

Police vs Yogida Sawmynaden - Judgment

2024 INT 115

POLICE vs YOGIDA SAWMYNADEN (Judgment)

THE INTERMEDIATE COURT OF MAURITIUS (Criminal Division)

In the matter of:-

Cause Number: 363/23

POLICE

VS

YOGIDA SAWMYNADEN

JUDGMENT

I. THE CHARGE

A. THE INFORMATION

1. The Accused stands charged under two counts of the information.
2. Under **Count one**, Accused is charged with the offence of 'forgery in a private writing' in breach of **sections 108(b), 111, 121 of the Criminal Code**. The Count reads as follows:

"That on or about the 28th January in the year 2020, in the district of Plaines Wilhems, at Office of Ministry of Commerce and Consumer Protection, Sicom Tower, Ebene, one Yogida Sawmynaden, then aged 46 years, Member of Parliament, residing at Morc. Medine, Floreal, did wilfully and unlawfully commit a forgery in a private writing, to wit declaration form dated 28.01.20."

The said forgery has been committed by fabricating an obligation and such act was of a nature to cause prejudice."

3. Under **Count two**, Accused is charged with the offence of 'making use of a forged private writing', in breach of **sections 108(b), 111, 112 and 121 of the Criminal Code**. The Count reads as follows:

“That on or about the 28th January in the year 2020, in the district of Plaines Wilhems, at Office of Ministry of Commerce and Consumer Protection, Sicom Tower, Ebene, one Yogida Sawmynaden, then aged 46 years, Member of Parliament, residing at Morc. Medine, Floreal, did wilfully and unlawfully make use of a forged private writing knowing it to be forged, to wit declaration form dated 28.01.20.”

“The said forgery has been committed by fabricating an obligation and such act was of a nature to cause prejudice.”

4. Accused has pleaded not guilty to the two counts and was represented by Counsel. Prosecution’s case was conducted by Counsel.

B. THE PARTICULARS

5. On 12th September 2023, Learned Counsel for Defence moved for particulars on the nature of the obligation and the prejudice, in relation to both counts. Learned Counsel for Prosecution provided the particulars, as follows:
 - a) The obligation averred is in the nature of engaging the State to pay to the complainant, the Constituency Clerk Allowance on a monthly basis by way of crediting the Accused’s salary or remuneration with the said allowance;
 - b) The prejudice averred is against the State. It is a financial prejudice in the sum of the Constituency Clerk Allowance which was credited to Accused’s salary from January 2020 to July 2020; and
 - c) The date is on or about 28th January 2020.

II. CASE FOR THE PROSECUTION

6. The case for the Prosecution is that the Accused has committed a forgery in a private writing by filling in the Constituency Clerk Declaration Form dated 28th January 2020 (**Document AD**) and declaring therein that Mrs Sakuntala Kistnen, witness no.3, was employed as his Constituency Clerk from January 2020, when in truth the said Mrs S. Kistnen was not employed as the Constituency Clerk of the Accused. It is also reproached to the Accused that he made use of the said document. Prosecution’s case is based on the following evidence:

Witness No. 3, Mrs Sakuntala Kistnen (W3)

The declarant

7. **W3** is the declarant in the present matter. She testified in creole. Her testimony is to the effect that she resides at Montagne Ory and was married to late Mr Soopramanien Kistnen since 2002. She further stated that:
 - i. She does not work currently but used to work before her marriage. Her husband was a ‘contracteur’ and owned a company named ‘Rainbow

Construction'. Her husband used to do several activities including social work, and when people were facing problems, he used to help them. Mr Soopramanien Kistnen was also an activist for the Mouvement Socialiste Militant (MSM) political party. He was 'enn agent MSM'.¹ He was a political activist in Moka, in constituency number 8, and he used to organise meetings for the Accused.

- ii. W3 stated that she never had any conversation with the Accused. Her husband and the Accused shared a strong friendship since around 2010. Mr S. Kistnen was organising political meetings for the Accused before the general elections of November 2019. W3 used to see the Accused in meetings but never had any conversation with him.² Her husband and Accused used to have phone conversations nearly every morning.
- iii. W3 was not working in 2020, she used to prepare food for religious events on a small scale and earn a small amount of money. In March 2020, during the COVID-19 lockdown in the country, given that her husband was not working, she made an application to the Mauritius Revenue Authority (the 'MRA') under the COVID-19 Self Employed Assistance Scheme (**hereinafter referred to as the 'SEAS'**). The application was done on her behalf by her husband on latter's mobile phone³ (**Document N**). She stated that her husband got a message on the phone by the MRA to the effect that she was not eligible for the said scheme. W3 explained that her husband was angry and she was shocked too, but they decided to look into the matter later. Her husband passed away in October 2020.⁴
- iv. After her husband had passed away, W3 came to know through the media that she was supposedly employed as Constituency Clerk for the Accused. Thereafter, she went to the MRA and the National Pensions Fund (NPF) offices to check same, and was informed thereat that she was employed as Constituency Clerk for the Accused. She stated that she never did the said job nor was she paid any allowance. W3 produced her three bank account statements for the period 01/01/20 to 28/12/20 (**Documents B, C and D**), which showed no funds credited by Accused in relation to the Constituency Clerk Allowance.
- v. W3 stated that her husband and herself were facing financial difficulty since prior to the lockdown and that her husband had incurred debts. She stated that in January 2020, her husband asked her to send a photograph of her National Identity Card (NIC) on Accused's phone number as the latter would get W3 a job at the Mauritius Broadcasting Corporation (MBC).⁵

¹ Page 5 of proceedings dated 21/02/24

² Page 9 of proceedings dated 21/02/24

³ Pages 11 and 13 of proceedings dated 21/02/24

⁴ Page 14 of proceedings dated 21/02/24

⁵ Page 34 of proceedings dated 21/02/24

- vi. She denied having participated in vaccination of old persons and in food distribution activities.⁶ She explained the strong bond between the Accused and her husband as being like “*calecon chemise*”.⁷ She never had any conversation with Accused, apart from once in July 2020 through her phone when her husband was missing. Accused called her saying a client was looking for her husband.
- vii. During cross examination, W3 explained that in October 2020, two days after the funeral of her husband, a journalist came to her place and asked her if she had ever worked as Constituency Clerk for Accused, to which she said she did not know. In December 2020, she went to the MRA and NPF offices to verify this. When she became aware of same, she lodged a private prosecution before the District Court of Port Louis PCN 10282/20, dated 21st December 2020. She explained that by the time she came to know that she was employed as Constituency Clerk of the Accused, her husband had already passed away⁸ and that during the time her husband was alive, he did not know about it.
- viii. W3 was confronted with an affidavit dated 21st December 2020 (**Document F**), which she solemnly affirmed in the case of the private prosecution mentioned above. She stated that the content of paragraph 6 therein is ‘*fausse*’ and that it was only after the demise of her husband that she became aware that Accused had employed her as Constituency Clerk.
- ix. Regarding the Lease Agreement dated 11th January 2013 (**Document E**), signed between Accused and herself, W3 explained that all procedures for the lease were entailed by her husband. She said that she never had any conversation with Accused on it.⁹
- x. W3 had saved Accused’s number on her phone as ‘*Yogida bureau*’ since January 2020. Her husband got ‘*contrats drain*’ through Accused. She had accompanied constituents to the Citizens Advice Bureau twice to meet with Accused and she was present during the meetings.

Witness No.1, DI Ramkalawon (W1)

8. **W1** recorded and produced five defence statements of the Accused (**Documents H to H4**). During cross-examination, W1 produced the ten cheques (**Documents J, J1 to J9**), which Accused produced to police and which are referred to in his defence statement (**Document H4**) at Folio 20/527710. W1 further stated that Accused gave his consent to the police to obtain a Judge’s Order, and that Accused voluntarily provided to the police his itemised bill of outgoing calls on his phone number. W1 stated he is not aware of the incoming calls on Accused’s mobile phone.¹⁰ He

⁶ Page 35 of proceedings dated 21/02/24

⁷ Page 35 of proceedings dated 21/02/24

⁸ Page 47 of proceedings dated 21/02/24

⁹ Page 54 of proceedings dated 21/02/24

¹⁰ Page 14 of proceedings of 04/03/24

explained that since there is no itemised bill regarding incoming calls on Accused's phone number in the police file, he would not know if any call was made by W3 and her husband on Accused's phone number. During re-examination, W1 explained that as per the itemised bill (**Document R**) there has been no call made from the phone of Accused to that of W3, from 2nd December 2019 to 14/07/24.¹¹

Witness No. 2, Inspector Seebaruth (W2)

9. **W2** produced five defence statements taken from Accused (**Documents K, K1 to K4**). He was shown a cheque dated 31st January 2020 (**Document AK10**) emanating from the Accused, communicated by the defence to prosecution, to which he stated that he had never seen this before.

Witness No. 6, Mr T. N.K. Ramanah (W6)

Representative of the Ministry of Social Integration, Social Security and National Solidarity

10. **W6** stated that he was posted at the contribution plan of the Ministry of Social Integration, Social Security and National Solidarity in 2020. He further stated that as from 1st January 2018, the MRA gives an Employer Registration Number to the employer.¹² Once the returns are submitted to the MRA and the payments are made to the MRA, the MRA sends them to his Ministry. As per his records, there is an Employee Registration No. 1090062 related to the Accused. The salary on which the contributions were calculated, was in relation to Accused for W3, in the amount of Rs 14,790 monthly. The Ministry does not have information in what capacity W3 was employed from January 2020 to July 2020¹³
11. W6 produced the National Pension Account in relation to W3, which gives the history regarding all the employers who have paid contributions to the National Pension Fund on her behalf (**Document L**). As per said document, the last employer is the Accused. The document provides for the total amount paid for the year 2020 in relation to W3.¹⁴ W6 also produced the National Pension Account (**Document L1**) in relation to W3, showing a breakdown of contributions paid by the Accused as employer, from January 2020 to July 2020 in the amount of Rs 1,331 monthly, which has been submitted to the MRA.

Witness No. 7, Mrs P. Puholoo (W7)

Representative of the Mauritius Revenue Authority

12. **W7** stated that in 2020, she was posted at the MRA and that the SEAS was implemented by the Government following the COVID-19 lockdown period and the MRA was the authority to implement the scheme (**Document M**). The purpose of the scheme was to assist self-employed persons who had suffered a loss of revenue due to the lockdown period. The application was to be made online only on the MRA

¹¹ Page 25 of proceedings of 04/03/24

¹² Page 43 of proceedings of 04/03/24

¹³ Page 43 of proceedings of 04/03/24

¹⁴ Page 40 of proceedings of 04/03/24

website. The applicant had to insert his or her NIC number, and mobile phone number. The application had to be filled in and submitted electronically to the MRA. If the application was approved then financial support was provided to the applicant. The scheme was only for the COVID period. The total amount which would be provided to each eligible applicant for the whole period was Rs 12,750.¹⁵

13. W7 explained that an applicant can view his or her status of the application on the MRA website using his mobile number and NIC number. If the financial support is rejected, this will be displayed on the system to the effect that the applicant has not passed the eligibility criteria. No reason is displayed on the MRA website for the rejection of the application.¹⁶ In order to know why an application had been rejected, an applicant would have to send an email to the MRA, or make a phone call to the MRA help desk or call in person at the MRA Head Office. These are the only three ways to know of the reason for any rejection of an application. No message is sent by the MRA.

