ICAC V BOSTOM INDRA KUMAR

2019 INT 20

CN 977/10

IN THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

The Independent Commission Against Corruption

V

BOSTOM Indra Kumar

JUDGMENT

The accused is charged in respect of **3 counts** with wilfully, unlawfully and criminally engaging in a transaction that involved property which, in part, directly represented the proceeds of a crime, where he had reasonable grounds for suspecting that the property was derived in part directly from a crime in breach of **Sections 3(1) (a), 6(1) and 8 of The Financial Intelligence and Anti-Money Laundering Act (The FIAMLA).**

He pleaded not guilty to the charges and was represented by Mr K. Trilochurn and Mr H.Ramlogun.

Mr Roopchand conducted the case for the prosecution.

The Prosecution

On the 7th of June 2007, on the 3rd of September 2007 and the 11th of October 2007, it is claimed that the accused deposited the sums of 28,000 rupees (*Count 1*), 10,000 rupees (*Count 2*) and 180,000 rupees (*count 3*) in his Bank Account No 01520100000200. It is the case for the prosecution that the accused suspected that these sums have been derived, in part, directly from a crime, that is, forgery.

The statement of account of the accused (**Document B**) shows that such sums were deposited on the abovementioned dates.

To prove its case, the prosecution called several witnesses, especially pertaining to the proceeds of crime.

Mrs Marie Roselyn Thomas (*witness 2*) explained that she held a joint account together with her uncle, Mr Pierre Alfred Alphonse, at the State Bank of Mauritius (The SBM). She produced various bank statements (**Document C**) for the period May 2005 to September 2005, which showed that there had been six withdrawals of money in cash, from that account. There were five withdrawals of 100,000 rupees and one withdrawal of 94,000 rupees. She revealed that she did not made those withdrawals, nor did her uncle. Later, the SBM reimbursed them that whole amount.

Mrs Chitra Devi Pursun (*Witness 4*) was posted at the SBM as teller and in 2004, she was working with the Accused, who was the Manager. She explained the procedure for a withdrawal of an amount exceeding 100,000 rupees. The electronic system did not allow for withdrawal of such an amount. Normally, the manager comes with the withdrawal form and asked any teller to execute the transaction. The teller then processed withdrawals transactions even if the customer is not physically present at the counter, but who is in his office. The teller compares the signature of the customer appearing in the system and if it tallied, she would make the withdrawal and handed over the money to the manager. She however did not remember a customer in the name of Mr Pierre Alphonse, even after being shown Document C. She could not tell whether she was involved in the six withdrawal transactions. She confirmed that when the manager came with a withdrawal form, she would make necessary verifications before effecting the withdrawal.

Mrs Manisha Devi Dowlut (*witness 5*) was working with the Accused in 2005. There were instances where the accused produced to her withdrawals forms without the customers being at the counter. She verified the account holder, the account number, amount in words and figures and signature in the form with the one available on the system. After all verifications, she handed over the money to the accused. For a dormant account, it has to be activated by a cash deposit and needs the authorisation of the manager online through the system before any withdrawal is made. She added that it was permissible for managers to effect withdrawals for customers who were present in their office and after all necessary procedures met with. She also could not remember any customer in the name of Pierre Alphonse and could not say whether she was involved in the withdrawal transactions of that person.

From the testimony of Mr Deochand Gonpot (*witness 10*), it is revealed that the accused joined the SBM on the 25th of September 1980 as Clerical Assistant and on the 11th of November 1996, he reached the managerial grade. He worked at several SBM branches. On the 8th of March 2006, his employment was terminated following the outcome of a disciplinary committee in a case of misappropriation of funds at the Bank.

Mrs Genevieve Anne Talbot (*witness 3*) was employed at the SBM as Team Leader and was performing internal auditing. Following certain complaints received from customers, she carried an internal investigation. There were unauthorised transactions which were linked to the accused. Based on the initial investigation, there was a trend that was picked up. It related mainly to the fact that the dormant accounts of a number of customers were being reactivated with normal deposits and then subsequently money on their account was being withdrawn.

Then, there was a second trend whereby, some of the accounts where money was being taken out allegedly fraudulently, the customers were not receiving their bank statements and there were the whole mail instructions on the accounts. These led to a series of investigation into an additional 23 dormant accounts that had been the target and where the funds have been fraudulently withdrawn. The accounts which were reactivated were of foreign nationals or Mauritians residing abroad. She also took an audit trail of a list of transaction that was processed by the SBM and looked at the user IDs who have accessed the accounts.

A number of these dormant accounts were accessed by the Accused.

The investigation went on for quite a while. There were other cases where loans were guaranteed by deposits and the documents were fraudulently discharged and these were linked to the accused. There was also a former partner of the accused who complained about having overdrafts in his name of which he was not aware.

