CHANGE EXPRESS LTD v INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR

2022 SCJ 301

Record No: 9098

THE SUPREME COURT OF MAURITIUS

In the matter of:

Change Express Ltd

Appellant

v.

1. **Independent Commission Against Corruption**
2. **The Director of Public Prosecutions**

Respondents

JUDGMENT

This is an appeal against the judgment of a learned Magistrate of the Intermediate Court convicting the appellant company of the offence of accepting payment in cash in foreign currency, the equivalent amount of which was in excess of Rs 350,000 in breach of sections 5(1) and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 ("FIAMLA"), coupled with section 44(2) of the Interpretation and General Clauses Act ("IGCA"), and sentencing the appellant company to pay a fine of Rs 1,000,000 and Rs 500 as costs.

This appeal is being heard again following the untimely demise of one of the learned Judges who heard the appeal before.

It was averred in the information before the Intermediate Court that on 26 April 2006 the appellant company, as represented by Mr Manogaren Poulay Sawmynaden, the Chairman of the Board of Directors, did wilfully, unlawfully and criminally accept a payment of 16,925 Euros in cash from one Santa Vaitilingon in exchange for the sum of

Rs 634,684.50 ("*the transaction*"). The appellant company, as represented by Mr Poulay Sawmynaden, pleaded Not Guilty to the charge.

Mr Poulay Sawmynaden further gave an unsworn statement on behalf of the appellant company to the investigators of the first respondent in which he stated that, according to the records of the company, the transaction was never effected at the branch of the appellant company in Quatre-Bornes ("the Quatre-Bornes branch"). He further contended that the copy of an email, which was found in the file of one Krishnaduth Motaye, the former Chief Executive Officer of the company, and which mentions the transaction, was fabricated by Mr Motaye who was the subject of an internal investigation into malpractices at the time.

The case for the prosecution was to the effect that Mr Vaitilingon went to the Quatre Bornes branch where he exchanged 16,925 Euros for Rs 634,684.50. The transaction was dealt with by one Mr Vinod Padayachy ("Mr Vinod"), the Manager of the branch. Mr Vinod was not called as a witness at the trial.

The prosecution called *inter alia* –

(a) **SI Nuckcheddy** from ICAC, who produced the unsworn statement recorded from Mr Poulay Sawmynaden; the company's Daily Transaction Report dated 26 April 2006 (**Doc B**) which shows that the transaction was not reported; and a copy of an e-mail dated 28 April 2006 found in the file of Mr Motaye, which mentioned, under the heading "INOX", that 16,925 Euros were exchanged at the rate of Rs 37.50 for Rs 634,687.50 (**Doc C**). He agreed under cross-examination that the only record of the transaction was **Doc C**, which had been remitted to him by the representative of the company;

(b) **Mr Vaitilingon,** who agreed that he had on 26 April 2006 remitted an amount exceeding Rs 500,000 in Euros to Mr Vinod, a "*cashier"* whom he knew at the appellant company and who exchanged the said sum into rupees without asking him for his National Identity Card as he was known at the branch and had an account there. He was prosecuted in relation to the transaction, pleaded Guilty and was convicted and fined;

(c) **Mr Motaye,** the former Chief Executive Officer of the accused company, who deposed generally on the procedure for reporting of transactions at the company. He stated that he had never come across the term "INOX", which appeared in **Doc C,** and that he had received the said email two days after the transaction. He did not leave the company on good terms.

No evidence was adduced by the defence.

In his judgment the learned Magistrate found that he could safely act on the evidence of witnesses Vaitilingon and Motaye and that **Doc C** was "*clear evidence against the accused*". He further found that the wilful failure to report the transaction in **Doc B** and the concealment and declaration of the transaction under the jargon "INOX" in **Doc C** showed "*the criminal intention of the accused*". He therefore found the case against the accused proved beyond reasonable doubt.

The appellant is now appealing against its conviction on four grounds and against sentence under ground 10. Five other grounds have been dropped.