14. She stated that an application was made by W3 online on 4th April 2020 on the MRA website for the scheme (**Document N**). The said application was processed and rejected by the MRA as W3 did not pass the eligibility criteria inasmuch as W3 was already an employee.¹⁷ W7 has no information as to whether W3 sent an email to MRA or called the MRA help desk or called personally at the MRA to know the reason why her application was rejected. W7 further stated that the MRA received returns under the National Pensions Act of 1976 in relation to W3, filed by the employer, that is the Accused (**Document P**). She explained that the Employer Registration Number on the form is 01090062. W7 also produced certified copies of the monthly contribution for January 2020 to July 2020 from the Accused as employer, in relation to the employee, W3 (**Document Q**).¹⁸ On the contribution return, Document Q, there is no information in what capacity W3 was employed. During cross examination,¹⁹ W7 confirmed that MRA does not send any message to applicants whose applications have been rejected.²⁰

Witness No. 11, Ms P. Rengasamy (W11)
Representative of the Mauritius Telecom

15. W11 produced the itemised bill in relation to the outgoing calls made from the phone number 52565969, belonging to the Accused to phone numbers 58020801 (W3) and 58276858 (W3's husband) for the period December 2019 to July 2020 (**Document R**). W11 also stated from that from 2nd December 2019 to 14th July 2020, there has been no outgoing call from 52565969 to 58020801.²¹

¹⁵ Page 49 of proceedings of 04/03/24

¹⁶ Page 49 of proceedings of 04/03/24

¹⁷ Page 52 of proceedings of 04/03/24

¹⁸ Page 55 of proceedings of 04/03/24

¹⁹ Page 58 of proceedings of 04/03/24

²⁰ Page 60 of proceedings of 04/03/24

²¹ Page 6 of proceedings of 04/03/24 (afternoon)

16. During cross examination, W11 stated that to obtain the list of calls made by numbers 58020801 and 58276858 to the phone number of Accused that is 52565969, a Judge's Order would be required as they are incoming calls. There was no such Judge's Order. She also stated that there is also no Judge's Order to disclose incoming and outgoing calls made on the numbers 58020801 and 58276858.²² She explained that Document R shows the date and time calls were made by the Accused, the mobile number he used and who he was calling as well as the duration of the calls in seconds. For SMS, it is considered as one second. The last column shows the relay station that registers the call.²³

Witness No. 5 Mrs N. Ramasamy (W5)

Representative of the Ministry of Commerce and Consumer Protection

17. **W5**, duly deputed by the Ministry of Commerce and Consumer Protection to depone in the case, stated that in 2020, she was posted at the said Ministry as Assistant Manager, Financial Operations. She confirms **Document AD** as being the original document sent to the Finance Section of the Ministry, by Accused in his capacity as the then Minister, dated 28th January 2020. It mentions that Accused was employing W3 as his Constituency Clerk, and her employment was to take effect as from January 2020. She stated that Document AD mentions the residential address, date of birth and NIC number of W3, and a photocopy of the NIC of W3 is attached to the form. The form was submitted by the Accused to the Finance section of the Ministry and the Ministry submitted same to the Clerk of the National Assembly.²⁴

18. She explained that the Constituency Clerk Allowance is paid by virtue of a departmental warrant that is issued by the National Assembly to the respective Ministries on yearly basis. The allowance is paid when the Minister informs the Ministry of the employment of a Constituency Clerk, through the declaration form.²⁵ The departmental warrant is the authority by which the National Assembly authorises any Ministry to debit funds. These departmental warrants (**Documents V and W**) allowed the Ministry of Commerce and Consumer Protection to use the funds from the budget of the National Assembly to pay the Constituency Clerk Allowance in the pay packet of the Accused.

19. W5 stated that in 2020, the Constituency Clerk Allowance per month was Rs14,790, which sum was credited in the pay packet of the Accused. On the payslip of latter, it appeared as 'Clerk Allowance', with payment code 1385 (**Document S**). W5 produced the monthly contributions that were made by the Accused, when W3 was employed as Constituency Clerk between January 2020 to July 2020 (**Document T**). She stated that in August 2020 there was no contribution paid in respect of W3. She also identified an original letter submitted to the Ministry by the Accused, dated 20th July 2020, informing the Ministry that W3 would no longer be employed as his

²² Page 10 of proceedings of 04/03/24 (afternoon)

²³ Page 11 of proceedings of 04/03/24 (afternoon)

²⁴ Page 6 of proceedings of 11/03/24

²⁵ Page 7 of proceedings of 11/03/24

Constituency Clerk as from August 2020. **(Document U)** Hence, the Constituency Clerk Allowance was not included in the payslip of the Accused as from August 2020.

20. During cross examination, W5 stated that Accused was paid the Constituency Clerk Allowance in his pay packet because of the declaration form. Accused was Minister of Commerce and Consumer Protection till February 2021, when he resigned. Also, when a person is a Minister, the departmental warrant is submitted to his Ministry. When someone is only a Member of Parliament, the National Assembly itself deals with such payment. W5 confirmed that as from August 2020 to February 2021 whilst Accused was still Minister of Commerce and Consumer Protection, there was no payment of Constituency Clerk Allowance in his pay packet and latter did not appoint any other Constituency Clerk.²⁶

Witness No. 4, Mrs B. S. M. Lotun (W4)
Former Clerk of the National Assembly

21. **W4** stated that she was formerly Clerk of the National Assembly. She explained that following general elections, an elected member of the National Assembly is eligible to allowances governed by the National Assembly Act No. 21 of 1973, including a Constituency Clerk Allowance. An elected member of the National Assembly wishing to employ a Constituency Clerk has to register the person as his employee with the relevant authorities. W4 also stated that the duties and responsibilities of a Constituency Clerk are not defined in any policy paper to her knowledge.²⁷ However, this job is generally understood to be an employee of the Minister, to assist latter in the discharge of his duties in relation to his or her constituency. The Constituency Clerk Allowance is payable on a monthly basis. It is included in the pay packet of the Minister every month and it is up to the Minister to pay the Constituency Clerk such that the National Assembly has no direct involvement on the payment to the Constituency Clerk.
22. To employ a Constituency Clerk, the Minister has to fill in the Constituency Clerk form, and a copy of the NIC of the person employed has to be attached to the form. W4 produced a template of the said form which is sent to each Ministry **(Document AC)**. The National Assembly does not take any step to inform the person employed as Constituency Clerk that he or she is being employed in that capacity.²⁸ For Members of Parliament who are not Ministers, the National Assembly prepares the payslip which includes the allowances, and pays the allowance to the said member. But for Members of Parliament who are Ministers, it is the Ministry which prepares the payslips. The finance section of the National Assembly sends said money as departmental warrant to the Ministry. She also stated that the Constituency Clerk Allowance from January 2020 to July 2020 was Rs 14,790 plus salary compensation, per month.²⁹

²⁶ Page 21 of proceedings of 11/03/24

²⁷ Page 30 of proceedings of 11/03/24

²⁸ Page 33 of proceedings of 11/03/24

²⁹ Pages 36 and 37 of proceedings of 11/03/24

23. W4 identified the declaration form (**Document AD**), submitted by the Accused who was then Minister of Commerce and Consumer Protection. It is in relation to the employment of W3 as his Constituency Clerk. The form is dated 28th January 2020 and a photocopy of the NIC of W3 is attached to it. It is by virtue of the said form that funds were disbursed for the payment of the Constituency Clerk Allowance in the pay packet of the Accused. W4 produced the two departmental warrants (**Documents AE and AF**), by virtue of which the funds for the payment of the Constituency Clerk Allowance were disbursed from the budget of the National Assembly to the Ministry of Commerce and Consumer Protection for the period January 2020 to July 2020.
24. Under cross examination, W4 explained that in July 2020, Accused informed his Ministry that he would no longer require the services of W3 as Constituency Clerk. She also stated that Accused resigned as Minister in February 2021 and sat as Honourable Member of Parliament, and he did not fill in any other declaration form regarding employment of another Constituency Clerk.³⁰

Witness No. 8, Mr P. C. Bissessur (W8)
Financial Operations, the National Assembly

25. **W8** was the Assistant Manager, Financial Operations at the National Assembly in 2020. He confirmed in Court that Accused held the ministerial portfolio of the Ministry of Commerce and Consumer Protection between January 2020 and July 2020, and that the Constituency Clerk Allowance that were disbursed by virtue of the two departmental warrants **Documents AE and AF**, was included in the pay packet of the Accused, on a monthly basis. He also confirmed that when a Constituency Clerk is employed, there are statutory contributions to be paid to the MRA. He explained that it was up to each Ministry to include in the pay packet of each Minister, the Constituency Clerk Allowance on a monthly basis when the Minister informed that he was employing a Constituency Clerk. He further explained that if Accused had not employed a Constituency Clerk, the Constituency Clerk Allowance would not have been included in his monthly pay packet.

Witness No. 10, Ms A. M.B.O. Niclair (W10)

26. **W10** explained that in 2020, she was posted at the Ministry of Information Technology, Communication and Innovation. She produced a summary of payments of Constituency Clerk Allowance paid to the Accused for the period January 2017 to December 2019 (**Document AH**). During cross examination, she stated that as per Document AH, from May 2018 to December 2018 no Constituency Clerk Allowance was paid to the Accused who was then the Minister of Information Technology, Communication and Innovation.

III. CASE FOR THE DEFENCE

³⁰ Page 46 of proceedings of 11/03/24

27. After the close of Prosecution's case. Accused elected not to give evidence in Court, as he was duly entitled to. Learned Defence Counsel thereafter, called three defence witnesses.

(a) Defence Witnesses

- i. The Court Manager of the District Court of Port Louis 2nd Division produced a certified and true copy of the information lodged before the Port Louis District Court bearing Cause Number PCN 10282/2020, regarding a private prosecution lodged by W3 against the Accused on 21st December 2020, with an attached affidavit solemnly affirmed by W3 before the Court Manager and also a copy of summons to party charged (**Document AJ**).
- ii. The representative of Hong Kong and Shanghai Banking Corporation Ltd (HSBC) produced certified true copies of eleven (11) cheques signed by Accused (**Documents AK, AK1 to AK10**), respectively. Certified copies of ten (10) of these cheques were initially produced as **Documents J, J1 to J9**.
- iii. The representative of the Honourable Master and Registrar of the Supreme Court produced a Plaint with Summons in the matter of Mrs Sakuntala Kistnen against the Accused dated 28th October 2022 and the answers to particulars thereof, collectively marked as **Document AL**.