When they looked at the nature of the processing that was performed, in some cases these were marked as “Accounts Inquiry” which means going into an account of a particular customer and querying the balance of that account. In some of these accounts that had been accessed, money was withdrawn without the knowledge of the customer.

In some cases, they even found that approval was given by the accused himself. She also queried from tellers who stated that the vouchers were provided by the accused and the customers named in those vouchers were that of the accused. The SBM had to refund around 15 million rupees.

It came out during cross-examination that she had no details of all the accounts she investigated into and even of those accounts she mentioned above. The first complaint came from Mrs Thomas and Mr Alphonse who stated that they were not receiving their bank statements. They found out that the sum of 300,000 rupees were missing on their account and upon querying in the corresponding vouchers, it was found, through the tellers, that the vouchers were given by the accused.

Investigation was made into the handwritings of the Accused and the latter’s colleagues concurred that the vouchers bore the handwritings of the accused.

The defence

In his statement to the police, the accused explained that in 2009 he was working with his brother and receives a salary of 15,000 rupees. He stays in a store which is rented by his brother, and out of the salary paid to him, he uses 7,000 rupees to pay for the rent. He uses the remaining for his personal expenses.

Prior to that, he was employed at the SBM and his employment was terminated in 2006. At the beginning of 2006, he had health problem and went on sick leave. He was then informed from the Bank about certain fraudulent transactions and went through a disciplinary committee. He could not give any explanations as he did not have the figures with him.

He conceded that money was deposited in his bank account, but that he borrowed the money to pay back his loan, to avoid his property being seized. He denied that the money deposited in his account came from fraudulent transactions when he was at the SBM and he denied having committed any forgery during his employment with the Bank.

In court, he explained that he came to know much later that the money emanated from his brother Vedassur Bostom and it was Kavirajsing Bagratee who made the deposits into his account. He produced two legal notices (**Documents D and D1**). He added that the letters including the notices were delivered in the shop of his brother at La Flora. He was later told that a legal notice concerning the seizure and sale of his property was served upon him. He was following treatment for his heart disease and his relatives did not want to stress him furthermore. This is why they did not outright inform him.

Mr Vedassur Bostom, the brother of the accused confirmed that after the accused had lost his job, he was working with him for a monthly salary of 5,000 rupees. The accused suffers from heart disease and has a property near to his shop at La Flora. The delivery of any letter is always made in his shop which remains open during the day. He did obtain a notice served by an usher in respect of the seizure of accused's property. The fact that the accused had no means to reimburse his loan and was not working, he sought the help of other relatives. They did contribute and he handed the money to his cousin Mr Bagratee. He personally contributed 100,000 rupees. At the time he received the notice, the accused was admitted for heart treatment and this is why he did not inform him.

Mr Kavirajsing Bagratee revealed that on three occasions, he credited the money into Accused's account in the sums of 28,000 rupees, 10,000 rupees and 180,000 rupees, which money he obtained from accused's brother. He explained that the first two deposits were made at the counter of SBM, Head Office. But for the third deposit, he was brought in an office where he was informed that the balance due was 195,743 rupees. He deposited the 180,000 rupees and further made a transfer of 15,743 rupees from his personal account into the accused's account to prevent the seizure. For all three deposits, he filled in the deposit vouchers and remitted them back to the teller. He could not say about the source of money.

The law and the elements

Section 3(1) (a) of The Financial Intelligence and Anti-Money Laundering Act (FIAMLA) reads:

> *"**3. Money Laundering***
>
> *(1) Any person who –*
>
> *(a) engages in a transaction that involves property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime;*
>
> *…*
>
> *where he suspects or has reasonable grounds for suspecting that the property is derived or realised, in whole or in part, directly or indirectly from any crime, shall commit an offence."*

The prosecution needs to prove the following elements:

1. the accused was engaged in a transaction involving property
2. the property, in part and directly represented the proceeds of a crime
3. circumstances showing that the accused had reasonable grounds to suspect that the property was derived from a crime.

1.That the accused was engaged in a transaction that involved property

It is the submission of learned counsel for the prosecution that transaction contemplated in respect of each count relates to deposits of various sum of money.

The defence contended that it was incumbent upon the prosecution to produce the Deposit Vouchers which were used to effect those transactions in order to establish this element. The prosecution has failed to establish that the deposits were deposited under the instructions of the accused.

It is not an issue that the Deposit Vouchers with regard to the three transactions were not produced in court, not having been secured. There is therefore no direct evidence with regard to the engagement of the accused.

The version of the accused clearly seems to be that he borrowed the money from his relative, but that he personally did not effect the deposits. Mr Bagratee did so. The absence of the vouchers is not fatal, since the accused was aware, albeit later, that money was deposited in his account, for a certain purpose.