The four grounds of appeal against conviction read as follows –

"Ground 2

The mischief which Section 5[1] of the aforesaid Act seeks to sanction ***requires mens rea*** *but the trial court failed to direct its mind that the prosecution ought to have been preferred under the main Act coupled with* ***Section 44[1][b]*** *of the IGCA although same is applicable to a body corporate which provides that "every person who, at the time of the commission of the offence was* ***concerned in the management of the body corporate or was purporting to act in that capacity****" and the evidence disclosed that the persons concerned in the management were in fact prosecution witness No.5, the CEO of the Company, and one Vinod, the Manager of the Branch who was identified but not cited in the information and* ***not Mr Manogaren Poulay Sawmynaden*** *who was appointed several months* ***after the commission of the alleged offences*** *and on a proper direction of the law the conviction and sentence should be quashed inasmuch as the same elements ought to be applicable because even* ***Section 44 [2] expressly refers to "corporate body"****.*

Ground 6

The Learned Magistrate was plainly wrong to act on the sole evidence of witness No.2, an accountant, who confirmed that the alleged transaction was

allegedly dealt with by one ***"Vinod" and maintained in chief that he was issued a receipt by the said Vinod whom he identified at the ICAC*** *and on a close analysis of the evidence in the absence of Vinod's name on the list of witnesses, the* ***non-production of the "receipt handed over to one Yaveen Murday"*** *coupled with the investigative authorities which failed to have a fair, full and faithful enquiry, the conviction cannot be upheld as both the evidential and the legal burden of proof beyond reasonable doubt could not have been satisfied.*

Ground 7

The trial court's examination of the evidence of witness No.5, the CEO of the Company at the material time is again faulty in many material particulars especially when it failed to consider the issues raised by the appellant in his statement to the effect that document C was a fabrication with a view to causing harm to the company, which matter was never directed to despite the fact that ex-facie the email nothing is suggestive that it was sent to the appellant and on a proper direction of such evidence, the information ought to have been dismissed.

Ground 8

That on a proper direction as to the contents of documents B and C which were produced by the Appellant himself and in the absence of ***"the issued receipt"*** *with the failure of the prosecuting authorities to have Messrs Vinod and Yasveen Murday cited as witnesses who could have been cross-examined, there is a real likelihood that the transaction was never dealt with at the said branch and the benefit of the doubt ought to have been given to the accused."*

Grounds 2, 6, 7 and 8, which are all verbose and long-winded, were dealt with together. Grounds 6, 7 and 8 essentially challenge findings of fact of the learned Magistrate. The thrust of the submissions of all Counsel at the hearing of the appeal however was on corporate criminal liability and the issue of the *mens rea* of the appellant company, which was indirectly raised in Ground 2 and which we shall also be focussing on.

Learned Senior Counsel for the appellant extensively referred in his submission to the judgment of **Central Electricity Board v The State [2010 SCJ 75]**, in which it was held that the "*identification principle*" should be applied to establish corporate liability in the Mauritian context**.** It was his contention that the prosecution had identified Mr Vinod as having the *actus reus* but failed to bring in evidence of *mens rea* as Mr Vinod did not give evidence and was not interrogated by ICAC; Mr Vinod failed to follow the protocol established; and the prosecution adduced no evidence that the company knew about the

impugned transaction at the time that it occurred. It was also submitted that Mr Vinod was not the "*directing mind and will*" of the company and acted on a frolic of his own when he effected the transaction.

On the other hand, learned Counsel for the first respondent pointed to the fact that the undisputed evidence on record shows that Mr Vinod was the Manager of the Quatre Bornes branch at the material time and had therefore been delegated its management; that it was part of his duties to accept money on behalf of the appellant company; that he had been identified by witness Vaitilingon as being the person to whom he had remitted a sum of money above the prescribed limit at the branch; that Mr Vinod had processed the transaction, issued a receipt and asked for neither Mr Vaitilingon's National Identity Card nor the source of the funds. **Doc C**, which was sent to Mr Motaye, the then Chief Executive Officer of the appellant company, establishes that the impugned transaction, albeit an unofficial one, was recorded in favour of the appellant company. He submitted that Mr Vinod was therefore not acting on a frolic of his own when he accepted the payment, but was acting within the field of operation assigned to him and his action was by design for the benefit of the company; all the legal requirements to engage the criminal liability of a body corporate were therefore satisfied.