(b) Out of Court Statements of Accused

28. The version of Accused is found in his ten (10) unsworn defence statements (**Documents H, H1 to H4 and Documents K, K1 to K4**). Accused has denied the charges. In a nutshell, Accused stated the following in his statements:

- (a) Late Mr Soopramanien Kistnen, the husband of W3, was a political agent for the Mouvement Socialiste Militant (MSM) and he used to organise political meetings on behalf of the Accused in latter's constituency between 2014 and 2019. Accused used to provide financial assistance to Mr Kistnen as latter was always in financial difficulties. In 2013, Accused leased his property to W3, and latter did not pay the rent but Accused never claimed it nor sued her. In 2014, Accused sold his agricultural land to Mr Kistnen at a very reduced price. Over the years, Accused had developed a strong friendship with Mr Kistnen and trusted the latter.
- (b) In December 2019, during a 'get together' after the general elections, Mr Kistnen requested Accused to appoint W3 as his Constituency Clerk and this happened in front of W3. W3 agreed to it. Accused told them that he would look into the matter after the New Year festivities. In January 2020, Mr Kistnen asked Accused anew about the job, to which Accused requested for the NIC copy and bank details of W3. Mr Kistnen informed Accused that the allowance had to be paid in cash inasmuch as Mr Kistnen was highly indebted and was being chased by unpaid creditors. As such, on 28th

January 2020, Accused filled in the Constituency Clerk Declaration Form, attached the NIC copy of W3 and sent it to the Clerk of the National Assembly through his Ministry.

- (c) Accused was always communicating with Mr Kistnen regarding W3's duties as Constituency Clerk. Mr Kistnen told Accused that he would assist W3 in performing the job. W3 participated in two activities namely, food distribution and vaccination campaign. Mr and Mrs Kistnen were reporting to Accused daily, several times a day on his mobile number 52565969, from Mr Kistnen's phone number 58276858. Accused informed the police that he had no objection that a Judge's Order be sought of the itemised bill for his phone number regarding his communications with Mr and Mrs Kistnen.
- (d) On several occasions from January 2020 till the end of June 2020, Mr Kistnen contacted Accused to ask for advance payment on the Constituency Clerk Allowance either when he was in financial difficulty or when he was being chased by his creditors. Accused gave the advance payment to Mr Kistnen to be handed over to W3.
- (e) On 15th July 2020, Accused called W3 on her phone number to ascertain the whereabouts of Mr Kistnen as latter was being looked for by a client. Subsequently, Accused started receiving adverse reports on W3 and hence, on 20th July 2020, he terminated the employment of W3 as his Constituency Clerk.
- (f) Accused explained that it was through Mr Kistnen that he was apprised of the works carried out by W3 in his constituency during the lockdown period. He found it normal for Mr Kistnen to collect the allowances on behalf of latter's wife. His relationship with Mr Kistnen was based on total trust and he did not require any acknowledgment from Mr Kistnen that the money would reach W3. He produced to the police 10 cheques regarding the financial assistance he provided to Mr Kistnen in the past. W3 was attending political 'get togethers' and regularly accompanied constituents when Accused was receiving members of the public. W3 shared her phone number with Accused. Accused was in regular contact with Mr and Mrs Kistnen. Accused finds W3's application for the SEAS to be of utter bad faith inasmuch as latter was employed as his Constituency Clerk during that period.

IV. SUBMISSIONS BY DEFENCE

The preliminary legal issues

29. At the outset of his submissions, Learned Defence Counsel raised two points in law, namely:

- (a) As per the evidence on record, the acts of forgery and making use of forged document are indivisibly linked such that the '*fait d'usage*' no longer exists and hence, prosecution ought to have elected one count only. The Defence relied essentially on

the case of **Maudarbux v The Queen**³¹ to submit that in the present matter, if there was forgery, then given that the Accused filled in the declaration form on 28th January 2020 and sent it to be processed on same day, this amounts to one single act and hence, he should not have been prosecuted under Count 2.

- (b) Under Count 1 of the information, the Defence's contention is that the element of fraudulent intent has not been averred. Learned Defence Counsel also submitted that it was incumbent on prosecution to aver in what manner Accused fabricated an obligation. As such, there is no mention on the way in which there has been alteration of truth. Reference was made to the case of **Bheekhan vs The Queen**,³² **Bhunjun vs The Queen**³³ and **Burokur vs Queen**³⁴ to submit that Count 1 discloses no offence and should be quashed.

On the merits

30. In a gist, Learned Defence Counsel's submissions are:

- (a) The right to silence is an absolute right under **section 10(7) of the Constitution** and failure by an accused to give evidence shall not be subject of any comment by prosecution. Reference was also made to **section 184(2)(b) of the Courts Act**. Accused chose not to give evidence and it is his right.
- (b) It is not disputed by defence that Accused filled in the Declaration Form to appoint W3 as his Constituency Clerk. Accused then sent same to be processed. Accused got the allowance of the Constituency Clerk in his pay packet and same is evidenced in his payslips from January 2020 to July 2020, until Accused did no longer require her services. Court will have to weigh the version of W3 and that of the Accused and the question is whether W3 was in truth and in fact, the Constituency Clerk of the Accused at the material time. The Magistrate is sovereign in the appreciation of facts and it is for the Magistrate to assess the demeanour of W3. There are major contradictions in the version of W3.
- (c) The police had carriage of investigation. There is no Judge's Order in relation to incoming calls on the phone number of the Accused made from the phone numbers of Mr and Mrs Kistnen, that is, 58276858 and 58020801, respectively. This would have enabled Court to know whether Accused is telling the truth. Accused himself informed the police to seek for such Judge's Order. Accused voluntarily remitted his itemised bills regarding outgoing calls from his phone number.

³¹ (1973) SCJ 107

³² (1976) MR 3

³³ (1955) SCJ256

³⁴ (1992) SCJ 118

- (d) W3 said that her husband got a message from the MRA on his phone to the effect that W3 was not eligible for the said SEAS. However, W7 stated that the MRA was not sending any message by phone. Also, W3 inserted false information in her SEAS application.
- (e) W3 stated in Court that she came to know she was employed as Constituency Clerk in October 2020, when two days after the demise of her husband, a journalist came to her place and informed her of same. Later, she stated that she came to know of it through the media. W3 was confronted with paragraph 6 of her affidavit dated 21st December 2020 and W3 contradicted herself and this affects her credibility. She admitted that she lied in that affidavit.
- (f) Since the beginning, W3 stated that she never had any conversation with the Accused but in evidence, it came out that Accused went to visit her husband at home, Accused went to see her son at the clinic and she was there. She signed the lease agreement with Accused and met latter during the signature. Her phone contained Accused's phone number saved on the name 'Yogida Bureau'. W3 brought people to the Citizens Advice Bureau twice to meet Accused. Defence contends that W3 cannot say that she doesn't know Accused well the *moreso* as her husband was a close friend of Accused.
- (g) Accused has been consistent in his versions given in his out of court statements. His version on the phone calls with Mr Kistnen on 31st January 2020 is corroborated by the itemised bill. There is no element of fraudulent intent by Accused. If Accused had the fraudulent intent, he would have carried on claiming the allowance and not sent the letter to stop same in July 2020.

V. SUBMISSIONS BY PROSECUTION

31. Learned Counsel for Prosecution submitted as follows:

- (a) It has been established that Accused filled in a declaration form, signed it and submitted it to the Finance section of his Ministry for onward submission to the National Assembly and this was the process in place in order for the Constituency Clerk Allowance to be inserted in the monthly pay packet of the Accused and credited to his bank account and this was done from January 2020 to July 2020. By virtue of the declaration form, the State paid statutory contributions for W3. By doing so, Accused created an obligation as the State was the under a duty to disburse the Constituency Clerk Allowance for W3 to be paid on a monthly basis.
- (b) The only issue to be determined is whether W3 was in fact employed as the Accused's Constituency Clerk.
- (c) There is not a single telephone call made by Accused to W3 during the period 1st January 2020 to 14th July 2020. W3 has been consistent in denying that she was ever

employed as Constituency Clerk for the Accused between January 2020 and July 2020. W3 accompanied constituents to the CAB only twice and at the request of those constituents. W3 also explained the circumstances in which she sent her NIC copy to the Accused. Prosecution submitted that no evidence has been adduced to prove otherwise or to disprove the version of W3.

- (d) As per Document R, Accused effected phone calls to W3 only from 14th July 2020 to 31st July 2020 and they were not calls made in relation to W3's employment as Constituency Clerk. Contradictions are not lies. W3 maintained she got to know the reason why she was ineligible for the SEAS after the date the declaration form was filled in. The contradictions did not destroy her credibility and they are not on the central issue.
- (e) On Accused's contention of cash payments made to Mr Kistnen, prosecution submitted that these cash payments are in random amounts made on random dates and do not relate to the Constituency Clerk Allowance for January 2020 to July 2020. Regarding the payments by cheques, there are pre-2020 cheques and 2020 cheques. Regarding Document AK10, encashed by Accused's bodyguard, Mr Veerabadren, there is no evidence that it was to be remitted to Mr Kistnen. The pre-2020 cheques have no relevance. Cheque marked as Document AK10 is dated 31st January 2020 and the form was filled in on 28th January 2020. There is no link established between Document AK10 and W3 or Mr Kistnen. The 2020 cheque was never produced by Accused during police enquiry.
- (f) In his out of court statements, Accused mentioned only two instances where W3 would have performed the duties as Constituency Clerk. Accused has not provided details of duties performed by W3 as Constituency Clerk. Mr Kistnen cannot assist the defence as he is an absent witness. Accused made a false declaration in the Declaration Form (Document AD). This amounts to fraudulent intent and this caused financial prejudice to the State. Based on evidence on record, prosecution has established a *prima facie* case and Accused's choice not to depone under oath was exercised at his own risk and peril as per **Andoo vs R.**³⁵

32. Regarding the two points in law raised by the defence, prosecution submitted that:

- (a) Prosecution has averred in the information all essential elements of the offence as set out under the sections of the law creating the offence.
- (b) Accused filled in and signed the form. This is the act of forgery. The making use of it occurs when Accused submits it to the Finance Section of the Ministry and the use continues when the form is submitted to the National Assembly. Hence, the two acts are not indivisibly linked.

³⁵ (1989) SCJ 257

VI. THE UNDISPUTED FACTS

33. I have carefully considered and analysed the whole of the evidence on record, as well as the able submissions of both Learned Counsel for the Prosecution and Learned Counsel for the Defence. I shall first, set out the facts which are undisputed in the present case, and which are as follows:

Status of the Accused

34. After the general elections were held in November 2019, Accused was elected Member of the National Assembly and was thereafter appointed Minister of Commerce and Consumer Protection. From the period January 2020 until February 2021, Accused was Minister. He resigned as Minister in February 2021 but remained Member of Parliament. He was returned as a candidate in Constituency number 8.

