person.

Section 53(2) provides for the procedure that has to be followed after arrest, the rights of an arrested person and the circumstances in which the Commission may detain him. In *Ha Yeung Chin Ying v. Independent Commission against Corruption & Anor*,¹⁷² the applicant argued that a police officer seconded to ICAC does not have the ordinary powers of a police officer and that such an officer is not an officer of ICAC if he still receives his orders from the Commissioner of Police. The Supreme Court held that when a police officer is seconded to the ICAC,

[H]e remains a Police Officer within the meaning of the Police Act and retains all his functions under that Act, including his powers, immunities, liabilities and responsibilities under the common law or under any other enactment. Among such powers are notably his powers of arrest, detention and of lodging provisional information.¹⁷³

The Court added that ‘there is nothing abnormal’ about the fact that a police officer who is seconded to ICAC retains his powers as any police officer even if he is appointed to a senior position in ICAC. This is the case although there is ‘no doubt’ that such officer ‘is subject to the orders and directives issued to him by the [Commissioner of Police] under section 6 of the Police Act but when posted to the [ICAC] and ...he is also amenable to the directives of the [ICAC].’¹⁷⁴ The Court added

172. *Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor* 2003 SCJ 273; 2003 MR 228.

173. *Ha Yeung Chin Ying v Independent Commission Against Corruption & Anor*, *id*; 2003 MR, *id.*, at 5–6. See also, *Peerthum v. The Independent Commission Against Corruption (ICAC) & Anor* 2012 SCJ 371. However, see also *Lesage v. ICAC*, *supra* note 170; 2003 MR, *supra* note 170, at 15, where the Court held that ‘The text of the law that enables a Police Officer to come to ICAC empowers him to act as an Officer of ICAC and engage in the work of ICAC. It does not empower a Police Officer to do the work of the Commissioner of Police at ICAC in the name of ICAC. This fatal confusion of role has been caused by an absence of proper designation of statutory duties.’

174. The Court observed that ‘It is noteworthy that the Legislator could also have achieved the same purpose by specifying in the Act, as was done in Section 101B of the Independent Commission Against Corruption Act 1988 of New South Wales, Australia, that police officers who are seconded for duty at the Independent Commission Against Corruption retain all their powers, immunities, liabilities and responsibilities attached to their office.’ See *Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor*, *supra* note 172; 2003 MR, *supra* note 172, at 8.

that there was no need for POCA to expressly provide that police officers seconded to ICAC retain all their powers as police officers.¹⁷⁵ The Court concluded that the secondment of police officials to ICAC is crucial in empowering ICAC to fight corruption and fraud.¹⁷⁶

The Privy Council also reached a similar conclusion in another matter.¹⁷⁷ A senior prosecutor may travel with investigators to a foreign country to advise them when they are in the process of gathering evidence that will be used at the accused's trial in Mauritius even if the accused is to be prosecuted by that same prosecutor.¹⁷⁸ Although the accused has a right to summon witnesses, his application to summon that prosecutor as a witness in chief to give evidence about the lawfulness of the investigations that were carried out abroad will be dismissed if it is meant to abuse the court process.¹⁷⁹ A public official may disclose confidential documents to ICAC if those documents are needed in the investigation of corruption and once those documents are disclosed to ICAC, even if the application to ICAC was not made in terms of section 52 of POCA, they are admissible in evidence.¹⁸⁰ Under part three of this article above, we have dealt with some of the offences under POCA. It is now necessary to have a look at the general principles relevant to prosecution of corruption that have emerged from Mauritian courts.

B. Prosecuting corruption

POCA criminalises different conducts and a person could be prosecuted for the same conduct under different sections. In *ICAC v. Soobrun*,¹⁸¹ the Supreme Court held that:

POCA seeks to criminalize as many situations of bribery as may be possible and creates a host of offences. In many cases, the offences so

175. *Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor*, *id*; 2003 MR, *id*.

176. *Ha Yeung Chin Ying v. Independent Commission Against Corruption & Anor*, *id*; 2003 MR, *id*., at 9. See also, *Ha Yeung Chin Ying v. The Independent Commission Against Corruption & Anor* 2003 SCJ 64; 2003 MR 36 in which the judge held that a police officer seconded to ICAC may lawfully arrest a suspect.