Learned Counsel appearing for the second respondent also submitted that Mr Vinod, as the Manager of the Quatre Bornes branch, was the identified individual capable of engaging the responsibility, and could be said to be a "*directing mind*", of the appellant. Further **Doc C** showed that the transaction was "*circulated*" to other employees of the company so that the offence could be attributed to the appellant company.

We have duly considered the submissions made by all learned Counsel and the authorities relied upon by them.

Section 5 of FIAMLA provided at the material time[1] as follows –

5. Limitation of payment in cash

(1) Notwithstanding section 37 of the Bank of Mauritius Act, but subject to

[1] According to the information, the offence was committed before section 5 of FIAMLA was amended by the Finance Act 2006 [Act No 15 of 2006] with effect from 7 August 2006 to increase the prescribed threshold from Rs 350,000 to Rs 500,000.

subsection (2), any person who makes or accepts any payment in cash in excess of 350,000 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.

It is now well-settled that section 5 of FIAMLA does not create a technical offence and that the prosecution will need to aver and establish *mens rea* on the part of an accused party charged with an offence under that section (see **Meeajun v State [2011 SCJ 141]**). It was therefore incumbent upon the prosecution to establish the *mens rea* of the appellant company beyond reasonable doubt. This raises the issue of the criminal liability of the appellant and in particular whether the appellant company willfully committed an offence when Mr Vinod, as Manager of a branch of the appellant, accepted the cash payment in excess of Rs 350,000.

Although the information mentions specifically section 44(2) of the IGCA, we find it appropriate to reproduce the whole of section 44 of the IGCA, which reads as follows –

44. Offence by agent or body corporate

(1) Where an offence is committed by –

(a) an agent, the person for whom the agent is acting;

(b) a body corporate, every person who, at the time of the commission of the offence, was concerned in the management of the body corporate or was purporting to act in that capacity, shall also commit the like offence, unless he proves that the offence was committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence.

(2) (a) Where a company, société or other corporate body is charged with an offence, a representative may appear before the appropriate Court and enter a plea of guilty or not guilty on behalf of the company, société or other corporate body.

(b) For the purposes of paragraph (a), "representative" means a director, or the secretary, of the corporate body or a person duly authorised by the corporate body to represent it.

Now section 44 (2)(a) clearly provides for the representation of the corporate accused party in Court, particularly for the purpose of entering a plea to the charge. The person representing the accused corporate body in Court for the purposes of section

44(2)(a) does not necessarily have to be a person who was concerned in the management of the said body at the time of the commission of the offence; it suffices that he is duly authorised by the corporate body to represent it in Court and to enter a plea on its behalf. We would respectfully disagree with the *obiter* pronouncement of the Supreme Court at paragraph 7 of **Central Electricity Board** to the extent that it appears to conflate the issues of liability (**section 44(1)(b)**) and representation in Court (**section 44(2)(a)**). The present appeal raises no issue under section 44(2)(a) of the IGCA as the appellant company was duly represented in Court by Mr Poulay Sawmynaden.

Section 44(1)(b) of the IGCA, on the other hand, seems to provide for two potential accused parties when an offence is committed by a body corporate –

(a) the body corporate itself; but "*also*"

(b) every person who, at the time of the commission of the offence, was concerned in the management of the body corporate or was purporting to act in that capacity, unless he proves that the offence was committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence.

(see also **Coindreau v The State** [2013 SCJ 417]).

As noted by the Court at paragraphs 13 and 15 of the judgment of **Central Electricity Board**, the relevant legislation, that is, the Criminal Code and section 44 of the IGCA, is silent as to the circumstances in which the charge should be entered against the body corporate itself. In that case where the appellant had been charged with involuntary wounds and blows by negligence, the Supreme Court reviewed a number of authorities on the issue of corporate manslaughter and endorsed the "identification principle" as the basis for corporate liability for manslaughter and assault (see also **DPP v La Clinique Mauricienne** [2014 SCJ 70]).