Relationship of Accused with Mr and Mrs Kistnen

35. W3 is the widow of late Mr Soopramanien Kistnen. Mr S. Kistnen was a political agent for the MSM party in Constituency number 8. Accused shared a strong friendship with Mr S. Kistnen. Latter was organising political meetings for the Accused. They used to talk to each other almost everyday and meet on a very regular basis. In 2020, Mr and Mrs Kistnen were residing in Constituency No. 8. Mr Kistnen passed away in October 2020. Accused came to visit Mr Kistnen at home when latter was unwell and Accused also visited their son at the clinic. In 2013, Accused leased his building to W3. Accused had also sold his plot of land to Mr Kistnen.

Procedure for the employment of a Constituency Clerk

36. In his capacity as Minister of Commerce and Consumer Protection in 2020, Accused was entitled to employ a Constituency Clerk. As per the required procedure to employ a Constituency Clerk, Accused filled in a Declaration Form (**Document AD**) with the name and particulars of his proposed Constituency Clerk, W3. Accused signed the Form and annexed the NIC copy of W3. The Form is dated 28th January 2020. Accused then submitted the Form to the Finance Section of his Ministry for onward submission to the National Assembly. Accused also did needful to register W3 as his employee at the MRA (**Documents P and Q**) and contributed for her pensions as employer at the NPF (**Document L1**).

37. The monthly Constituency Clerk Allowance in the year 2020 was in the amount of Rs14,790 (**Document W**). This amount was credited on a monthly basis to Accused as part of his payslips, from January 2020 to July 2020 (**Document S**). Accused was also paying the monthly contribution to the MRA for the said period in relation to W3

(Document T). On 20th July 2020, Accused informed his then Ministry that W3 would no longer be his Constituency Clerk **(Document U)** and accordingly, as from August 2020, Accused stopped receiving the said allowance in his pay packet and stopped paying the statutory contributions to the regarding W3. Thereafter, Accused did not employ any other Constituency Clerk.

The Declaration Form

38. The writing which is the basis of prosecution's case is the Declaration Form signed by the Accused **(Document AD)**. It was on the faith of this document that the Constituency Clerk Allowance was disbursed in his pay packet.

Telephone communications

39. In 2020, the mobile phone number used by Accused was 52565969, that of late Mr S. Kistnen was 58276858, and the mobile phone number used by W3 was 58020801. A person having his phone number registered at the Mauritius Telecom Ltd can obtain his itemised bill regarding the outgoing calls on his phone number. However, to obtain the list of incoming calls on his or her phone number, a person requires a Judge's Order. In the present case, only the itemised bill regarding the outgoing calls on Accused's phone number is available in the police file. This was provided by Accused during investigation. No Judge's Order was sought by the police regarding incoming calls on Accused's mobile phone number. Also, W3 had the number of Accused saved on her mobile phone.

Cases lodged by W3

40. W3 is the declarant in the present matter and she gave her first statement to the police on 9th January 2021.

41. On 21st December 2020, W3 lodged a private prosecution against the Accused before the District Court of Port Louis 2nd Division bearing Cause Number PCN10282/2020, in which she solemnly affirmed an affidavit **(Document AJ)**.

42. In October 2022, W3 lodged a Plaint with Summons against the Accused before the Supreme Court **(Document AL)**.

VII. THE LAW

UNDER COUNT 1

43. The sections of law under which Accused is charged in relation Count 1 are **sections 108(b) and 111 of the Criminal Code**, which read as follows:

“108. Forgery by private individual of public or commercial writing

Any other person who commits a forgery in an authenticated and public writing, or in a commercial or bank writing -

(a)...;

(b)by fabricating any agreement, condition, obligation or discharge, or inserting it in any such act after it has been completed; or

(c)

shall be punished by penal servitude.”

“111. Forgery of private writing

Any person who by one of the means specified in section 108, forges a private writing, shall be punished by penal servitude for a term not exceeding 10 years.”

UNDER COUNT 2

44. Under Count 2, Accused is charged for making use of the forged private writing, and in relation to this, **Section 112 of the Criminal Code** reads as follows:

“112. Making use of forged private writing

The like punishment shall be inflicted upon any person who makes use of the forged writing, knowing it to be forged.”

VIII. ANALYSIS BY COURT – APPLYING THE LAW TO THE FACTS

LEGAL ISSUES RAISED BY DEFENCE

45. Before analysing the evidence on record, I propose to deal with the following two legal issues raised by Learned Defence Counsel:

- i. **As per the evidence on record, are the acts of filling in the Declaration Form and using it, so indivisibly linked such that they amount to one single act? Should prosecution have elected to prosecute Accused under Count 1 only?**

46. As per the evidence of W5, the then Assistant Manager, Financial Operations Ministry of Commerce and Consumer Protection, Document AD was signed by the Accused and dated 28th January 2020, and was sent to her department by the Accused to be processed, such that the employment of his Constituency Clerk was to take effect as

from January 2020. This is not disputed by Accused. At this stage, I am not dealing with whether the signing and filling in of the Form amount to an act of forgery, but whether there are two separate acts effected by Accused, should a case of forgery be proved.

47. The cases of **Ramdhayan v R**³⁶ and **Maudarbux v The Queen**³⁷ are authority for the proposition that:

“...where the forgery and the making use, although constituted by different and distinct elements, are so inextricably mixed in terms of fact, that is to say where the acts constituting the user are not other than those by which the forgery itself is committed, then the act of use merges with the commission of the act of forgery itself”.

48. The situation is different in the present case. I agree with the Prosecution that the act of filling in and signing the Declaration Form is one act, and the act of sending the form to the Finance Section of the Ministry for onward submission to the Clerk of the National Assembly, to be processed and to give effect to the contents of the Declaration Form is a completely separate act. The two acts are not indivisibly linked. Hence, prosecution is right in averring two different counts in the information.

- ii. **Under Count 1 of the information, should prosecution have averred the element of ‘fraudulent intent’ and the manner in which Accused allegedly fabricated the obligation?**

49. As per **section 125(1) District and Intermediate Courts (Criminal Jurisdiction) Act**, *“the description in the information of any offence in the words of the enactment creating such offence, with the material circumstances of the offence charged, shall be sufficient.”* This section reiterates one of the fundamental principles of our law that all the essential elements of an offence must be averred in the information - **Beekhan v. The Queen**.³⁸ An information should satisfy the constitutional requirement of **section 10 of the Constitution**: A person charged with an offence should be informed in detail of the charge levelled against him so that he can prepare his defence. In this regard, in **Lobogun v The State**,³⁹ the Court held that:

“By virtue of section 10 (2)(b) of the Constitution when read together with section 10 (12) of the Constitution, the appellant can only be charged and convicted in respect of a criminal offence which is created and punishable by law and the information must accordingly formulate a complete statement of all the constitutive elements of this criminal offence as created by law. All the elements of the offence should, for that

³⁶ (1991) SCJ 151

³⁷ (1973) SCJ 107

³⁸ (1976) MR 3

³⁹ (2006) SCJ 227

purpose, be set out with clarity, precision and certainty in the information and should be such as will enable the accused to be informed in detail and exactly which charge he has to meet. This is an essential condition to enable him to prepare an adequate defence in conformity with the requirements of section 10 (2)(b) of the Constitution.” (The underlining is mine).

50. In the present case, Count 1 avers that Accused “*did wilfully and unlawfully commit a forgery in a private writing, to wit declaration form dated 28.01.20.*” It further avers that “*the said forgery has been committed by fabricating an obligation and such act was of a nature to cause prejudice.*”
51. Hence, the wordings of **sections 108(b) and 111 of the Criminal Code**, including the constitutive elements of the offence have been duly averred in Count 1 by Prosecution. Furthermore, upon the motion of Learned Defence Counsel, particulars have been provided by Prosecution on the nature of the obligation averred in the body of the Count 1. Also, the words ‘*wilfully and unlawfully*’ refer to the fraudulent intent. There was hence, no obligation to aver more than what has already been averred in Counts 1 and 2.
52. In light of the above, the two preliminary legal issues raised by the defence do not hold water and they are accordingly, set aside. Having dealt with these preliminary legal issues raised, I shall now turn to the merits, to determine whether or not, the charges of ‘forgery’ and ‘making use of forged document’ have been proved beyond reasonable doubt against the Accused.

MERITS OF THE CASE

COUNT 1 – FORGERY IN A PRIVATE WRITING

A. THE LEGAL PRINCIPLES

53. It is settled law that sections 106 to 111 of our Criminal Code correspond to Articles 145, 147, 148, and 150 of the French Penal Code of 1810. Thus, the different ways in which a forgery may be committed are couched in similar terms as those of their French counterpart in its original form, that is in the pre-1994 French Penal Code. The French version has since, been amended on several occasions. Hence, we can seek guidance from the pre-1994 French doctrine and case law. This has been decided in the cases of **Procureur-Général v Olivier**⁴⁰ and **Ramchurn v R.**⁴¹ These cases have been cited with approval in **Bauhadoor v The State**,⁴² where the Court held:

⁴⁰ (1950) MR 218

⁴¹ (1983) SCJ 433

⁴² (2022) SCJ 149

“We may usefully refer to pre-1994 French doctrine and case-law on this issue since it is well-settled that sections 106 to 111 of the Criminal Code replicate Articles 145, 147, 148 and 150 of the French Penal Code of 1810 (see Procureur-Général v Olivier [1950 MR 218] and Ramchurn v R [1983 SCJ 433]; see also Venchard, Codes Annotés de l’Ile Maurice, Code Pénal, Volume 1).”

54. I also refer to the following extract from **Thalwansing v The Queen**.⁴³

“The definition by our Penal Code, of the crime of forgery and of that of uttering a forged document is as broad as possible. According to Article 108 P.C., any one fabricating an agreement, condition, obligation or discharge, commits the crime of forgery, and, any one making use of a forged writing, knowing the same to be forged, is guilty of the crime of uttering. The jurisprudence of the French Courts and the commentaries of the Penal Code are, however, agreed that the three essential ingredients of the crime of forgery are:1o. The alteration of truth.2o. The intention to do injury (prejudice)3o An injury (prejudice) real or possible.”

55. In **Burokur v R**,⁴⁴ the Supreme Court held that:

“It is trite law that “le faux consiste essentiellement dans une altération de la vérité” and that “il ne peut y avoir faux punissable lorsque l’écrit ne contient aucun mensonge, ne relate que des faits vrais. Il importe peu que celui qui a dressé au fait dresser cet écrit ait eu l’intention de mentir au de causer un préjudice” Garçon Code Pénal Annoté, Art. 145 à 147 notes 27 and 28. At note 29 the learned author quotes what is said to be a classical example given by Julius Claius namely “Il n’y a pas faux punissable lorsqu’on efface une clause dans un acte, si cependant elle n’eut reste pas moins visible.” (The underlining is mine).

