ARMON-DRESSLER S v INDEPENDENT COMMISSION AGAINST CORRUPTION & ORS

2022 SCJ 97

Record Nos. 8950 & 8952

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Siven Armon-Dressler

Appellant

v.

Independent Commission Against Corruption

Respondent

In the presence of:

1. **AfrAsia Bank Ltd**
2. **The Director of Public Prosecutions**

Co-respondents

And in the matter of:-

AfrAsia Bank Limited

Appellant

v.

Independent Commission Against Corruption

Respondent

In the presence of:

1. **Siven Armon-Dressler**
2. **The Director of Public Prosecutions**

Co-respondents

JUDGMENT

The appellants, Siven Armon-Dressler (then accused No. 1) and AfrAsia Bank Limited (then accused No. 2), were prosecuted on an information containing 4 counts before the Intermediate Court. Siven Armon-Dressler was prosecuted under counts 1 and 2, while the AfrAsia Bank Ltd was prosecuted under counts 3 and 4, with the offence of "limitation of payment in cash" in breach of sections 5(1) and 8 of the Financial Intelligence and Anti Money Laundering Act ("the FIAMLA"). The particulars of the offence under counts 1 and 2 were that Siven Armon-Dressler ("Mr Dressler") had made a payment in cash in foreign currency whose equivalence was in excess of Rs 500,000 while the particulars under counts 3 and 4 were that AfrAsia Bank ("the Bank") had accepted a payment in cash in foreign currency whose equivalence was in excess of Rs 500,000. The learned Magistrate found both appellants guilty as charged and he initially gave an absolute discharge to both of them. Following an appeal against sentence by the Director of Public Prosecutions ("the DPP"), the appellants were each sentenced to pay a fine of Rs 5000 under each count and to each pay Rs 500 as costs. Both appellants are appealing against their conviction.

Both appeals were heard together. Since some of the grounds of appeal are common, we shall deliver a single judgment, a copy of which shall be filed in each record.

The grounds of appeal on behalf of Mr Dressler are as follows –

" 1. *Because the Learned Magistrate erred in finding that the Prosecution had established all the elements of the offence against the Accused No. 1 under Section 5(1) and 8 of the Financial Intelligence and Anti Money Laundering Act.*

2.*Because the Learned Magistrate erred in holding that the 'offence under scrutiny is a strict liability one'.*

3. *Because Section 5 of the Financial Intelligence and Anti Money Laundering Act is not compatible with the Constitution of Mauritius inasmuch as it is an Unconstitutional interference with the property of the Accused No. 1 without*

satisfying the requirement of Public Safety, Public interest and Public Order".

The Bank is appealing against the judgment on the following grounds of appeal -

" 1. *Because the learned Magistrate erred in finding that the Prosecution had established all the elements of the offence against the Appellant under Sections 5 and 8 of the Financial Intelligence and Anti Money Laundering Act.*

2. *Because the learned Magistrate erred in holding that the 'offence under scrutiny is a strict liability one'.*

3. *Because the learned Magistrate erred in failing to conclude that the Appellant had a defence in law under Section 19 of the Financial Intelligence and Anti-Money Laundering Act."*

Mr Dressler was born in Mauritius in 1977 and emigrated to Germany in 1996. In 1998, he was adopted by Mr R. Dressler, a German national. He took the German nationality in 2004 and travelled to Mauritius on numerous occasions. On 02 November 2010, he arrived in Mauritius with about Euros 95,000 in cash in his possession; 62,000 Euros had been withdrawn in cash from his bank account in Germany on 1 November 2010 while 40,000 Euros had been withdrawn, on the same day, from a bank account he held jointly with his adoptive father. The 40,000 Euros from the joint bank account were his savings while the 62,000 Euros were composed of his savings amounting to 2000 Euros and of 60,000 Euros inherited from his adoptive father, after the latter had sold an apartment in Germany. In his statement he explained that, from 2000 to 2008, he had been working as legal adviser in the Human Resource Department at Lufthansa Airlines in Germany. As from 2008, he stopped working for the company and worked in the business of his adoptive father. On leaving Germany with the money, he produced documents witnessing the source of funds to the immigration authorities. However, he did not declare anything to the Mauritian authorities on his arrival as he had read from the portal of the Government of Mauritius www.gov.mu on the non-citizen webpage/ a guide for foreigners, under the item "currency", that there was no exchange control in Mauritius and foreign currency notes may be brought into Mauritius without restriction. He also produced a copy of the hard copies of documents downloaded from the said website coded as Doc SD. He explained that after a few days, during a conversation, he was advised not to keep the money on him as it may constitute an offence and that he had to bank same. He decided to approach AfrAsia Bank as it appeared to give the best deals on foreign currency deposits. At the Bank, he met Mrs Sharmila Harel and informed her of the cash in his

