

ICAC V/S ALKESH KUMAR GOBURDHUN

2021 INT 120

**IN THE INTERMEDIATE COURT OF MAURITIUS [FINANCIAL CRIMES
DIVISION]**

CN: 24/2020

Independent Commission Against Corruption

v/s

Alkesh Kumar Goburdhun

Ruling

Accused stands charged with the offence of money laundering under 91 counts in breach of sections 3(1)(a), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act [FIAMLA] 2002. Accused was assisted by counsel and pleaded not guilty to the charges.

Learned Counsel for the defence made a motion that the proceedings be stayed for abuse of process on the ground that the averment in the list of witnesses “CP to come and produce previous convictions of the Accused party” is highly prejudicial to the Accused in as much as it will have a bearing on the mind of the court and it amounts to a breach of the right of the Accused party to be given a fair trial before an independent court . The prosecution objected to the motion. The case was fixed for arguments.

Submissions

Mr Nulliah submitted that it is important for the prosecution to place before the court evidence surrounding the crime which has led to the offence of money laundering and that one of the means of doing so is by bringing forth the previous conviction of the Accused party. He conceded however that the prosecution is not burdened to prove the specific crime. Mr Ramful on the other hand submitted that the prosecution has elected to specify the particular predicate offence in the information but that the FIAMLA has not specifically provided for instances where the ICAC can produce the previous convictions of the

Accused to prove the predicate offence. He further submitted that the general rule is that previous convictions should not be allowed. In support, he referred to the case of **B W Laventure v/s The State** [2018] where the conviction was quashed on appeal where the Learned Magistrate relied upon an admission by the appellant in his statement of defence that he had previously been arrested for a similar offence and that Appellate Court held that the prejudicial effect of that admission being acted upon by the magistrate clearly outweighed its probative value and rendered the appellant's conviction unsafe.

Discussions

It is well settled that the court has the power to stay proceedings in order to protect its process from abuse. This common law power was recognized in **Connelly v/s DPP** [1964] AC 1254 & **R v/s Horseferry Road Magistrates' Court, Ex p Bennet** [1994] AC 42. The principle was explained by Lord Chief Justice Roger Ormrod in the case of **R v/s Derby Crown Court ex p Brooks** [1985 80 Cr App R p. 164]; *"The power to stop a prosecution arises only when it is an abuse of process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of protection provided by law or to take unfair advantage of a technicality or (b) on the balance of probability, the defendant had been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable"*.

The general rule as rightly submitted by Mr Ramful is that the trial court should not be made aware of the previous convictions of the Accused before his conviction by the court. The case which is in fact directly pertinent to the present arguments is that of **E Madelon & Anor v/s v/s State** [2009] SCJ 208. In that case, 2 appellants had been charged with possession of heroin for the purpose of selling with a further averment that they were drug traffickers. The information had further averred that the first and third appellants had been previously convicted of an offence connected with dangerous drugs. After alluding to the case of **Sabapathie v/sThe State** [1999] WLR 1836. the full bench of the Court of Criminal Appeal laid down the following principles *"The proper course would have been for the prosecution not to make any reference in the information to the previous conviction but, after the guilt of the accused party for the offence charged would have been established, to move for sentence. The court would then proceed to a hearing before*

determining sentence. That procedure would have the advantage of ensuring that no evidence which may have a prejudicial effect against an accused party is adduced at the stage of trial.” They went on to stress however that “This is not to say that the previous conviction of an accused party should indiscriminately not be averred in all cases. Thus, an information may contain a reference to a previous conviction if the fact of such conviction is an associated element of the offence charged.”

In the light of the above principles, it is sufficiently clear that where the fact of a previous conviction is an associated element of the offence, it may be averred in the information. The prosecution in the present case intends to adduce evidence of a conviction in support of the offence of drug dealing which is averred in the information as the predicate offence.

I find it apposite to refer to section 6 (1) and (3) of the FIAMLA 2002 which provides “A person may be convicted of a money laundering offence notwithstanding the absence of a conviction in respect of a crime which generated the proceeds alleged to have been laundered.”

“In any proceedings against a person for an offence under this Part, it shall be sufficient to aver in the information that the property is, in whole and in part, directly or indirectly the proceeds of a crime, without specifying any particular crime, and the Court, having regard to all the evidence, may reasonably infer that the proceeds were, in whole or in part, directly or indirectly, the proceeds of a crime”.

The judgment of the Privy Council in the case of **DPP V/S A.A. Bholah** [2011] UKPC 44 is enlightening on the nature of evidence which is required for the purposes of section 3 (1) of the FIAMLA. The Judicial Committee held that the proof of a particular predicate crime is not an essential element of the offence of money laundering. It is sufficient for the purposes of section 3 (1) of the FIAMLA that it is shown that the Accused party was in possession of property, which is, in whole or in part, directly or indirectly represent the proceeds of any crime that is any criminal activity. It is thus clear that there is no burden on the prosecution to aver and prove any specific crime from which the proceeds may be derived in order to establish its case.

In the light of the above legal principles, the prosecution may wish to reconsider their stand in respect of witness 6 and is reminded that any evidence which has a prejudicial effect which will outweigh its probative value cannot be admitted.

Turning now to the motion of defence counsel that the proceedings ought to be stayed, I find that it would not be judicious for this court to stay proceedings because of the mere averment in the list of witnesses "CP to come and produce previous convictions of the Accused". It must not be forgotten that for the purposes of thrashing out the motion of abuse of process, the ultimate test is one of fairness and that the court can regulate proceedings and reach any decision by an objective appraisal of facts. It is noteworthy that the present case is not being tried before a Judge sitting with a jury in which case different considerations are applicable. Hence, the question of the prejudicial effect of the averment of the previous convictions does not arise. It is borne in mind that in the case of **Madelon [supra]**, the convictions of the first and third appellants were quashed due the wrongful admission of the previous conviction and the irregular averment in the information disclosing and detailing previous conviction in the body of the information which was the Learned Judges construed as being a gross irregularity which flies in the face of section 10 of the Constitution. The present case is to be distinguished in as much as there is no irregular detailed averment of the previous conviction in the body of the information, albeit a mere reference in the list of witnesses only.

I therefore conclude that it is possible for this court to hold a fair trial and that there are no compelling reasons to warrant the exercise of my discretion to stay proceedings against the Accused party. For the above reasons, I set aside the motion of defence counsel.

[Delivered by N. Senevrayar-Cunden, Magistrate of Intermediate Court]

[Delivered this 10th of September 2021]