56. It is hence, well-settled law that the elements which constitute the offence of forgery are (**Dalloz, Recueil, Faux en Ecriture, note 2**):

*“1° l’altération de la vérité dans un écrit par un des moyens déterminés par la loi
2° l’intention frauduleuse
3° la possibilité d’un préjudice pour autrui”*

⁴³ (1895) MR 26

⁴⁴ (1992) SCJ 118

ANALYSING THE 1ST ELEMENT
HAS THERE BEEN ALTERATION OF TRUTH BY ACCUSED IN THE DECLARATION FORM?

.....

'Faux materiel' or 'Faux Intellectuel'

57. When considering alteration of the truth, which is one of the essential elements of forgery, a distinction has to be made between "*le faux materiel*" which is the actual alteration of the writing and "*le faux intellectuel*" which relates to the contents of the writing drawn on false information.

58. According to **Chauveau Adolphe et Faustin Helie, Théorie du Code Pénal, tome 2, paras. 687, 688, 690, 699, 691 and 701**, the French law has, in articles 145 and 146 of the French Penal Code catered for 2 types of forgery: (i) *Faux matériel* (ii) *Faux intellectuel* .

"690. - Après avoir défini les écritures qui sont réputées publiques, il faut examiner les différentes espèces de faux qui sont commis dans ces écritures par les fonctionnaires publics. La loi a séparé dans deux articles le faux matériel et le faux intellectuel. Le premier est prévu par l'art. 145, ainsi conçu..."

699. - Nous avons vu que les fonctionnaires publics peuvent se rendre coupables de faux, non seulement par l'altération matérielle des actes, mais encore par l'altération intellectuelle des clauses que ces actes, doivent contenir. Cette deuxième espèce de faux est prévue par l'art. 146 portant..."

Faux matériel consists in the 'falsification physique et corporelle d'un écrit ... commis au moyen de l'un des trois procédés énumérés'. Faux intellectuel is committed 'sans laisser aucune trace matérielle apparente. Il consiste dans l'altération, non de l'écriture de l'acte, mais sa substance, non dans sa forme matérielle, mais dans des clauses qu'il doit contenir. Les écritures sont matériellement vraies, mais l'expression en est fausse...(Daloz, Répertoire pratique, v° Faux en écritures, note 95).

59. In a judgment delivered by the Cour de Cassation (**Cass. crim. 24 mai 2000 Bull. crim. n° 203 p.597**), it was held as follows:

'On parle de faux intellectuel lorsque l'on est en présence d'un document dont les mentions comportent une altération de la vérité. Le faux est dit intellectuel lorsqu'il porte sur le contenu d'un acte et ne laisse aucune trace matérielle. (The underlining is mine).

60. In the present matter, prosecution's case is that Accused has committed a '*faux intellectuel*.' Accused as the then Minister of Commerce and Consumer Protection,

was duly entitled to fill in and sign the Declaration Form to appoint a Constituency Clerk. Prosecution's case is that although Accused was entitled to fill in the Declaration Form, which he did, the content averred therein is false, amounting to a *'faux intellectuel.'*

61. Whether the offence deals with a *'faux materiel'* or a *'faux intellectuel'*, the first essential element of forgery to be proved by Prosecution is that there is an alteration of the truth in the document. To determine whether there has been alteration of truth in Document AD, I find it relevant to set out an outline of the contents of this impugned document, so that the averments in the information and the evidence of the witnesses can be put in context.

The Declaration Form (Document AD)

62. The Declaration Form is dated 28th January 2020. It was filled in and signed by Accused and this is the alleged 'private writing' averred in the body of the information under Counts 1 and 2. The contents of it is a declaration made by Accused that he has employed W3 as his Constituency Clerk as from January 2020. Accused has also provided therein the residential address of W3, as well as latter's date of birth, and NIC number. Attached to it is the copy of W3's NIC. Based on the testimonies of W4 and W5, Accused was duly entitled to fill in and sign the said declaration form, and he did so in his capacity as Minister.
63. W4, the then Clerk of the National Assembly produced a bundle of document (**Document AA**), entitled 'MP's Kit' which was given to elected members of the National Assembly following the general elections of 2019.⁴⁵ At Page 3 of Document AA, Members of Parliaments are informed of the forms which they have to fill in and return to the office of the Clerk of the National Assembly, including the said Declaration Form. This document is in fact, entitled 'Constituency Clerk' but same has been referred to as the 'Declaration Form' by Prosecution, and this is not disputed. Subsequently, an allowance for the Constituency Clerk was credited to Accused as part of his pay packet.

Alteration of truth in Document AD - What is the '*mensonge*' reproached to Accused?

64. Having set out the contents of Document, I shall now deal with whether the contents amount to a '*mensonge*' as is being reproached to Accused. On this score, I find it apt to quote **F. Goyet, Code Penal Special, Art. 149, Pg. 111:**

"Le faux est au contraire intellectuel lorsqu'il porte sur le contenu d'un acte et ne laisse aucune trace materielle. C'est alors un simple mensonge qu'aucun indice apparent ne revele." (The underlining is mine).

⁴⁵ Page 2 of Doc AA

65. Prosecution's case is that W3 was never in effect employed as Constituency Clerk of the Accused, and that the Accused has, by signing and filling the form, falsely represented in Document AD that he was employing W3 as his Constituency Clerk. Therefore, the question which needs to be thrashed out is whether or not W3 was employed as the Constituency Clerk for Accused from January 2020 to July 2020. To address this question, it is crucial to assess the overall testimony of W3. As rightly submitted by Learned Counsel for Prosecution, the case for prosecution rests essentially on the testimony of W3. I shall hence, proceed with an analysis of the sworn testimony of W3.

ANALYSING THE TESTIMONY OF W3

66. W3 started testifying on the 21st February 2024 at around 10.10am. Her cross examination started on the same day and carried on until around 1pm. Her cross examination resumed on 28th February 2024 and ended on the same day. W3 was provided with a chair in the witness box, and was allowed to consume water in the courtroom, upon her request.

67. As explained above, to establish that there has been an alteration of truth by Accused in the Declaration Form, it is incumbent on prosecution to prove beyond reasonable doubt that W3 was not employed as Constituency Clerk for the Accused, contrary to what Accused mentioned in the said Declaration Form. W3 has denied having been employed as the Constituency Clerk of the Accused and having obtained any allowance for same. W3 was cross examined by Learned Defence Counsel and the version of the Accused found in his unsworn defence statements was also put to W3.

68. I have had the opportunity to see and assess the demeanour of W3 in Court and I have carefully analysed her overall testimony. I have noted several shortcomings in the version of W3, which I have addressed as follows:

Shortcomings in W3's version

A. W3'S RELATIONSHIP WITH THE ACCUSED AND HER INVOLVEMENT IN POLITICAL ACTIVITIES

i. Meetings and communications

69. In Court, since the beginning, W3 has stated that she never had any conversation with Accused. Upon being asked in Court as to whether she knows the Accused, she replied: *"Non, personnellement mo pas cone li. Mais quand nous ti pe al banne reunions tou sala, li ti laba."*⁴⁶ She further stated: *"Parfois quand mo alle bane*

⁴⁶ Page 6 of proceedings of 21/02/24

*reunions mo trov li comme ca. Mais jamais mone gagn dialogue avec li. Nek de loin mone trouve li comme ca.*⁴⁷

70. However, W3 also testified on the long-standing friendship and close proximity between her late husband and the Accused and stated how they were like '*calecon chemise*' and were talking on the telephone every morning as well as meeting regularly. During cross examination, she explained the involvement of Accused in their life such as the Accused came to visit her husband at home,⁴⁸ visited her son at the clinic and that her husband got "*contrats drain*" through the help of Accused.⁴⁹ W3 was also attending political meetings regularly, which were organised by her husband ("*Mo coner parcequi chaque fois quand ena reunion tousala mo present, mo trouve li, li organiser, li faire tout.*")⁵⁰ She entered into a lease agreement with the Accused in 2013, and met with latter during the signature. She explained having greeted him but did not speak to him regarding anything. However, upon being further cross examined, W3 explained that Accused asked her about the purpose for which she was renting the place, and she replied to the Accused. Accused called her on her mobile phone on 15th July 2020 to find out about her husband, who was then missing. W3 had the phone number of Accused saved on her phone. W3 agreed having accompanied constituents to the CAB to meet with the Accused, albeit on two occasions and that she was present during said meetings.

71. Hence, her testimony as explained above, in relation to the various occasions during which W3 has met with Accused, coupled with the fact that she went to the CAB with the constituents albeit at their request, and she was even present throughout the meetings, is in sheer contradiction with the fact that she never had any communication with the Accused, as claimed by her. As such, from W3's testimony taken as a whole, I am of the view that W3's version that she does not know the Accused personally or that she only used to see latter from far does not hold water. Given the nature of this offence, this is a major contradiction, and it goes to the core of W3's credibility.

ii. **W3's involvement in political activities**

72. During cross examination, W3 stated that on two occasions she brought constituents to the CAB to meet the Accused, and that she was present during the said meetings. I find that there can be no reason as to why W3 would randomly accompany constituents to go to the CAB, a place where Members of Assembly receive constituents and deal with their problems. W3 stated that she went with the constituents "*pour ene travail.*"⁵¹ She stated that she accompanied the constituents

⁴⁷ Page 9 of proceedings of 21/02/24

⁴⁸ Pages 63 and 64 of proceedings 21/02/24

⁴⁹ Page 65 of proceedings of 28/02/24

⁵⁰ Page 8 of proceedings of 21/02/24

⁵¹ Page 18 of proceedings of 28/02/24 (afternoon)

twice upon their requests. It is doubtful that the constituents would request W3 to accompany them to the CAB to meet a Minister if W3 was not conversant with or involved in the political activities of the Accused. W3 also stated she used to attend the political meetings of Accused. All these show W3's involvement in the political activities of the Accused. W4 did explain that the job of a Constituency Clerk is understood to be an employee of the Minister, to assist latter in the discharge of his duties in relation to his or her constituency.⁵² From the overall testimony of W3, it is clear therefore, that W3 was well aware of and involved in the political activities of Accused. Hence, W3's testimony on the fact that she was not involved with Accused and his political activities cannot be believed and her version that she never had any "dialogue" with the Accused does not stand.

73. I note here that during her submissions, Learned Counsel for Prosecution stated that Accused has enumerated only two activities whereby W3 had allegedly assisted him in the constituency.⁵³ On this, I have to add that the burden of proving that W3 was not employed as the Constituency Clerk of the Accused lies on the Prosecution. There is no burden on Accused to prove that W3 worked for him in that capacity. Furthermore, Court takes judicial notice of the fact that from March 2020 to June 2020, the country was under COVID-19 lockdown period, meaning that there were restrictions on many activities to be carried out during that period.