possession. He was asked several questions on the source of funds and he produced a number of documents to establish the provenance of the funds. He made a first deposit of 60,000 Euros on 11 November 2010 and a second deposit of 30,000 Euros on 12 November 2010.

Ground 1 of the grounds of appeal of Mr Dressler and the Bank

Under this ground, both learned Counsel for Mr Dressler and for the Bank challenged the finding of the learned Magistrate with respect to only one of the elements of the offence under section 5(1) of the FIAMLA, namely that there was a payment by Mr Dressler within the purview of the said section.

The thrust of the argument of learned Counsel for Mr Dressler was that the deposits which he made into the bank account did not constitute a payment and that the prosecution had failed to establish that there was a payment within the meaning of section 5(1) of the FIAMLA. He submitted that the learned Magistrate was wrong to have relied on the dictionary meaning of the word “payment” in determining what is meant by the said word in section 5(1) and that, in fact, in determining whether the appellant had made a payment, the learned Magistrate should have considered the mischief which the legislator intended to cure in enacting the FIAMLA. He further submitted that the main purpose of the FIAMLA was to combat money laundering and the financing of terrorism. It was his contention that for a payment to fall within the purview of section 5(1), one has to look at the source of the funds and the purpose to which the funds are being applied. He argued that in the current case, it was not disputed that both the source of the funds and the purpose to which the funds were put were perfectly legitimate. In addition, he submitted that since the learned Magistrate had specifically found that: (a) the primary purpose of the FIAMLA was to combat money laundering; (b) the present case did not reveal any criminal activity and was not one of money laundering through the banking system; (c) the source of the money was not tainted; and (d) there was no reason to believe that there was any intention of breaking the law, he erred when he relied solely on the ordinary meaning of the word “payment” in finding that element proved. He argued that since the learned Magistrate had found that there was no intention of laundering any money or committing any crime, he ought to have found that there was no “payment” within the meaning and spirit of the FIAMLA.

Learned Counsel for the Bank, for his part, argued that given that the prosecution itself agreed that the source of the money was not tainted and that Mrs Mohideen, a prosecution witness herself, stated that the money was being applied for a legitimate purpose, there was no money laundering offence since there was no laundering of money on the facts of the case.

Learned Counsel for the Bank also argued that in the light of paragraph 3.1 of Guidance Note 2 of the Financial Intelligence Unit ("the FIU") dated the 14 August 2009 (Document L), the Bank had no option but to accept the payment and to subsequently raise a suspicious transaction report ("STR") and it had thus not committed an offence under section 5(1) of the FIAMLA.

Section 5 of the FIAMLA reads as follows-

> ***"5. Limitation of payment in cash***
>
> *(1) Notwithstanding section 37 of the Bank of Mauritius Act, but subject to subsection (2), any person who makes or accepts any payment in cash in excess of 500,000 rupees or an equivalent amount in foreign currency, or such amount as may be prescribed, shall commit an offence.*
>
> *(2) Subsection (1) shall not apply to an exempt transaction."*

Section 2 of the FIAMLA defines "money laundering offence" as an offence under Part II of the Act. It is of interest to note that there are two specific offences provided for under Part II of the FIAMLA: the offence of "Money laundering" under section 3 and that of "Limitation of payment in cash" under section 5. While section 3 of the FIAMLA makes it an offence for a person to engage in a transaction that involves property which is, or in whole or in part directly or indirectly represents, the **proceeds of any crime**, section 5 simply provides that any person who makes or accepts any **payment in cash** in excess of 500,000 rupees (which is the prescribed amount) or an equivalent amount in foreign currency, shall commit an offence. Further, as stated by learned Counsel for respondent No.1, unlike section 3 where the prosecution has to prove that the money involved is the proceeds of a crime, under section 5(1), this is not an element of the offence. Moreover, when one carefully reads the Act, it is clear that it was not the intention to limit the application of section 5(1) to cases where the source of the payment or the purpose for which the payment was made was illicit but rather that, through section 5(1), the legislator decided to impose a ban in so far as any payment or acceptance of a payment in excess of the prescribed amount is concerned in a bid to combat money-laundering.