The "identification principle" has also been applied by the Supreme Court in cases where a body corporate is being prosecuted for money-laundering (see **Shibani Finance Co Ltd v Independent Commission Against Corruption & Anor** [2012 SCJ 413] where the charge laid was under section 5 of FIAMLA).

Under the "identification principle", a company will, in a nutshell, only be criminally liable if an identified individual's criminal conduct can be attributed to the company. However not every employee or officer of a company will engage the criminal liability of the company; it has to be established that he represents the "*directing mind and will of the company*". The House of Lords in **Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127** cited with approval the following famous statement of Lord Denning in **Bolton (Engineering) Co v Graham [1957] 1 Q.B. 159** at page 172 –

> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such".*

(the underlining is ours).

The Court has also in this regard to consider whether the officer of the company was acting within or outside the scope of his duties when he effected the transaction. As has been explained in **Blackstone's Criminal Practice 2020, Section A6 – Corporate Liability, Rules of Attribution: Principle of Identification at para A6.4** –

> "***Scope of Office***
>
> *Although there seems to be no decision directly in point, it is generally accepted that a company would only be identified with an act done by one of its officers within 'the scope of his office', to use the expression adopted in the Law Commission's Draft Criminal Code (Law Com No. 177), cl. 30(2). For example, if a director driving to a board meeting causes death by his dangerous driving, the company would not be liable for the statutory offence, or for manslaughter, since the director was not exercising his managerial functions whilst driving, even though he was on his way to a place where he would exercise those functions. On the other hand, if the acts done are within the scope of his office, as with the false purchase tax returns made by the company secretary in* ***Moore v I. Bresler Ltd [1944] 2 All ER 515****, it does not matter that they are done to conceal a fraud on the company".* [Emphasis added].

The issue of whether the officer of the company has acted outside the scope of his duties and "*on a frolic of his own*" also has to be considered. In such cases, his personal

liability is engaged and not the company's (see **Kirk v The Bay (Holding) Limited & Ors [2013 SCJ 108]**).

In the present case since the information was laid against the body corporate itself, the Court had to address its mind to whether the *mens rea* of the body corporate was established in line with the applicable principles above, including the "identification principle". It is patently clear from the judgment that the learned Magistrate utterly failed to even allude to the applicable principles, let alone apply them.

In fact the learned Magistrate, when considering the guilty intent of the appellant, seemed totally oblivious to the fact that the then accused was a body corporate. His judgment therefore contains no analysis as to whether Mr Vinod's act of accepting money in excess of the prescribed limit and the alleged concealment of the transaction could and should bind the company in the light of the applicable principles on corporate criminal liability. He contented himself, when considering the guilty intent of the accused, with finding that the non-recording and concealment of the transaction showed that the accused had acted wilfully and unlawfully, as if for all intents and purposes he were considering the *mens rea* of a natural person. This in itself vitiates his finding that the *mens rea* of the appellant has been established.

Based on the above, we allow the appeal. We quash the appellant's conviction and sentence and remit the matter back to the learned Magistrate for him to address his mind to the *mens rea* of the accused company in the light of the facts he had found proved and of the applicable legal principles. In view of the circumstances, we make no order as to costs.

A. D. Narain
Judge

R. D. Dabee
Judge

6 September 2022

Judgment delivered by Hon. R. D. Dabee, Judge

For Appellant	**:**	**Mr. S. Mardemootoo, Attorney at Law** **Mr. G. Glover, Senior Counsel** **Mr. L. Balancy, of Counsel**
For Respondant No. 1	**:**	**Mr. S. Sohawon, Attorney at Law** **Mrs. A. Rangasamy-Parsooramen, of Counsel** **Mr. T. Naga, of Counsel**
For Respondent No. 2	**:**	**Mr. K. Parson, Principal State Attorney** **Mr. A. A. Ramdahen, Ag. Principal State Counsel**