The court has no qualm to find proven that the accused was engaged in transactions involving in all the sum of **218,000 rupees**.

2. The money represented the proceeds of crime

Section 8 (2) of the FIAMLA provides that:

"Any property belonging to or in the possession or under the control of any person who is convicted of an offence under this Part shall be deemed, unless the contrary is proved, to be derived from a crime and the Court may, in addition to any penalty impose, order that the property be forfeited."

It is not a disputed fact that the case of forgery lodged against the accused was dismissed. During a previous ruling, dated 9th of June 2017, this court had borne in mind that **Section 6(1) (2) of the FIAMLA** (before the amendment in 2012) is also relevant with regard to the procedure. That section provides that a person may be convicted for money laundering even in the absence of a conviction in respect of a crime which generated the proceeds alleged to have been laundered. Also, a person may upon single information or a separate information, be charged with and convicted of both the money laundering offence and of the offence which generated the proceeds alleged to have been laundered.

By virtue of **Section 6(3) of the FIAMLA**, it shall be sufficient to aver in the information that the property is in whole, directly the proceeds of a crime, without specifying any particular crime.

In the present case, the predicate crime has been averred as being a forgery. There have been several pronouncements that proof of a specific predicate crime is not required. Where it is possible to give particulars of the nature of the criminal activity that generated the illicit proceeds, fairness demands that this should be done.

In **The DPP V A. A. Bholah 2011,** the Privy Council referred to several cases and concluded at paragraphs 33 that:

"The Board has therefore concluded that proof of a specific offence was not required in order to establish guilt under section 17(1) of ECAMLA. It is sufficient for the purposes of that subsection that it be shown that the property possessed, concealed, disguised, or transferred etc represented the proceeds of any crime – in other words any criminal activity – and that it is not required of the prosecution to establish that it was the result of a particular crime or crimes. In light of this conclusion it follows that a failure to identify and prove a

specific offence as the means by which the unlawful proceeds were produced is not a breach of section 10(2)(b) of the Constitution. In the Board's view, that section requires that the nature of the offence of which the accused person must be informed is that with which he is charged, in this case the offence of money laundering. Proof of a particular predicate crime is not an essential "element" of the offence of money laundering.

The Board also considered the case of **R v Anwoir [2009] 1 WLR 980**, quoting Latham LJ in **R v W (N**) who said this, at paragraph 21:

"*We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, (a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or (b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime*."

The court has to decide whether there is any evidence, even circumstantial, from which it can reasonably infer that the monies in part and directly represented the proceed of a crime.

It is the submission of the prosecution that there is sufficient evidence on record to infer that the three deposits were derived from forgery. The testimony of Mrs Talbot is relevant to that effect. Furthermore,

1.the accused was reluctant to fully collaborate at the time of the enquiry and to state where he got the money to repay the loan.

2.the deposits could not have been from his earnings which amounted to 5,000 rupees as stated by his brother (which is in contradiction to the 15,000 rupees accused stated his was earning).

3.the fact that the money emanated from his family members is a mere lie and fabrication in view of the numerous inconsistencies in his version and that of witnesses Bostom and Bagratee.

The defence took the view that witnesses 2, 4 and 5 did not implicate the accused. The only witness who tried to link the fraud to the Accused was Mrs Talbot. But the court has only her testimony with no documentary evidence available to assess the facts. It was incumbent upon the prosecution to bring direct evidence by calling tellers and customers to link the accused to the fraud. The court cannot act upon the inference made by witness Talbot.

The court found proven that there were fraudulent transactions at the SBM during the year 2005. Witness 2/ Mrs Thomas explained how there were fraudulent withdrawals from her joint account and ultimately the Bank had to reimburse her. As for witnesses 4 and 5, they explained the procedures when an amount greater than 100,000 rupees had to be

withdrawn. However, none on these witnesses referred to the accused being involved in the fraudulent transactions.

Mrs Talbot admitted that whatever she stated in court are evidences gathered as part of the internal investigation carried out at the SBM. And those evidence emanate from the tellers, customers and the bank computer system. She tendered to the court evidences emanating from her personal enquiry, gathered from tellers, customers, documentary evidence. however, none of the tellers she referred to were called. She made mention of customers who dealt with the accused personally, but they were not called. No documentary evidence was produced. All the issues she brought up during her testimony with regard to her findings was based on her oral evidence and the court cannot make any inferences from the testimony. Vouchers, list of transactions, handwriting report (if made by an expert) were not produced. The court cannot rely on her testimony that she and her colleagues confirmed that the vouchers bore the signature of the accused to establish a case of forgery against him, let alone to infer that he was implicated in some kind of criminal activity.