In the case of **Beezadhur v The Independent Commission Against Corruption and another [2014] UKPC 27**, upon being invited to consider the FIAMLA against its background of international pressure to combat economic crime and money laundering, including recommendations that cash transactions should be closely monitored and

controlled, the Board referred to the rationale behind the provisions of the FIAMLA as follows:

> *'6. The 2000 Act had been a response to such international criticism, including by the Financial Action Task Force (or FATF), a body set up in 1989 by the G7 countries to examine measures to combat money laundering. FATF had also drawn attention to the risks posed by large cash transactions in the economy. Its "Forty recommendations...on money-laundering" (in the 1990 and 1996 versions) had included:*
>
> > *"Countries should consider the feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency with a computerised data base, available to competent authorities for use in money laundering cases, subject to strict safeguards to ensure proper use of the information.*
> >
> > *Countries should further encourage in general the development of modern and secure techniques of money management, including increased use of checks, payment cards, direct deposit of salary checks, and book entry recording of securities, as a means to encourage the replacement of cash transfers."*
>
> *7. The Bill on which the 2000 Act and later the 2002 Act were based was itself the result of detailed consideration over a number of years with expert advice from overseas, including a report from Professor Norton of London University in 1998. His report included a detailed review of the draft Bill (section IV A), of which he commented:*
>
> > *"The draft Anti-Money Laundering and Economic Crime Bill legislation represents an excellent effort to underlie the development of a framework to protect the bank and non-bank financial systems from systemic invasion and corruption by domestic and international criminal organisations."*
>
> *His review of the provisions relating to cash transactions, including the exemptions (section IV B 2(a), made no specific comment on the wording of the exemption now in issue, but he spoke more generally of the need for flexibility -*
>
> > *"…to ensure that the exempt transactions provision is not abused, but nonetheless sets forth 'bright line tests' to identify particular institutions where money laundering operations are highly unlikely or non-existent..."'*

It is patent from the above and from the debates of the Legislative Assembly that, as stated in the case of **Beezadhur T v Independent Commission Against Corruption & Anor [2013 SCJ 292],** among the means used by the legislature to promote and achieve the objects of the FIAMLA, it deemed it fit to prohibit the making or acceptance of cash transactions above

a prescribed limit.

We also find it apposite to refer to the following extract from the case of **Beezadhur v The Independent Commission Against Corruption and another [2014] UKPC 27**-

> *"37. The Board has considerable sympathy for the appellant. It is accepted that the source of his cash deposits was entirely legitimate, as was the reason for his cash withdrawal. There is no reason to believe that he had any intention to break the law…"*

It is noteworthy that, in the case of **Beezadhur T v Independent Commission Against Corruption & Anor** [2013 SCJ 292], the appellant had made cash deposits and accepted a payment in cash in foreign currency, the equivalent amount of which was in excess of the prescribed amount. He was prosecuted before the Intermediate Court on five counts of an information in breach of sections 5(1) and 8 of the FIAMLA: on four counts for depositing cash in excess of the prescribed amount and one count for accepting a payment in cash in excess of the prescribed amount. It was undisputed that the money that was deposited by him and accepted by him was from his and his wife's savings and pension. Although the interpretation to be given to the word "payment" was not one of the issues raised in the case before the local Courts or before the Board, we do not consider that the Board, which was clearly fully alive to the fact that the source of the funds and the purpose to which they were put were legitimate, would have maintained the conviction if the word "payment" in section 5(1) of the FIAMLA was to be interpreted as not including the making of a cash deposit above the prescribed amount into a bank account or receiving a payment in cash above the prescribed amount.