177. *Peerthum v. Independent Commission Against Corruption & Anor* [2014] UKPC 42. This was an appeal to the Privy Council after the Supreme Court granted the appellant the leave to appeal. See *Peerthum v. The Independent Commission Against Corruption & Anor* 2013 SCJ 138.

178. *Ahmine v. Chady & Anor* 2013 SCJ 264.

179. *Id.*, at 10.

180. *ICAC v. Pursun & 2 Ors* 2014 INT 218.

181. *ICAC v. Soobrun*, *supra* note 39.

created overlap not only with others in POCA itself but also with criminal offences under the Criminal Code. They are, however, not mutually exclusive. Which charge befits which offender in which situation is not for the courts to decide but for the prosecution in its discretion.¹⁸²

For example, a person may be prosecuted for the same conduct either under section 4(1) or under section 7 and the prosecution will remain valid. In *Burhoo v. The Independent Commission Against Corruption & Anor*,¹⁸³ the appellant was prosecuted and convicted of using his position as a public official for gratification contrary to sections 7(1) and 83 of POCA. He argued that he was wrongly charged under section 7(1) ‘when the circumstances of this case fall squarely under Section 4(1) of the Act.’¹⁸⁴ In dismissing the appeal, the Supreme Court held that: ‘[t]he fact that the appellant could, in the circumstances of the present case, have been equally charged under Section 4 of the Act, does not mean that the charge laid against him under Section 7, was defective.’¹⁸⁵ The Court added that the prosecution had the discretion to determine which section to invoke in prosecuting the accused.¹⁸⁶

Section 82(1) of POCA provides that ‘...no prosecution for an offence under this Act... shall be instituted except by, or with the consent of, the Director of Public Prosecutions.’ Subsections 2 and 3 empower officers of the ICAC to also prosecute offences under the Act. Therefore, in terms of section 82, the general rule is that the offences under the Act have to be prosecuted by the Director of Public Prosecutions or by another person with the consent of the Director of Public Prosecutions. Subsections 2 and 3 provide for the exceptions. All the cases discussed in the article have been prosecuted either by the ICAC or by the police. In *Suneechara v. The State*,¹⁸⁷ one of the issues was whether ICAC’s acting Chief Legal Adviser could legally institute proceedings against an accused under section 4(1)(a) of POCA. The Supreme Court held that:

182. *Id.*, at 5. See also, *Joomeer v. State*, *supra* note 8, para 50; *Parayag v. The Independent Commission Against Corruption*, *supra* note 56, at 15.

183. *Burhoo v. The Independent Commission Against Corruption & Anor* 2012 SCJ 211.

184. *Id.*, at 4.

185. *Id.*

186. *Id.*, at 5. See also, *ICAC v. Subhiraj Dookhy and Anor* 2013 INT 38 in which the same approach has been taken.

187. *Suneechara v. The State*, *supra* note 37.

There is no doubt that pursuant to section 82 of the POCA, the ICAC, in its own rights, has the authority to initiate criminal proceedings and conduct prosecution in respect of any offence under the Act. Although section 82(1) requires that a prosecution shall not be instituted for an offence under the Act without the consent of the DPP, one can hardly suggest that any prosecution undertaken by ICAC becomes that of the DPP. Under our legal system, an aggrieved party other than the DPP may legitimately institute and undertake criminal proceedings before a Court of law. This explains that informations [charge sheets] are lodged by local authorities or Ministries whenever there have been breaches, for example, of licensing, health or building regulations. This also explains the possibility of a private individual lodging a private prosecution provided he is an aggrieved party... All prosecutions initiated by a party other than the DPP are however subject to the DPP's decision to take over and continue or to discontinue such criminal proceedings as set down in section 72 of the Constitution.¹⁸⁸

The Court also added that the mere fact that a public prosecutor had prosecuted the case on behalf of the ICAC did not mean 'that the DPP had taken over the conduct of the criminal proceedings so that it became the aggrieved party to the exclusion of the ICAC.'¹⁸⁹ This case shows that there may be a need for the law to be amended to specify, in clear terms, the circumstances in which public prosecutors and ICAC officials may co-prosecute the accused in such a manner that there is no ambiguity as to which of the two institutions is actually in charge of the prosecution. As the Court observes, the appellant's lawyer had a valid point when he submitted that the fact that the case was prosecuted by a public prosecutor 'could have misled the appellant into believing that the DPP had exercised his power to take over the prosecution pursuant to section 72(3)(b) of the Constitution.'¹⁹⁰ In *ICAC v. Jacques Roger Rousseau and Ors*¹⁹¹ the Court held that ICAC is an integral part of the state and therefore cannot be categorised as 'person other than the state' for the purpose of section 4(1) of the Public Officers Protection Act which provides that such a person's right to institute criminal proceedings against another person expires after two years.