B. TELEPHONE COMMUNICATIONS

74. Regarding the telephone communications between Accused and W3, Prosecution adduced evidence of only the list of outgoing calls made from Accused's number 52565969 for the period December 2019 to July 2020 to the phone numbers of Mr and Mrs Kistnen, which list was provided to the Police by Accused himself (Document R). W11 explained that in the present matter, there has been no Judge's Order in relation to the incoming calls on the phone number of the Accused. This was also confirmed by the Enquiring Officer, W1. Accused informed the police that he had no objection for such Judge's Order to be sought, yet same was not sought for.

75. In the absence of an itemised bill in relation to the incoming calls on Accused's phone number, Court is left in the dark as to whether Accused used to receive calls from W3, which is an important part of prosecution's case, given that the issue to be thrashed out is the employment of W3 as the Constituency Clerk of Accused. This area has not been investigated into by the police and this raises doubts on prosecution's case that there has been an alleged lack of phone communication between the Accused and W3.

76. Furthermore, W3 stated that when Accused called on her phone on 15th July 2020, she spoke to him only once. However, during cross examination, she was confronted

⁵² Page 30 of proceedings of 11/03/24

⁵³ Page 30 of Prosecution's written submission

with several other phone calls made by Accused to her mobile phone, as well as the calls' duration, as summarised in the table below⁵⁴:

Outgoing calls from 52565969 (Accused) to 58020801 (W3)⁵⁵

Date	Time	Call duration
15 th July 2020	10.34hrs	76 seconds
	10.39hrs	40 seconds
	11.04hrs	124 seconds
	11.54hrs	93 seconds
	15.43hrs	159 seconds
	17.02hrs	121 seconds
	18.31hrs	324 seconds
	19.29hrs	112 seconds
17 th July 2020	8.14hrs	60 seconds
	16.38hrs	84 seconds

77. Upon being confronted with the above call details, W3 then stated that the remaining calls were not answered by her and might have been answered by her nephew instead. She was not sure about this too, although she stated that her mobile phone used to remain with her. The manner in which W3 answered on this issue is also of relevance.⁵⁶

Q. Ou portable ress ar kisanla?

A. Ar moi

Q. AR ou?

A. Oui

Q. Ca troisieme call le 15 juillet 2020 11hr04 koz pou 124 secondes, kisanla kinne koze?

Pas ou?

A. Pas moi

Q, Pas ou?

A.Kapav mo ene neveu

Q. Kapav ou neveu? Ou donne ou neveu pour repond?

A. Oui kapav.

⁵⁴ Pages 74 and 75 of proceedings of 21/02/24

⁵⁵ Extracted from Document R

⁵⁶ Page 74 of proceedings of 21/02/24

78. As per Document R, Accused called on W3's mobile phone number on 8 occasions on 15 July 2020 and on 2 occasions on 17th July 2020. W3's explanation is that regarding the first call, Accused called her to query about the whereabouts of her husband given that Mr Kistnen was missing. W3 stated that on 15th July 2020, she even went to look out for her missing husband.⁵⁷ However, W3 did not provide for any reason as to why she allegedly did not answer Accused's calls made so many times on that day.
79. Given the circumstances in which Accused was calling W3, and the fact that W3 was herself looking for her missing husband, as well as the proximity of Accused with the Kistnen family, and the number of times Accused had called on her mobile phone, W3's version that she did not speak to Accused is loaded with doubts. Assuming that W3 is believed that it was her nephew who answered the remaining 8 calls, and that her nephew informed her of the fact that Accused was looking to speak to her, even then she does not provide any reason as to why she did not pick up Accused's subsequent calls neither on 15th July 2020 nor on 17th July 2020. It stands to no reason that W3's nephew would pick up the calls on W3's phone and speak with Accused on 8 occasions and that W3 would not care to speak to Accused even upon knowing that she was being looked for by Accused for the purposes of finding her missing husband.
80. Furthermore, during cross examination, initially W3 stated that Accused got her phone number from her brother in July 2020⁵⁸. Then upon being confronted with the IT Unit report regarding examination of her mobile phone, W3 stated that it was since July 2020 that she had saved Accused's phone number on her phone – "*Oui. Be ine save li oui, sa meme kan li ti telephone moi la, en juillet la.*"⁵⁹ However, upon being further cross examined, W3 finally stated that she had in fact, saved Accused's phone number on her mobile phone since January 2020⁶⁰ when her husband asked her to send a photograph of her NIC to the Accused. W3 gave three different versions on this issue. W3 has been incoherent on this aspect as well.

C. APPLICATION FOR THE 'SEAS'

i. How did W3 come to know of her non-eligibility for the SEAS?

81. W3 said that in April 2020, her husband made the application for the Self-Employed Assistance Scheme on her behalf but on the husband's phone and that latter got a message on his phone from the MRA to the effect that W3 is not eligible for the said scheme. Upon being questioned on how she came to know that she was not eligible for the SEAS, she replied: "*Mo messier ine montrer moi lors so portable kot nou ti fer*

⁵⁷ Page 79 of proceedings of 21/02/24

⁵⁸ Page 67 of proceedings of 21/02/24

⁵⁹ Page 68 of proceedings of 21/02/24

⁶⁰ Page 70 of proceedings of 21/02/24

*application.*⁶¹ She even said that her husband was angry and she was shocked, to find out that she was not eligible for the scheme.

82. When we refer to W3's application for SEAS (**Document N**), she has provided the phone number 58054468 which she claims to be that of her nephew. She did not provide her phone number or that of her husband. Also, W7 from the MRA, stated that the only way for an applicant to know that his application was rejected is when he goes to the MRA's website, insert his phone number and check the status of the application or if the applicant goes to the MRA physically to query on same or call the helpdesk. W7 also explained that the MRA did not send any message in case of rejection of the application. Hence, I find that there is no way that W3 could have received a message on her husband's phone from the MRA on her non-eligibility for the SEAS. Thus, W3's version as to how she became aware of her non-eligibility for the SEAS is not the truth.

ii. When did W3 become aware of her non-eligibility for the SEAS?

83. W3 stated that when her husband and herself became aware that she was not eligible for the SEAS, they were shocked and decided that they would check with the authorities later. After her husband passed away, she went to the MRA and National Pension Fund offices to check same and was informed thereat that she is employed as Constituency Clerk for the Accused. She did so in December 2020. W3 stated that her husband and herself were always in financial difficulty.⁶² Yet, in June 2020 when the lockdown period was over, she never went to check with the MRA as to why she was not eligible to the said financial assistance. She explained that she had other priorities, but this does not hold water in view of the constant financial difficulties the couple was facing. This casts serious doubts on the fact that W3 did not know the reason of her non-eligibility for the SEAS.

iii. When did W3 became aware that she was employed as Constituency Clerk?

84. What can be concluded from the evidence on record is that becoming aware of non-eligibility to the SEAS does not mean becoming aware of the fact of being employed as Constituency Clerk. In the present case, the reason for the non-eligibility of W3 to the SEAS is that W3 was employed by the Accused. However, the records at the MRA (Documents P and Q) and at the Ministry of Social Integration, Social Security and National Solidarity (Document L1) only mention that W3 is registered as the employee of the Accused as from January 2020 to July 2020. There is no mention in what capacity W3 was employed. This was confirmed by both W6⁶³ and W7 in Court. Hence, if W3 says that she went to the MRA and NPF offices to query on her non-

⁶¹ Page 13 of proceedings of 21/02/24

⁶² Page 67 of proceedings of 28/02/24 (morning)

⁶³ Page 43 of proceedings of 04/03/24

eligibility for the SEAS, she could only have been informed that she was employed by the Accused. She could not have been informed by the MRA and the NPF that she was employed as Constituency Clerk of the Accused, contrary to what she stated in court.

85. I refer to her answer during her examination in chief, found at Page 16 of the proceedings of 21st February 2024:

“Q: Ek dans ca bane document ki ca bane officiers la ine montrer ou, ki travaille ou ti p faire?”

A: Constituency Clerk”

86. As such, W3’s version that when she went to the MRA and the NPF offices in December 2020, then she became aware that she was employed as Constituency Clerk of the Accused, is not the truth.

87. Now, regarding W3’s version on when she became aware of the fact that she was employed as the Constituency Clerk of the Accused, this too is fraught with contradictions, for the following reasons:

(a) During the examination in chief, W3 stated that after the demise of her husband in October 2020, she came to know through the media that she was supposedly working as Constituency Clerk for the Accused.⁶⁴ However, during cross examination, she stated that in fact, in October 2020, two days after the demise of her husband, a journalist came to her place and asked her *“si pas mone deja travaille comme constituency clerk pu Monsieur Yogida”* and she replied to the latter: *“mo pas conner”*.⁶⁵ In Court, she even gave the name of the journalist, and the company for which latter works. She then stated that in December 2020, she went to the MRA and the NPF offices to check same. However, when her cross examination resumed a few days later, W3 stated that she made a mistake and it was not that journalist who told her so, but that she became aware of same through the media *“dans bane journal”*.⁶⁶ Later, she also stated that it was during the Judicial Enquiry held before the District Court of Moka, when she heard the witnesses, then she became aware that she was supposedly employed by the Accused: *“Non cést a dire ti ena lenquete judiciaire Moka, lerla ti ena bane dimoune ti vine temoigner ki mo missier ti dire zotte qui soi disant mo p travail avec missier Yogida Sawmynaden, qui mo pas pe recevoir auken largent avec li.”*⁶⁷ In fact, W3 could not testify in a clear and coherent manner as to how she became aware of the fact that she was employed as Constituency Clerk for the Accused, and this is a matter which goes to the crux of this case.

⁶⁴ Page 15 of proceedings of 21/02/24

⁶⁵ Page 37 of proceedings of 21/02/24

⁶⁶ Page 61 of proceedings of 28/02/24

⁶⁷ Page 50 of proceedings of 28/02/24

(b) Furthermore, regarding the present case, she gave a first statement to the police on 9th January 2021 and at F527306,⁶⁸ she stated that after the demise of her husband, she found out that she was employed as Constituency Clerk for the Accused. She also stated in Court that whilst her husband was alive neither latter nor herself knew that she was employed as Constituency Clerk for the Accused.⁶⁹ However, during cross examination, W3 was referred to an affidavit solemnly affirmed by her on 21st December 2020 in relation to the case of private prosecution which she lodged against Accused before the District Court of Port Louis (**Document AJ**). She was confronted with paragraph 6 thereof, which reads as follows:

“6. I aver that upon further investigation from, inter alia, the Mauritius Revenue Authority and the National Pensions Scheme, I and my late husband were astounded to learn that I was allegedly employed as constituency clerk with Hon Minister Yogida Sawmynaden and that I have been allegedly perceiving a monthly salary of Rs15,000 from the Minister during the year 2020 and that my contribution regarding my employment has been paid to the National Pensions Scheme. My late husband was very angry with the Hon. Minister.”