In his judgment, the learned Magistrate stated that since no definition is given to the word "payment" under the FIAMLA, the ordinary meaning given to the said word has to be resorted to. He then went on to consider the dictionary meaning of the word "payment" and concluded that payment also means paying into one's own banking account so that a deposit, as per the particulars provided under counts 1 and 2 of the information, would fall within the definition of payment. He noted that the ordinary meaning of deposit also corresponds to payment into a bank. He found that making a deposit, as averred under counts 1 and 2, and accepting a deposit, as averred under counts 3 and 4, are within the ordinary meaning of making or accepting a payment before concluding that the prosecution had proved the first element under all 4 counts beyond reasonable doubt.

We find that the above interpretation and finding of the learned Magistrate is buttressed

by the definition of an "exempt transaction" under the FIAMLA. As rightly submitted by learned Counsel for the respondent, according to the said definition, a transaction consisting of **a deposit into an account of a customer with a bank** (as is the case here) will be an "exempt transaction" provided certain conditions are met. *A contrario* if these conditions are not met, a cash deposit above the prescribed limit made by a customer into his bank account will not be an "exempt transaction" and will be caught by the FIAMLA and will amount to making a payment under section 5 of the FIAMLA. This was the case for the cash deposits made by Mr Dressler into his bank account.

As regards the Bank, learned Counsel for the Bank relied on paragraph 3.1 of Guidance Note 2 of the FIU which is reproduced below to argue that the Bank could not in the light of the said guideline refuse to accept the payment in cash-

> *"**3.1 Limitation of Payment in Cash***
>
> *Limitation of cash transactions are set in section 5 FIAML Act 2002. It is mandatory to report any payment in cash in excess of 500,000 rupees or an equivalent amount in foreign currency.*
>
> *When two or more transactions totalling 500,000 rupees or the equivalent amount in foreign currency are conducted on behalf of the same individual within a short lapse of time, and the reporting entity or person is required to keep a cash transaction record knows that these transactions or transfers are conducted by, or on behalf of, the same person or entity, they must be treated as a single transaction and be reported to the FIU.*"

The plain meaning of the above extract is that section 5 of the FIAMLA sets limits on cash transactions. It also provides that when there is any payment in cash in excess of Rs 500,000 or its equivalent in foreign currency, a report must be made. It further explains that a record of cash transactions must be kept so that, when two or more cash transactions are made on behalf of the same individual within a short lapse of time in excess of the above amount in rupees or its equivalent in foreign currency, the matter is reported to the FIU. We are unable to agree that the extract should be interpreted as implying that where a payment in excess of Rs 500,000 or its equivalent amount in foreign currency is made by a person, a bank should accept the payment.

It is also of note that in **Beezadhur v The Independent Commission Against Corruption and another [2014] UKPC 27**, the Board observed at paragraph 37 of the judgment that –

> *"…Furthermore, one might have expected that his bank which certainly would have known the law, would have drawn it to his attention and refused either to accept his deposits (if not the first, then certainly the second, third and fourth times) or to pay out the cash. (Indeed, on the material before the Board, it is unclear why he alone was prosecuted for an offence, which on the face of it was also committed by the bank…"*

Taking all the above into consideration, we are unable to find fault with the reasoning and the finding of the learned Magistrate that the payments were made in breach of section 5(1) of the FIAMLA by Mr Dressler under counts 1 and 2. As regards the Bank, since it was admitted that it had accepted the payments which were made by the appellant and since, as explained above, paragraph 3.1 of Guidance Note 2 of the FIU in no way absolves the Bank from its obligation not to accept cash deposits above Rs 500,000, we are of the view that the learned Magistrate was perfectly right to find that the Bank had accepted the cash deposits as averred under counts 3 and 4.

Ground 1 in both appeals is of no merit and fails.