188. *Id.*, at 7.

189. *Id.*, at 7 – 8.

190. *Id.*, at 10.

191. *ICAC v. Jacques Roger Rousseau & Ors*, *supra* note 18.

Should the offender be prosecuted by the ICAC with the consent of the DPP and he appeals against his conviction or sentence, he must cite the DPP as one of the respondents. In *Sicharam v. Independent Commission against Corruption*,¹⁹² the appellant was prosecuted by the ICAC with the consent of the DPP and convicted of influencing a public official to make a decision favourable to the accused and sentenced to three months' imprisonment. In his appeal against the conviction, he only cited the ICAC as the respondent. In dismissing the appeal, the Supreme Court referred to its earlier jurisprudence and held that:

We take the view that the proposition of law to be drawn from [the cases cited] is that, in an appeal against conviction following a prosecution by a party other than the Director of Public Prosecutions, the appellant has to join the Director of Public Prosecutions either by himself or through the State as a party to the appeal. However, in the case of an appeal against an acquittal following a prosecution by a person other than the Director of Public Prosecutions, the latter ought not to be joined as a respondent to the appeal, but notice of appeal may be given to him at any time before the hearing of the appeal. The requirement of joinder or notification is important if the Director of Public Prosecutions is to be in a position to meaningfully exercise his powers under section 72 of the Constitution.¹⁹³

As mentioned earlier, there are many cases in which the police have prosecuted people who have committed offences under POCA. The question that the Supreme Court has had to deal with is whether POCA empowers the police to institute charges against people accused of corruption. In *Ramkalawon v. State*,¹⁹⁴ the appellant was prosecuted by the police and convicted of taking a gratification to screen an offender from punishment in breach of section 6(1)(b) of POCA. In his appeal against conviction, he argued, inter alia, that the Commissioner of Police did not have the power to assume the duties of the ICAC.¹⁹⁵ The point of contention was whether section 45(2) of POCA permitted the Police to prosecute offences under POCA. Section 45(2) provides that:

192. *Sicharam v. Independent Commission Against Corruption* 2011 SCJ 375.

193. *Id.*, at 2.

194. *Ramkalawon v. State* 2012 SCJ 254.

195. *Id.*, para 14

Where in the course of a Police enquiry - (a) it is suspected that an act of corruption or a money laundering offence has been committed; and (b) the Commissioner of Police is of the opinion that the matter ought to be investigated by the Commission, the Commissioner of Police may notwithstanding the Financial Intelligence and Anti-Money Laundering Act 2002 and subject to subsection (3) refer the matter to the Commission for investigation.

In dismissing his appeal, the Supreme Court held that:

There would have been purchase in the argument of learned counsel for the appellant had POCA provided that ICAC has exclusive competence to investigate offences created under the Act. ICAC, albeit an independent and impartial body, with its own staff, its own parliamentary accountability, its own budget and its own statutory rules for the conduct of an enquiry is not a legal system outside our legal system. In no way does it curtail the power of any other person or body to investigate and prosecute an offence. ICAC is no more than a specialized body with proficiency in dealing with sophisticated offences of corruption and money laundering in their multiple forms. For all its independence and impartiality, it is still an integral part of our legal system and may only operate within the framework of our constitution. In this sense, ICAC is not the only specialized body which has been created by an Act of Parliament to deal with specialized and sophisticated areas of the law where the authority is entrusted with statutory responsibilities of conducting investigation and prosecution.¹⁹⁶

The Court added that interpreting the law to exclusively empower the ICAC to investigate and prosecute corruption 'would be to stretch ICAC's powers beyond the permissible limits of the law.'¹⁹⁷ It should be noted that it is not POCA only which criminalises corruption. The Criminal Code, for example, criminalises the taking of bribes¹⁹⁸ as does POCA. A prosecutor has a choice either to prosecute the offender

196. *Id.*, para 18.

197. *Id.*, para 19.