(c) After being cross examined on the contradiction between her version in Court to the effect that her husband never knew about her employment as Constituency Clerk, and her version in paragraph 6 of the said Affidavit to the effect that her husband and herself *“were astounded to learn”* that she was employed as Constituency Clerk, W3 denied having mentioned same in the affidavit, and finally, she stated that what is in the affidavit is *“fausse”*.⁷⁰ I note with concern here that W3 has admitted having lied in an affidavit which she solemnly affirmed wherein she is expected to speak the truth and based on which she lodged a case of private prosecution before a court of law. This goes to the core of her credibility as a witness before this Court. This is not only a major contradiction in the testimony of W3 but an admission by W3 to have lied in an important document like an affidavit.

(d) Regarding the contradiction in her version with the affidavit, W3 stated in her statement to the police that this was because she had just lost her husband and was disturbed. Court is unable to accept such justification for the contradiction because W3 solemnly affirmed the affidavit on 21st December 2020 and only two weeks later, that is, on 9th January 2021, she gave her statement to the police in the present matter with a completely different version.

88. Learned Counsel for the Prosecution submitted that these contradictions relate only to the peripheral issue of when W3 got to know the reason for her non-eligibility for the SEAS. I do not agree with this submission. I find that W3’s version on the timing

⁶⁸ Pages 41 and 46 of proceedings of 21/02/24

⁶⁹ Page 47 and 48 of proceedings of 21/02/24

⁷⁰ Page 96 of proceedings of 21/02/24

at which she or her husband allegedly became aware of the fact that W3 was employed as Constituency Clerk of Accused is no doubt linked to her credibility on the central issue in this matter – whether W3 was indeed employed in that capacity. Assuming that what W3 stated in the affidavit was the truth, this would mean that the Kistnen couple would have known about this issue since before October 2020, that is before the demise of Mr Kistnen and yet, W3 waited till December 2020 to take an action. I find that for the reasons above, these contradictions are material in determining the central issue.

D. THE BANK STATEMENTS

89. The three Bank Statements of W3 for the period 01/01/2020 to 28/12/2020 (**Documents B, C, D**) were perused in Court and as contended by Prosecution, there is nowhere any amount credited by Accused in relation to the Constituency Clerk in the amount of Rs14,790. There is also no evidence on record that a Constituency Clerk Allowance should be paid to the Constituency Clerk by bank transfer. The former Clerk of the National Assembly, W4, stated that the allowance is included in the pay packet of the Minister and it is for the Minister to pay the Constituency Clerk such that the National Assembly has no direct involvement on the said payment. It is thus up to the Minister to decide on the mode of payment. Also, no evidence has been adduced to the effect that the allowance needs to be paid in the bank account of the Constituency Clerk. Hence, the fact that the Bank statements of W3 do not show any amount credited by the Accused does not in any way prove that W3 was not benefiting from the Constituency Clerk Allowance.

E. LETTER DATED 20TH JULY 2020 (Document AG)

90. From the evidence of W5 and as admitted by Accused, the latter sent a letter dated 20th July 2020 to inform his then Ministry that he was no more employing W3 as his Constituency Clerk. The MRA and the NPF offices were informed accordingly. Thereafter, Accused did not employ anyone as his Constituency Clerk, although he was entitled to do so, as explained by W4.⁷¹ If ever Accused had the bad faith of claiming the Constituency Clerk Allowance for himself, he would not have sent the said letter to the authorities. It stands to reason that if Accused had falsely represented W3 as his Constituency Clerk and claimed the allowance unlawfully, he could have carried on doing same even after July 2020, the *moreso* since, if we were to believe W3, she became aware of it only after the death of her husband, that is after October 2020.

⁷¹ Page 46 of proceedings of 11/03/24

F. W3's NIC COPY

91. Regarding the copy of W3's NIC which Accused has attached to the Declaration Form, W3 identified same in Court and stated that her husband asked her to send same on Accused's phone number as Accused would get her a job at the Mauritius Broadcasting Corporation (MBC). Even on this issue I do not find W3 testifying in a coherent manner. Initially, she stated that her husband sent her NIC to Accused using his phone number and later in cross examination, she stated that the NIC was sent from her phone number⁷² (*"Ar mo portable"*). She explained that ultimately, her husband took a photograph of her NIC and sent it to the Accused. Under cross examination, W3 stated that she could not recall if it was from her phone or the phone of her husband.⁷³ On another note, as per W3, her NIC was sent to the Accused for a specific purpose - to obtain a job at the MBC. W3 did not testify on the outcome of same, whether an offer of job at the MBC was indeed made to her or whether she followed up same with Accused or her husband. No evidence was adduced to canvass this issue. The incoherent manner in which W3 testified on this aspect, creates doubts on her version that she sent her NIC copy to Accused for the purposes of obtaining a job at the MBC.

ASSESSING THE CREDIBILITY OF W3

What weight should be ascribed to W3's testimony?

92. In light of the shortcomings in the version of W3, I shall now assess the weight to be given to her testimony, and address whether W3 is a credible witness, on whose version I can rely on to find Accused guilty of the charges. It is a settled principle that credibility is a matter of sovereign appreciation of the trial court. In this regard, I find it apt to refer to what was held in the case of **Joomeer N. v The State**.⁷⁴

"The credibility of a witness requires to be assessed with reference to his evidence which must be free from doubt so that the court has no hesitation in reaching a conclusion of guilt against an accused party based solely on his uncorroborated evidence." (The underlining is mine.)

93. I have also given due consideration to the oft-quoted principle in **Saman G. v The State**,⁷⁵ that:

"... Not every inconsistency is serious and material and inconsistencies need not affect per se the appreciation by a trial Court that a particular witness's testimony is true".

⁷² Page 70 of proceedings of 21/02/24

⁷³ Page 9 of proceedings of 28/02/24 (afternoon)

⁷⁴ (2013) SCJ 413

⁷⁵ (2004) SCJ 3

94. I am alive to the principle laid down in **Ramcharran v/s The Queen**,⁷⁶ where the Supreme Court held that:

“It is a fallacy that evidence should be treated as a monolithic structure which must be either accepted or rejected en bloc. On the contrary, it is the function of a trained magistrate to weigh and to criticize testimony so as to distinguish what may safely be accepted from what is tainted or doubtful.” (The underlining is mine).

95. It is also pertinent to refer to the case of **Vythilingum V State**,⁷⁷ where the Supreme Court held that:

“Giving evidence in court is not a memory test and failure to recollect with precision all the circumstances and details of an incident is understandable. What is important is for the court to be satisfied that a witness is speaking the truth in substance” (The underlining is mine).

96. The following extract from **Hauradhun v The State**⁷⁸ also explains fully well as to when the evidence of a witness would be rejected or accepted:

“It is well established that the Court will not outright reject the evidence of a deponent merely because it contains inconsistencies. It has a duty to analyse the whole testimony of the deponent taking into consideration, inter alia, the lapse of time between the alleged offence and the time he gives evidence, his age, his apparent mental state and his demeanour in Court. The learned magistrate has then to decide whether the inconsistencies were so material that the whole of the deponent’s evidence should be rejected; or whether they were of such a nature that they did not affect his credibility. No doubt each case has to be decided on its own merit.” (The underlining is mine).

97. I have had the benefit of seeing and observing W3 throughout her testimony, as well as assessing her demeanour in Court. The testimony of W3 is riddled with inconsistencies and contradictions on matters of substance as explained in my analysis above. I find that the unexplained shortcomings in W3’s testimony, when taken as a whole and considered in their entirety, affect the credibility of W3.

98. Learned Counsel for Prosecution submitted that W3 has maintained all throughout that she was not employed as the Constituency Clerk of the Accused and that her contradictions are not lies, and that they do not affect the central issue. I do not agree. I find that W3’s version that she was not employed as Constituency Clerk cannot be assessed in isolation. It has to be assessed in light of her overall testimony

⁷⁶ (1977) MR 226

⁷⁷ (2017) SCJ 379

⁷⁸ (2010) SCJ 183

which includes major contradictions and incoherence. Also, I cannot lose sight of the fact that W3 has lied in an affidavit which was the basis of a case before a Court of law. After having assessed the overall testimony of W3, I find that the inconsistencies and contradictions therein are substantial, rendering it unable for me to believe W3. Her demeanour did not depict the hallmarks of a witness on whose version I can rely. On many occasions, W3 could not provide plausible explanations for her contradictions and evaded the issue by saying that these are not important matters. Her incoherent manner of answering questions and her doubtful answers impeach her credibility. W3 did not strike me as a witness of truth.

THE UNSWORN VERSION OF ACCUSED

99. The Court has to weigh all evidence on record before the determination of the charges. I have assessed the evidence on record. Given that Prosecution's case rests essentially on W3, and that W3 has not come up to proof on the element of 'alteration of truth,' I find that Prosecution has not established a prima facie case against the Accused. I am alive that the version of the Accused is only an unsworn one. Nonetheless, for the sake of completeness, and given that Prosecution has submitted on certain facts found in the unsworn version of the Accused, I propose to address these aspects found in Accused's defence statements.

100. In his defence statements,⁷⁹ Accused has denied the charges. He has also given an account of the circumstances in which he employed W3 as his Constituency Clerk from January 2020 to July 2020. During the course of her submissions, Learned Counsel for Prosecution questioned the unsworn version of Accused on the 'advance payments' made in cash by him to Mr Kistnen from January 2020 to July 2020, as mentioned in his defence statements. Prosecution submitted that these are random payments made on random dates and for random amounts, and they cannot relate to the payment of the Constituency Clerk Allowance. On this matter, I have considered the following:

- i. Accused produced 10 cheques to the police regarding financial assistance which he used to provide to Mr Kistnen before 2020 (**Documents J to J9**), and the cheques had been cashed by Mr Kistnen, as explained by the Defence witness, the representative of HSBC Ltd. W3 has lent credit to Accused's version on his proximity with the Kistnen family. As stated by W3, there was a long-standing friendship and bond between Accused and her husband and they were always in communication with each other. W3 also stated that her family was regularly in financial difficulty and that her husband was indebted to the extent that he had to leave the house on several occasions to escape from being looked for by unpaid creditors. The unsworn version of the Accused is that Mr Kistnen used to seek financial assistance from the Accused when he was being looked for by unpaid creditors and as Mr Kistnen was highly indebted, he did

⁷⁹ Documents H, H1, H2, H3, H4, K, K1, K2, K3 and K4

not want payment to be effected through bank transfer. As such, the payment for the Constituency Clerk Allowance to be effected to W3 was done to Mr S. Kistnen through cash.