Ground 2 of the grounds of appeal of Mr Dressler and grounds 2 and 3 of the grounds of appeal of the Bank

At the hearing of the appeal, Counsel for all the parties agreed that section 5 of the FIAMLA does not provide for a strict liability offence. We agree likewise. In **Beezadhur T v Independent Commission Against Corruption & Anor** [2013 SCJ 292], the rather infelicitous dictum of the Court that the offence under section 5 of the FIMALA *"is more in the nature of a strict liability offence"* led the learned Magistrate to read more into those words than their actual meaning and to mistakenly hold that the offence was a strict liability one. There should be no doubt that the offence under section 5 is not one of strict liability.

Learned Counsel for Mr Dressler argued that the learned Magistrate proceeded to hear the case on the basis that it is one of strict liability and hence there was no need for the prosecution to prove the mens rea of the appellant. He submitted that although, after stating that the offence is one of strict liability, the judgment shows that the learned Magistrate nevertheless went on to consider mens rea as an element of the offence, the reasoning adopted by him in finding mens rea proved was wrong in law.

Learned Counsel for Mr Dressler also argued that the learned Magistrate erred in relying on the maxim "ignorance of law is no defence" to find the appellant guilty as charged inasmuch as the conduct of the appellant all throughout clearly shows that he acted under an

officially induced error.

He referred to the cases of **Maitland Valley Conservation Authority v Cranbrook Swine Inc**. **[2003] O.J No. 1433** and **R v Crosswell 2007 ONCJ 25** where the five elements of the defence of officially induced error were highlighted: (1) the accused must have considered the legal consequences of his actions and sought legal advice; (2) the legal advice obtained must have been given by an appropriate official; (3) the legal advice was erroneous; (4) the person receiving the advice relied on it; and (5) the reliance was reasonable. He also relied on the case of **DPP V Casey (2019 EISC 7)** to submit that an officially induced error would provide an exception to the general rule that "ignorance of law is no defence".

Learned Counsel for Mr Dressler submitted that the appellant could avail himself of the defence of officially induced error inasmuch as prior to bringing the money, he considered the legal consequences of his action, he obtained the necessary documents from customs in Germany and he sought assistance from the official website of the Government of Mauritius. He further argued that, in fact, the appellant relied on a misleading and erroneous document which he obtained from the official website of the Government of Mauritius since the document fails to mention the law with respect to the limitation of payment in cash.

Indeed, it is clear from the judgment that the learned Magistrate found that the offence under section 5(1) of the FIAMLA was a strict liability one. However, one cannot overlook that, after stating that "*since the offence under scrutiny is a strict liability one, there is no issue of guilty knowledge*", the learned Magistrate did not stop there. He expressly stated that *"[i]n any event,* ***even if it was an offence requiring guilty knowledge****,* ***then the following extract from Meeajun (Supra), where the Supreme Court came to another conclusion that the offence requires mens rea, would perfectly deal with Accused no. 1's situation****:*

> *In his out of court statement, he did state that he did not know that such transactions constitute breaches of the law. Even if we were to assume for the purpose of argument that he did not know, a person of his business acumen should know the rule that ignorance of the law is no defence."* [emphasis added]

The learned Magistrate then stated that, even if Mr Dressler stated that he did not know that he could not make a cash payment over a certain limit, this was not relevant to the issue of guilt since he had clearly admitted that he had intentionally made the deposits under both counts 1 and 2. In the light of the above, it can hardly be argued that the learned Magistrate did not make a finding that Mr Dressler had the required mens rea to commit the offences

under counts 1 and 2.

As regards the defence of officially induced error, Mr Dressler stated that he relied on the information which he found on the portal of the Mauritian Government, www.gov.mu, on the non-citizen webpage/ a guide for foreigners under the item “Currency”. He produced hard copies of the information which he downloaded from the said website (Documents E and E1). A perusal of Document E shows that it contains the following information under the heading, “Currency”-

> *“Currency*
>
> *The monetary unit is the Mauritian Rupee (Rs.) which is divided into 100 cents (cs). Coin exist as: 1 rupee, 5-rupees, 10-rupees; 20 and 50 cent-pieces. Notes are in the following denominations: Rs 25, 50, 100, 200, 500, 1000 and 2000. Foreign currency notes, drafts and travelers cheques may be brought into Mauritius without restriction.”*

As laid down in the case of **Maitland** (supra), the five elements of the defence of officially induced error are as follows: (1) the accused must have considered the legal consequences of his actions and sought legal advice; (2) the legal advice obtained must have been given by an appropriate official; (3) the legal advice was erroneous; (4) the persons receiving the legal advice relied on it; and (5) the reliance was reasonable.