198. See section 126(1)(b).

under the Criminal Code or under POCA.¹⁹⁹ It is not one of the requirements in POCA that for a police officer to arrest a person who is suspected of having committed one of the offences under the Act, he/she should have participated in that person's interrogation relating to the alleged corrupt activities. What matters is that the police officer has reasonable grounds to believe that the suspect committed one of the offences under POCA.²⁰⁰ A suspect must be informed of his rights, such as the rights to remain silent, not to incriminate himself, and to have his lawyer present during the interrogation otherwise he may successfully challenge the admissibility of such evidence.²⁰¹

Where a public official is accused of accepting a bribe, he will be convicted even if he chewed and swallowed the notes in question, provided that there is circumstantial evidence to prove that he accepted the bribe.²⁰² ICAC is not obliged to furnish the accused with a preliminary investigation report compiled under section 46 of POCA unless failure to furnish such a report will negatively affect the accused's right to a fair trial.²⁰³

Section 81 of POCA imposes an obligation of confidentiality on all officials and board members of ICAC. It provides, inter alia, that:

(2) No member of the Board or officer shall, except in accordance with this Act, or as otherwise authorised by law - (a) divulge any information obtained in the exercise of a power, or in the performance of a duty, under this Act; (b) divulge the source of such information or the identity of any informer or the maker, writer or issuer of a report given to the Director of the Corruption Investigation Division. (3) Every Member of the Board and every officer shall maintain confidentiality and secrecy of any matter, document, report and other information relating to the administration of this Act that becomes known to him, or comes in his possession or under his control.

In *Independent Commission against Corruption (ICAC) v. Ramdoyal & Anor*,²⁰⁴ the first respondent sued the second respondent for damages for malicious denunciation in

199. *Rambhurosh v. The State* 2009 SCJ 218.

200. *Police v. Jugnauth Pravind Kumar*, *supra* note 19.

201. *Id.*

202. *Police v. Kiran Kumar Burhoo*, *supra* note 20.

203. *Chady v. Her Honour, Mrs. R. Seetohul-Toolsee*, Senior Magistrate, Intermediate Court & Anor 2011 SCJ 54; *ICAC v. Chetanand Pursun & Ors*, *supra* note 110.

204. *Independent Commission Against Corruption (ICAC) v. Ramdoyal & Anor* 2010 SCJ 156.

writing in the sense that the second respondent gave false and malicious information ICAC which led to the prosecution of the first respondent in a case that was dismissed by a lower court. In order to strengthen his case, the first respondent asked the lower court to order ICAC to bring and produce to him certified copies of all the documents and statements that the second respondent had submitted and made to ICAC about the first respondent. ICAC invoked section 81 and argued that it had a duty to keep that information confidential.²⁰⁵ The Supreme Court held that ‘the obligation of confidentiality imposed on the members of the board of the Commission and on the officers of the Commission is not absolute but is subject to exceptions “*in accordance with the Act, or as otherwise authorised by law*”’.²⁰⁶ The Court then concluded that:

Accordingly, the imperative of affording to an accused party a fair trial is one of the instances where under section 81(2) of the Act, the disclosure of relevant investigative material should be considered as “authorised by law”. Similarly where public interest requires that material which is otherwise confidential, be disclosed to ensure a fair trial in civil proceedings, such disclosure will necessarily be considered as “authorised by law”, for the purposes of section 81(2).

The Court ordered ICAC to comply with the summonses issued by the lower court and produce the documents in question because they were ‘necessary to ensure a full and fair trial of the civil action before the’ lower court.²⁰⁷

1. *Sentences imposed for corruption*—POCA prescribes sentences ranging from six months to 10 years for those convicted of different offences.²⁰⁸ However, the prescribed sentence for most of the offences is that not exceeding 10 years’ imprisonment. In other words, courts have the discretion to decide which sentence to impose on the offender provided that the sentence does not exceed 10 years’ imprisonment. Jurisprudence from courts in Mauritius shows that courts have imposed the following sentences on those convicted of offences under POCA: three months’

205. *Id.*, at 2.

206. *Id.*, at 3. Emphasis in the original.

207. *Id.*, at 4. However, in *Independent Commission Against Corruption v. Ramdoyal & Anor* 2011 SCJ 44, the full bench of the Supreme Court held that the judge had erred in ruling on the issue of admissibility of evidence obtained on the basis of section 81. That this issue should be left for a trial court.