From the evidence adduced, there is no sufficient nexus between the money deposited in the bank and the monies which were misappropriated from the Bank.

The accused explained that when his employment was terminated in 2006, he already started to have health problem. It is worth noting that the first Notice came in November 2006. There was then a deposit of 28,000 rupees in June 2007, a second deposit of 10,000 rupees was made in September 2007. The Notice of the Sale by Levy came in October 2007, following which the final deposit was made to clear the loan.

The court does not agree that the accused was reluctant to fully collaborate with the ICAC. It is obvious that he exercised his right to silence, as he was entitled to, with regard to the fraudulent transactions at the SBM in a first statement given. But, with regard to the present charge, he did state that he borrowed the money to repay his loan, though he did not want to say from whom. In court he explained that it was his brother and his cousin who helped him in repaying the loan.

It was also never stated that the money which was deposited in the Bank comes from his earnings, so that the discrepancy in his testimony with regard to the amount he was getting is not material. He explained that out of the 15,000 rupees given to him, 7,000 rupees was used for rent of the property which his brother was letting.

The defence sought to rebut the prosecution's case by calling these two witnesses to explain the source of the money and the purport for which the monies were deposited. Save for some contradictions in the testimony of the two witnesses, the court believes that they have deposed in a truthful manner. Their explanation makes sense. Accused was not well and they did not want to disturb him further. The brother gathered money from relatives and he personally contributed some 100,000 rupees. It is obvious that accused was striving to pay back his debt and that the deposits were isolate in time. It is only when he was faced with an ultimatum that an effort was made to clear out the loan.

As for Mr Bagratee, the court notes that he deposed with humility. Accused's brother gave him 180,000 rupees to be deposited since it was the last day for settling the loan. When he went to the Bank, he was informed that there was a further 15,743 rupees to be paid. He then made a transfer from his own account to that of the accused in that sum so that the loan can be cleared. The court finds that more credence is given to his testimony when referring to the statement of account of the accused (**Document B**) which shows that in fact a transfer of 15, 743 rupees was made from another account, which Mr Bagratee identified to be his, to that of the accused.

It has therefore remained unrebutted that the money was collected from accused brother and his relatives and deposited to the Bank by Mr Bagratee.

3. Whether the circumstances show that the accused had reasonable grounds to suspect that the property was derived from a crime.

D D Manraj and Ors v ICAC 2003 SCJ 75 defines what the court needs to look into when deciding whether there was a reasonable suspicion:

"Reasonable suspicion" must necessarily be grounded on facts:

"Reasonable suspicion, in contrast to mere suspicion, must be founded on fact. There must be some concrete basis for the officer's belief, related to the individual person concerned, which can be considered and evaluated by an objective third person."

"Reasonable suspicion" must necessarily be distinguished from mere suspicion.

"Mere suspicion, in contrast, is a hunch or instinct which cannot be explained or justified to an objective observer."

"Reasonable suspicion" is no instinct, allows no guess, no sixth sense. It is scientific. It has to find support on facts, not equivocal facts but facts consistent with guilt. All that an investigatory authority may do with its hunches is keep the person under observation but it cannot act on it.

If an offence was committed under Section 3 of the FIAMLA when the accused had suspicion or reasonable grounds for suspicion that the property comes from a crime, it goes without saying that the offence is also committed when the accused knew of the tainted nature of the property: **Antoine v The State 2009 SCJ 328**.

It was further held in **Antoine v The State** that: "Since *'knowledge' necessarily implies and encompasses the notion of 'reasonable grounds for suspicion' we do not find that the legislature has made a blunder by omitting to include, in the money laundering offences, 'knowledge' as one of the mental elements, although we concede that this element could have been included and there would have been absolutely no harm in doing so*."

In the circumstances as laid down above, where it is established that it was the accused's brother who arranged for the money and had it deposited at the Bank, it is obvious that the accused had no knowledge of the source of the money.

Despite the fact that, when his statement was being recorded, the accused did not inform the ICAC where he borrowed money from, he later explained in court that it was his brother who gathered the money and with the help of his cousin, the money was deposited on time at the Bank to avoid a seizure of his property. The accused gave sworn evidence and was exposed to cross-examination. The witnesses called on behalf of the defence gave coherent version so that the court finds the defence has been able to rebut the presumption that the accused could have a reasonable suspicion about the origin of the money.

Therefore, the prosecution did not establish elements 2 and 3 of the charge as laid down.

For the above reasons, the court holds that the prosecution has not proved its case beyond reasonable doubt and dismisses all three counts against the accused.

B.R.Jannoo- Jaunbocus (Mrs.)
Magistrate
Intermediate Court (Criminal Division)
This 31st January 2019.