It can hardly be argued that there was any legal advice sought in the case at hand. Reliance of information found on a government website can in no way be equated to obtaining legal advice. Further, even if, for the sake of argument, we were to consider that there was some sort of “advice” tendered through the website, which is clearly not the case, the website contained information about the different denominations of the Mauritian currency and only stated that there was no exchange control in Mauritius. The information on the website made no mention of cash deposits and could in no way be construed as implying that a person was at liberty to make cash deposits in excess of Rs 500,000 at banks in Mauritius.

In the circumstances, the defence of officially induced error can be of no avail to Mr Dressler and we fully agree with the learned Magistrate that the prosecution had established that Mr Dressler had the necessary mens rea.

There is clearly no merit in ground 2 in so far as Mr Dressler is concerned.

For his part, learned Counsel for the Bank submitted that it is clear from the judgment that the learned Magistrate at no point considered the issue of mens rea in so far as the Bank

is concerned. He also argued that the learned Magistrate never analysed the guilty knowledge of the Bank and he did not make any finding of mens rea under counts 3 and 4. It was his contention that the Bank could not have committed an offence under section 5(1) of the FIAMLA because it believed that it had to accept the cash deposits and then file a suspicious transaction report ("STR") to the FIU, failing which it would commit the offence of tipping off. He relied on Guidance Note 2 issued by the FIU to support his contention.

We note that the defence put forward by the Bank before the trial Court was that it could not have refused the deposits. It was argued on behalf of the Bank that if it had refused the deposits, it would have been in breach of Section 19 of the FIAMLA, that is, it would have tipped off Mr Dressler by its refusal to accept the deposits.

A perusal of the judgment shows that that the learned Magistrate in effect made a thorough analysis as regards the mens rea of the Bank and fully analysed the defence put forward by the Bank. A reading of the judgment shows that after taking into consideration, inter alia, sections 14 and 18 of the FIAMLA, the definition of "suspicious transaction" and Guidance Note 2 issued by the FIU, the learned Magistrate came to the conclusion that *"the duty to raise a STR is not dependent on the sum of money involved"*. He also observed that section 18 of the FIAMLA makes it mandatory for banks to comply with guidelines issued by the Bank of Mauritius and after considering paragraphs 4.19 and 4.31 of the Guidelines of the Bank of Mauritius and section 19 of the FIAMLA, he found that the Bank could not reasonably justify accepting the deposit so as not to commit a tipping off offence in the light of guideline 4.31.

Section 14 of the FIAMLA and the definition of "suspicious transaction", as they stood at the material time, which were referred to by the learned Magistrate are reproduced below-

> ***"14. Reporting obligations of banks, financial institutions, cash dealers, and members of relevant professions or occupations***
>
> *(1) Every bank, financial institution, cash dealer or member of a relevant profession or occupation shall forthwith make a report to the FIU of any transaction which the bank, financial institution, cash dealer or member of the relevant profession or occupation has reason to believe may be a suspicious transaction.*

Suspicious transaction is defined under the FIAMLA in the following terms:

> *"suspicious transaction" means a transaction which—*
>
> *(a) gives rise to a reasonable suspicion that it may involve—*

(i) the laundering of money or the proceeds of any crime; or

(ii) funds linked or related to, or to be used for, terrorism or acts of terrorism or by proscribed organisations, whether or not the funds represent the proceeds of a crime;

(b) is made in circumstances of unusual or unjustified complexity;

(c) appears to have no economic justification or lawful objective;

(d) is made by or on behalf of a person whose identity has not been established to the satisfaction of the person with whom the transaction is made; or

(e) gives rise to suspicion for any other reason."