208. For 10 years, see sections 4(1), 5(1), 7(1), 8(1) and (2), 9, 10, 11, 12, 13(3), 14, 15, 16; for six months, one year and five years, see section 6(1).

imprisonment for influencing a public official contrary to section 9,²⁰⁹ for accepting a bribe in breach of section 4(1)(b),²¹⁰ for soliciting from another person, for himself, a gratification for doing an act in the execution of his duties contrary to section 4(1)(a) and (2),²¹¹ and for accepting for himself a gratification contrary to section 4(1)(a).²¹² Five months' imprisonment for using his office for gratification,²¹³ six months' imprisonment for accepting a bribe as a public official contrary to section 4(1)(a),²¹⁴ for using his position for gratification contrary to section 7(1),²¹⁵ and for bribery by a public official contrary to section 4(1)(e).²¹⁶ Nine months' imprisonment for taking a gratification to screen offender from punishment contrary to section 6(1)(b),²¹⁷ twelve months' imprisonment for accepting a bribe contrary to section 126(1)(b) of the Criminal Code²¹⁸ and for soliciting a bribe contrary to section 4(1)(a) of POCA.²¹⁹ The Supreme Court held that the circumstances of the case will determine the sentence the court will impose on the offender.²²⁰ The Supreme Court also held that the magistrate was correct not to impose the sentence of community service on the offender convicted of corruption because of 'the gravity of the offence and the position of the offender.'²²¹

It is clear that in most of the cases courts have imposed sentences of less than a year in prison although the maximum sentence is 10 years' imprisonment. It is argued that although corruption is a serious offence, not all offenders are the same and not all offences are committed under the similar circumstances. It is better that courts are given the discretion to determine which sentence to impose on the offender depending on factors such as the offender's personal circumstances, the seriousness of the offences and the interests of society. POCA does not provide for sentences that may be imposed

209. *Sicharam v. Independent Commission Against Corruption*, *supra* note 192.

210. *Bissessur v. The State & Anor*, *supra* note 62.

211. *Curpen v. Independent Commission against Corruption & Anor*, *supra* note 35. The accused was a police official and solicited a bribe so as to investigate a case against the suspect such that he would not be prosecuted.

212. *Suneechara v. The State*, *supra* note 37.

213. *Joomeer v. State*, *supra* note 8.

214. *Hanumunthadu Rajen v. The State & Anor*, *supra* note 32.

215. *Burhoo v. The Independent Commission Against Corruption & Anor*, *supra* note 183. See also, *Noormamode v. ICAC & Anor*, *supra* note 7 (marriage officer falsifying birth dates hence facilitating child marriage).

216. *Parayag v. The Independent Commission Against Corruption*, *supra* note 56, at 1.

217. *Ramkalawon v. State*, *supra* note 194, para 1.

218. *Rambhurosh v. The State*, *supra* note 199.

219. *Joymungul v. The State & Anor*, *supra* note 163.

220. *Hanumunthadu Rajen v. The State & Anor*, *supra* note 32, at 18.

221. *Joomeer v. State*, *supra* note 8, para 54.

on corporate bodies found guilty of corruption. The court recommended in *Police v. Boskalis International bv and anor*,²²² there may be a need for POCA to be amended to address this lacuna.

2. *Some of the challenges faced in prosecuting corruption*—Prosecuting corruption has not been a very smooth process. There have been cases where the prosecutors have not been able to secure convictions although there was evidence that an offence was committed. However, the mere fact that there is evidence of corruption does not mean that the accused will be convicted. The accused can only be convicted if the prosecution adduces evidence, beyond reasonable doubt, that the accused committed the offence. Factors which have led to the acquittal of those accused of corruption include: the witness's failure to lead evidence to convince court that he identified the accused as the person who solicited the bribe from him,²²³ the main prosecutor's witness's refusal to come to court and testify,²²⁴ and the inconsistencies in the main state witness's evidence.²²⁵

The inconsistencies in state witnesses' evidence have been largely attributed to the fact that many years pass by between the time the witness reports the case to ICAC and the time the accused is prosecuted. For example, in some cases it had taken three years,²²⁶ four years,²²⁷ six years,²²⁸ or nine years,²²⁹ for the accused to be prosecuted since the case was reported to the ICAC and statements taken from the witnesses.

Sometimes those who commit corrupt activities in their countries of nationality do not keep the proceeds of their unlawfully activities in those countries. They, for example, keep the money in foreign bank accounts or buy property in foreign countries. Mauritius has mechanisms in place to ensure that those who commit corruption in Mauritius and keep the proceeds of their corrupt activities outside the country do not

222. *Police v. Boskalis International bv & Anor*, *supra* note 64, at 15.