- ii. Based on the above, I find that there has been history of money being given by Accused to Mr S. Kistnen on several occasions before 2020. This has not been challenged by the Prosecution. The relationship between Accused and Mr Kistnen was not a new one. It was based on a long-standing friendship of over ten years. Against this backdrop, Accused's unsworn version in Document H and H1 to the effect that in 2020 too, on several occasions, Mr Kistnen requested for financial assistance from Accused is a plausible one. The financial help sought by Mr Kistnen was in terms of requests for advance payments on the Constituency Clerk Allowance. True it is that the amounts of these advance payments⁸⁰ made are not equally divisible by Rs 14,790, but it does not stand to reason that an advance payment to an employee should tally with the amount which has to be paid per month to the employee. The advance payment can be more than the monthly allowance, or less than it or even equal to the monthly allowance. Also, there is no evidence adduced by Prosecution on the mode by which a Constituency Clerk Allowance should be paid.
- iii. Moreover, I take note that on 20 July 2020, Accused has terminated the employment of W3. The employment was not for a determinate period of time as per Document AD, which mentions that the employment of W3 takes effect as from January 2020. Hence, until July 2020, when the Accused was still providing the advance payments, he could not have foreseen that the services of W3 would be terminated on 20th July 2020, such that it is plausible for the advance payments to cater for allowances which W3 would be entitled post July 2020 as well. As it is, in addition to being Accused's political agent, Mr Kistnen was also a very good friend of Accused and the evidence has disclosed a relationship of trust between them, such that it can be considered as normal for Accused to have provided advance payments to Mr Kistnen to be handed over to W3.
- iv. Also, regarding Accused's version found at F636957 of his defence statement (Document H), that Mr and Mrs Kistnen "*were reporting daily to me, more precisely several times per day through phone on my mobile phone number*", Prosecution has not adduced any itemised bills to contradict this version, despite Accused himself having given the authorisation to the police to obtain a Judge's Order in that respect. It is a well-established practice for the police to record a defence statement from an accused party so that at an eventual trial, the trial Court would know the defence's version without obliging the accused party to give evidence, vide **Shanto A & Ors v The State**.⁸¹ Moreover, in **A. S. Mamode v The Queen**,⁸² the Supreme

⁸⁰ Documents H and H1

⁸¹ (2001) SCJ 176

⁸² (1991) SCJ 126

Court held that: *“The concept of fair trial guaranteed by section 10 of the Constitution implies fair and impartial inquiries into the allegations of accused parties...”*

101. On another note, I wish to observe that Learned Counsel for Prosecution mentioned at Page 20, paragraph 109 of her written submissions that *‘no evidence has been adduced by defence as to what Constituency Clerk duties W3 would have supposedly performed between January 2020 and July 2020 for the benefit of Accused’s constituency.’* Learned Counsel for Prosecution also stated during her submissions, at Page 47 of the proceedings of 8th April 2024, that W3 explained the context in which she sent her NIC to the Accused and that *‘no evidence has been adduced to prove otherwise or to disprove the version of W3.’* On this score, I find it apposite to state that it is settled principle that the burden of proof is on prosecution to prove that W3 was not employed as Constituency Clerk of Accused. It is not for the Accused to prove that W3 was in fact employed as same and performing the duties associated. There is hence, no obligation on Accused to adduce any evidence to disprove the version of W3 on any matter. As rightly held by Viscount Sankey LC in **Woolmington v DPP [1935 AC 462]**: *“But while the prosecution must prove the guilt of the prisoner, there is no burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence...”*

CONCLUSION IN RELATION TO COUNT 1

Alteration of Truth

102. When all the matters considered above regarding the weight to be attached to the testimony of W3 are taken as a whole and considered in their entirety, the cumulative effect of the same sheds serious doubt on the veracity of such testimony, and the possibility of W3 having a purpose of her own to serve in alleging that she was not employed as Constituency Clerk by the Accused, cannot be excluded.

103. In view of the nature of the prosecution evidence which is tainted with inconsistencies and material contradictions, I find that a serious doubt has been raised as regards the charge levelled against the Accused. Accordingly, I cannot but reject the testimony of W3. I find it relevant to refer to the following extract in the case of **A.S. Rajbally v The State**:⁸³

“...if the inconsistencies and contradictions are on matters of substance to such an extent that it would render a conviction unsafe, the Magistrate is in duty bound to reject the testimony of the witness and to give the appellant the benefit of the doubt should there be no other evidence to sustain a conviction.” (The underlining is mine).

⁸³ (2016) SCJ 340

104. Moreover, in the present case, Learned Counsel for the Prosecution has relied on **Andoo v The State**⁸⁴ to submit that W3's unshaken testimony has established a strong prima facie case against Accused in relation to both counts and Accused's choice not to testify is exercised at his own risk and peril. The case of **Andoo (supra)** has to be read together with **Annia v The State**⁸⁵ where the following was held:

"Of course a trial court cannot, in all cases where no evidence is called on behalf of an accused party, perfunctorily rely on Andoo and convict. Andoo has not created any new species of burden or standard of proof in a criminal trial. It is clear from the above-quoted passage from Andoo that the court hearing a criminal matter has indiscriminately to analyse the evidence adduced by the prosecution to see that all the elements of the offence charged have been established and that the state of that evidence, when pitted against the version of the accused as elicited through the cross-examination of the prosecution witnesses and the unsworn statement of the accused, is such that there is no room for any reasonable doubt. The fact that no evidence has been adduced on behalf of an accused party does not absolve the trial court of such a duty." (The underlining is mine).

105. The version of Accused "as elicited through the cross-examination of the prosecution witnesses" has been analysed. Based on the case of **Annia v The State (supra)**, I have assessed the evidence adduced by prosecution on the elements of the offence and I have found it unsafe to rely on the testimony of W3. I find that the state of that evidence, "when pitted against the version of the Accused as elicited through the cross-examination of W3 and the unsworn statement of the Accused", raises several reasonable doubts in prosecution's case, the benefit of which goes to the Accused. Prosecution has therefore, not been able to prove the first essential constitutive element under Count 1, that there has been an alteration of truth in the Declaration Form.

Fraudulent Intent and Possibility of Prejudice

106. The other two constitutive elements which Prosecution has to prove under Count 1 is the fraudulent intention of the Accused as well as the possibility of causing 'prejudice' to the State. I read from **Dalloz, Répertoire de Droit Pénal et de Procédure Pénale, Tome III on Faux en Écriture, at note 1**, that, in order to constitute forgery, the alteration of truth must have been committed "*dans une intention frauduleuse*" and be "*de nature à porter préjudice à autrui*".

107. Fraudulent intention in an offence of forgery consists in the knowledge on the part of the offender not only that he is altering the truth but that such alteration may

⁸⁴ (1989) MR 241

⁸⁵ (2006) SCJ 262

cause prejudice – vide **Bunjun v R.**⁸⁶ Also, the element of prejudice which must exist for the offence of forgery to be constituted may be actual prejudice caused to particular person, but it may also be possible prejudice in the sense that the prejudice may not happen at the moment of the forgery but it could possibly happen– vide **Appadoo v R.**⁸⁷ On this issue, **Dalloz (supra)** mentions at **note 34** that:

“L’intention frauduleuse, nécessaire à l’existence du faux est la conscience, chez l’agent, que non seulement il altère la vérité, mais que cette altération est susceptible de causer un préjudice. Il n’est pas nécessaire, en revanche, qu’il ait eu l’intention de nuire.”

108. The case for the Prosecution is that Accused has fraudulently represented W3 as his Constituency Clerk in the Declaration Form by fabricating an obligation and the obligation is in the nature of engaging the State to pay to W3, the Constituency Clerk Allowance on a monthly basis by way of crediting the Accused’s salary with the said allowance. It was further submitted by Prosecution that by doing such act, Accused has caused a financial prejudice against the State, which is in the sum of the Constituency Clerk Allowance which was credited to Accused’s salary from January 2020 to July 2020. However, based on the evidence on record, prosecution has failed to establish any alteration of truth in the Declaration Form. There has been no ‘*mensonge*’ made by Accused therein. Consequently, I cannot find any fraudulent intention by the Accused nor any prejudice or possibility of prejudice which may have been caused to the State.

109. It is trite law that the golden rule in criminal cases, is that the prosecution bears the burden of proof, since the accused, as of right under **section 10(2) of the Constitution** is presumed innocent until proven guilty and it is only if the prosecution has been able to discharge this burden that the accused tactically then should consider whether or not to adduce any evidence in rebuttal. Proof beyond reasonable doubt can only be met where reliable evidence coherently sets out the events on which a charge is founded, which is certainly not the case here. (**Zhenduo Liu v The State**⁸⁸).

110. I refer to **Goburdhun v The Queen**⁸⁹ which reads as follows:

“When, therefore, the sum total of the evidence in the case is taken into account, there was, in effect, the word of the victim as against the denial of the appellant. It is in such a case, particularly, that the principle of the presumption of innocence comes into operation. The application of that principle in every criminal case is the foundation of the right of the accused person to insist that the prosecution should discharge the

⁸⁶ (1955) MR 256

⁸⁷ (1953) MR 177

⁸⁸ (2021) SCJ 230)

⁸⁹ (1956) MR 503

onus that rests upon it to prove that he is guilty. It seems to me that at the close of the case for the prosecution there was justification for the appellant and his counsel taking the view that there was no necessity to answer the case any further.”

111. Given that Prosecution has not been able to prove the charge under Count 1 beyond reasonable, Count 1 is accordingly, dismissed against the Accused.

COUNT 2 - MAKING USE OF FORGED DOCUMENT

112. For an offence of ‘making use of a forged writing’ to subsist, the Prosecution must prove the essential elements of the offence as laid down in the case of **Collet M E v The State**⁹⁰ namely that:

“Pour constituer le crime d’usage de faux, trois éléments sont nécessaires; il faut qu’il y ait: 1. usage de la pièce; 2. que cette pièce renferme les caractères d’un faux criminel; 3. que l’usage en ait été fait avec connaissance de sa fausseté; 4. qu’il en soit résulté ou qu’il ait pu en résulter un préjudice” (The underlining is mine).

113. As per my analysis above, the Declaration Form averred under Counts 1 and 2 does not *“renferme les caractères d’un faux criminel”*. The Prosecution having failed to establish beyond reasonable doubt that the said Declaration Form has been forged as averred, the charge of making use of a forged document under Count 2 cannot stand, because *« lorsque la pièce falsifiée n’offre pas les éléments d’un faux criminel, l’usage de cette pièce ne peut constituer le crime d’usage de faux. » Dalloz, Faux en Ecriture Note 168 ; Fausseté de la pièce.*

114. For all the above reasons, therefore, the Accused is given the benefit of doubt and I accordingly, dismiss both Counts 1 and 2 of the information against him.

JUDGMENT DELIVERED BY:

Anusha D. RAWOAH (Miss)
Magistrate
Intermediate Court (Criminal Division)
This 30th May 2024

⁹⁰ (2012) SCJ 488