It is clear from the above provisions that, as stated by the learned Magistrate, the duty to raise a STR is not dependent on the sum of money involved. As regards paragraph 3.1 of Guidance Note 2 of the Financial Intelligence Unit on which learned Counsel for the Bank relied, we have already explained above that paragraph 3.1 can in no way be construed as implying that where a deposit in excess of Rs 500,000 or its equivalent amount in foreign currency is made by a person, a bank should accept the deposit. Further as rightly stated by the learned Magistrate, a reading of section 19 of the FIAMLA, as it then stood, which is reproduced below shows that the Bank would only commit the offence of tipping off if it were to warn the owner of the funds that he may be subject of a STR-

"19. Offences relating to obligation to report and keep records and to disclosure of information prejudicial to a request

(1) Any bank, financial institution, cash dealer or any director or employee thereof or member of a relevant profession or occupation who, knowingly or without reasonable excuse—

….

(c) warns or informs the owner of any funds of any report required to be made in respect of any transaction, or of any action taken or required to be taken in respect of any transaction, related to such funds; or

…

shall commit an offence and shall, on conviction, be liable to a fine not exceeding one million rupees and to imprisonment for a term not exceeding 5 years.

…."

In this regard, we also note that there was undisputed evidence on record that there was an ostensible notice in the Bank (Document K) about limitation on cash transactions under the FIAMLA, where it was stated-

" LIMITATION ON CASH TRANSACTIONS

FINANCIAL INTELLIGENCE AND ANTI-MONEY LAUNDERING ACT 2002

The Public is hereby informed that Banks are required to obtain from their customers satisfactory details and/or documentary evidence supporting cash transactions and deposits.

In virtue of Section 5 of the above Act, account holders are advised that no cash deposits or withdrawals exceeding MUR 500,000/- or equivalent in foreign currency is accepted except as prescribed in the Act.

AfrAsia Bank Ltd reserves the right to accept or decline transactions at its counters if the above stated conditions are not met to its satisfaction".

As rightly submitted by learned Counsel for the DPP, the Bank could have refused the transaction without any tipping off, that is without being in breach of section 19, simply by invoking the reason set out in the notice. The need for any additional explanation for the refusal did not arise, the more so that Mr Dressler was a 'walk in client'.

It cannot be argued in the light of the above that the Bank believed that it had to accept cash deposits even where the cash deposit exceeded the prescribed amount. We also note that paragraphs 4.19 and 4.31 of the Guidelines of the Bank of Mauritius, which the Bank must have been aware of, provide as follows-

> *"4.19 With a view to secure an audit trail and as a preventative measure against the laundering of the proceeds of crime, a limit on cash payments has been imposed under the Act. Accordingly, apart from certain exempt transactions, described below, transactions in cash in excess of 500,000 rupees are prohibited altogether."*
>
> *"4.31 In practice, preliminary enquiries in respect of an applicant for business either to obtain additional information to confirm true identity or to ascertain the source of funds or the precise nature of the transaction being undertaken, will not trigger a tipping off offence. Great care should, however, be taken where a suspicious transaction has already been reported and it becomes necessary to make further enquiries, to ensure that customers do not become aware that their names have been brought to the attention of the FIU."*

The plain reading of paragraph 4.19 is that cash transactions exceeding Rs 500,000, except in the case of exempt transactions, are completely prohibited. Further, it is amply clear

from paragraph 4.31 that a bank may seek information from a customer with a view to make a STR and that in so doing the bank does not commit a tipping off offence.

In his judgment the learned Magistrate rightly stated that '*the bank is perfectly entitled to make any preliminary investigation as to the identity of the customer and as to the source of fund without in any way committing any tipping off offence*'.

In the light of the above, it is clear that there was an exercise carried out by the learned Magistrate with regard to the issue of *mens rea* of the Bank. Taking into consideration all the above, we are unable to agree with Counsel for the Bank that the learned Magistrate failed to address the issue of mens rea in so far as the Bank is concerned. We also find that the learned Magistrate was fully justified in coming to the conclusion that, taking into consideration paragraph 4.31 of the Bank of Mauritius Guidelines, the Bank cannot reasonably justify accepting the deposit so as not to commit a section 19 offence.

After taking into consideration all the above, we are of the view that it is amply clear that the learned Magistrate in effect found that the Bank had the *mens rea* to commit the offences under counts 3 and 4.

Ground 2 of the ground of appeal of Mr Dressler is devoid of merit and is set aside. Grounds 2 and 3 of the grounds of appeal of the Bank also fail.