223. *Independent Commission Against Corruption v. Kaundun* 2008 INT 10.

224. *Independent Commission Against Corruption v. Luchooa & Anor* 2007 INT 240; *Independent Commission Against Corruption v. Balluck*, *supra* note 59.

225. *Police v. Venkatajistnen Rangasananda*, *supra* note 20; *Police v. Veeria Hasokumar*, *supra* note 21; *Curpen v. Independent Commission Against Corruption & Anor*, *supra* note 35.

226. *Police v. Soobarao Rama*, *supra* note 20, at 2.

227. *ICAC v. Baboolall*, *supra* note 24, at 4.

228. *Police v. Veeria Hasokumar*, *supra* note 21, at 5 (the accused was acquitted of the offence of bribery of a public official because of the inconsistencies in the main state witness's evidence); *ICAC v. Gowry Suraj*, *supra* note 20 (prosecuted for assisting a prisoner to escape from lawful custody); *ICAC v. Joymungul Ambar*, *supra* note 162, at 1; *ICAC v. Bumma*, *supra* note 87, at 6.

229. *ICAC v. Satyawan Kutwaroo & Anor*, *supra* note 93, at 3.

escape justice. However, in practice it has been difficult to obtain evidence of abroad.

In *Police v. Chady Mohummud Siddick*,²³⁰ the accused was provisionally charged with receiving a gift for corrupt purposes. In order to secure a conviction, the prosecution needed evidence from the United Kingdom, The Netherlands and Singapore where the accused had allegedly hid the proceeds of his criminal activities. However, despite the fact that the prosecution did all that it could to obtain evidence from these countries, there was a delay of several months in securing that evidence which resulted into the magistrate striking the case off the roll. However, the accused's application to travel abroad was dismissed as the court was of the view that '[t]his case bears an international ramification and is a complex one' and that '[t]here is a risk that if there is no condition imposed on the Accused restricting his freedom of movement in and out of Mauritius, he may try to interfere with witnesses and tamper with evidence.'²³¹

In *Technology Soft Corporation & Ors v. Independent Commission against Corruption*,²³² the applicant was suspected of money laundering and some of the evidence needed to prosecute the case had to be obtained from abroad. However, the foreign authorities delayed to tender that evidence to ICAC and the court, in revoking the freezing order against the applicants' property, held that the 'institutional inadequacies which result in the applicants' assets remaining frozen for an unreasonably long period cannot be condoned.'²³³

The ICAC has also been sued sometimes successfully²³⁴ and sometimes unsuccessfully²³⁵ for terminating the employment contracts of some of its senior officials. Some ICAC officials have flouted fundamental procedural issues such as

230. *Police v. Mohummud Siddick Chady* 2011 PL3 18. *The accused's earlier applications for the case to be struck off the role because of the delay in prosecuting him had been dismissed. See Police v. Mohummud Siddick Chady* 2010 PL3 66; *Police v. Chady Mohummud Siddick* 2008 PL3 149.

231. *Police v. Chady Mohummud Siddick* 2012 BRC 126, at 2.

232. *Technology Soft Corporation & Ors v. Independent Commission Against Corruption*, *supra* note 157; 2005 MR, *supra* note 157.

233. *Technology Soft Corporation & Ors v Independent Commission Against Corruption*, *id*; 2005 MR, *id.*, at 7.

234. *Bhadain v. The Independent Commission Against Corruption* 2004 SCJ 182; *Bhadain v. The Independent Commission Against Corruption* 2004 SCJ 183; *Bhadain v. ICAC* 2005 SCJ 132; 2005 MR 272. The Court held that the dismissal of the three applicants, the Director of the Corruption Investigation Division, the Chief Investigator and an investigator, was unlawful.

235. *Dabee-Bunjun v. Independent Commission Against Corruption* 2010 SCJ 266 (ICAC's refusal to renew its Chief Legal Adviser's contract was not unlawful). In *Dabee-Bunjun v. Independent Commission against Corruption* 2011 SCJ 23, the application to appeal to the Privy Council was dismissed. *Bisasur v. The Independent Commission Against Corruption* 2014 SCJ 189 (for terminating Deputy Commissioner of ICAC's contract of employment). In *Taujoo v. The State & Anor* 2013 SCJ 332, the former Deputy Commissioner's position was phased out by an amendment to POCA.

improperly conducting the identification parade²³⁶ leading to the acquittal of the accused. In one case, the device that ICAC officials gave to a complainant to record the conversation with the accused did not function properly and the recording was unintelligible.²³⁷

III. CONCLUSION

Although most of the accused have not been high profile public officials, there have been a few exceptions where senior public officials have been prosecuted under POCA. These have included a vice Prime Minister and Minister of Finance who was prosecuted for conflict of interest,²³⁸ Chairman of the Mauritius Ports Authority,²³⁹ and the Assistant Commissioner of Police.²⁴⁰ The prosecution of senior public officials for corruption could be attributed to, inter alia, the fact that there is no political influence in the decisions that ICAC makes. ICAC also receives the funds it needs to conduct its operations. And it would appear that it incurs a lot of expenses in the process and that the money comes from the national budget as opposed to donors. This is because the Supreme Court observed that ICAC 'is a publicly funded institution, drawing for its heavy expenses, on the pockets of the citizens of this country.'²⁴¹

One of the issues that have consistently emerged during the investigations of corrupt activities relates to the use of traps or undercover operations. Some of the accused were arrested after a trap had been set by the ICAC officials. In some cases, the accused have raised the issue of whether evidence obtained through entrapment is admissible. For example, in *Police v. Kiran Kumar Burhoo*²⁴² where ICAC officials instructed the complainant how to take a bribe to the accused and when the accused received the money from the complainant he was arrested by the ICAC officials. The accused's lawyer argued that:

That this was a case of 'entrapment or a shameful operation' and that entrapment was condemned by law... [T]he sting operation was planned as ICAC officers were keen to obtain results and the prosecution was based on entrapment. All the details of the sting

236. *ICAC v. Doyal*, *supra* note 28, at 6.

237. *Police v. Charlot*, *supra* note 69.

238. *Police v. Jugnauth Pravind Kumar*, *supra* note 19.

239. *Ahmine v. Chady & Anor*, *supra* note 178.

240. *Independent Commission Against Corruption v. Suneechara Oozageer* 2006 INT 190.

241. *Bhadain v. ICAC*, *supra* note 234; 2005 MR, *supra* note 234, at 20.

242. *Police v. Kiran Kumar Burhoo*, *supra* note 20.

operation were given to the complainant. Everything was done to trap the accused.²⁴³

The Court held that:

Indeed entrapment is one method by which executive agents of the state misuse the coercive law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment occurs where agents of the state, mostly police officers, lure or incite or entice or instigate citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. Was the prosecution here founded on entrapment? In this Court's view, far from it. We note here that by the time of the much-decried sting operation, the complainant had already reported an actual incident of a public official soliciting of a bribe from him. True it was the completion of the offence took place after the ICAC became involved. However, it was a fact that the completion would have occurred with or without such involvement.²⁴⁴

It appears that had the court found that there had been entrapment, it would have held that the evidence in question was inadmissible and the accused would have been acquitted. In *Parayag v. The Independent Commission against Corruption*,²⁴⁵ the appellant argued that he had been arrested because of a trap set by ICAC officials and therefore the evidence of his involvement in the alleged corrupt activities should have been excluded. In dismissing his appeal, the Supreme Court held, inter alia, that:

We are satisfied that the commission of the offence by the appellant has not been brought about by the 'state's own agents'. The appellant already had the intent to commit the crime and the police officers had no role to play in the formation of his intent. The present case is certainly not one where the police officers themselves lured the appellant into committing an act forbidden by the law and then prosecuted him for doing so. There is absolutely no evidence on record showing that the officers enticed the appellant to commit an

243. *Id.*, at 7.

244. *Id.*, at 7.

245. *Parayag v. The Independent Commission Against Corruption*, *supra* note 56.

offence he would not otherwise have committed.²⁴⁶

In the light of the fact that some corrupt activities may not easily be investigated unless traps or undercover operations are used, there may be a need for the legislature in Mauritius to address the issue of the admissibility of evidence obtained through entrapment. Some countries in Africa, such as South Africa,²⁴⁷ have legislative provisions which govern the admissibility of evidence obtained through traps or undercover operations.

246. *Id.*, at 9.

247. See section 252A of the Criminal Procedure Act, 51 of 1977.