Ground 3 of the grounds of appeal of Mr Dressler

"Because Section 5 of the Financial Intelligence and Anti Money Laundering Act is not compatible with the Constitution of Mauritius inasmuch as it is an unconstitutional interference with the property of the Accused No. 1 without satisfying the requirement of Public Safety, Public interest and Public Order".

Under this ground, in his skeleton arguments, learned Counsel for Mr Dressler relied on the extract of the testimony of the Chief Investigator of the ICAC, Mr Mungur where he admitted that the enquiry did not reveal any sort of criminal activity from Mr Dressler's account and that Mr Dressler did not do anything unlawful apart from depositing an amount in excess of Rs 500,000 into his account. Learned Counsel for Mr Dressler also argued that section 5 of the FIAMLA is coercive since *"it is effectively an unconstitutional interference with the property of the appellant without satisfying the requirement of Public Safety, Public Interest and Public Order"*.

At the hearing of the appeal, while asserting that section 5 of the FIAMLA is in breach

of sections 1 and 8 of the Constitution, learned Counsel for Mr Dressler stated that he was not asking the Court to declare that section 5 of the FIAMLA is unconstitutional without in any way elaborating how section 5 of the FIAMLA breaches the said sections of the Constitution. Learned Counsel referred to the following extract from the case of **Auckloo v The State of Mauritius** [2004 SCJ 312] '*It is one of the sine qua non of a democratic set-up that where power is entrusted to a person, he or she should exercise it judiciously and not arbitrarily:* ***Breen v Amalgamated Engineering Union [1971] 2 QB 175****. Also, where that power is of a coercive nature rather than of a distributive nature, the holder of the power has a double responsibility that he justifies use of that coercive power on reasonable grounds and not on mere allegation or suspicion*' and stated that "*philosophically*" when one reads the judgments of **The State v Sir Bhinod Bacha** [1996 SCJ 218], **Auckloo** (supra) and **Police v Fra** [1975 SCJ 148], the present case makes no sense and "*seems to offend the Constitution"* altogether. Learned Counsel for Mr Dressler also argued that section 5 is a coercive legislation since it makes criminals of persons who are not blameworthy and who do not have any link to any criminal activity.

We may easily dispose of this ground of appeal. Not only was the issue of unconstitutionality barely canvassed by Counsel for Mr Dressler, but also, as rightly pointed out by learned Counsel for the DPP, learned Counsel for Mr Dressler who alleged a breach of section 8 which provides for protection from deprivation of property, failed to show that there was any deprivation of property in the present case since the money was not forfeited. In addition, he alleged that there was a breach of section 1 of the Constitution which provides that Mauritius shall be a sovereign democratic State but failed to show how section 5 of the FIAMLA is not reasonably justifiable in a democratic society.

At any rate, learned Counsel for Mr Dressler having himself stated that he is not asking the Court to declare section 5 of the FIAMLA to be unconstitutional, we find that there is no merit in ground 3 of the grounds of appeal of Mr Dressler and we set it aside.

All the grounds of appeal having failed, the appeal is set aside with costs.

D. Chan Kan Cheong
Judge

K.D. Gunesh-Balaghee
Judge

15 March 2022

Judgment delivered by Hon. K.D. Gunesh-Balaghee, Judge

For Appellant	**:**	**Mr N. Ramburn, Senior Counsel appears together with Mr S. Hussenbocus, of Counsel**
	:	**Mr O.I.A. Bahemia, Attorney-at-Law**
For Respondent	**:**	**Mr H. Ponen, of Counsel appears together with Mr F Arzamkhan, of Counsel**
	:	**Mr N. Seetaram, Attorney-at-Law**
For Co-Respondent No. 1	**:**	**Mr R. Chetty, Senior Counsel appears together with Mr N Jeetah, of Counsel**
	:	**Mr T. Koenig, Senior Attorney**
For Co-Respondent No. 2	**:**	**Mrs Dabeesing-Ramlagun, Principal State Attorney**
	:	**Mr R. Ahmine, Deputy Director of Public Prosecutions appears together with Mrs R. Seegobin-Kalachand, State Counsel**