CN 911/2015
(FCD CN 96/2020)

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

ABC Motors Co. Ltd

JUDGMENT

1. The accused has been prosecuted for the offence of limitation of payment in cash in breach of section 5(1) and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 and section 44(2) of the Interpretation and General Clauses Act. The accused's representative pleaded not guilty to the Information and was represented by counsel throughout the proceedings.

2. It is noted that the case has been started anew before the Financial Crime Division of the Intermediate Court.

CASE FOR THE PROSECUTION

3. Witness no.1, filed the following documents to court:

a) Two defence statements of the accused (Docs AA and AA1).
b) A duplicate receipt from the accused company dated 07.05.10, for a payment of Rs300,000 (Doc AB).

c) A duplicate receipt from the accused company dated 18.05.10, for a payment of Rs300,000 (Doc AB1).
d) A duplicate receipt from the accused company dated 18.05.10, for a payment of Rs235,000 (Doc AB2).
e) A duplicate receipt from the accused company dated 18.05.10, for a payment of Rs300,000 (Doc AB3). The payment was made by cheque as indicated by the cheque number on the receipt.
f) A copy of an email dated 20.12.07 sent by the finance manager of the accused company to the cashier office, to the effect that any cash payment in excess of Rs500,000 should not be accepted (Doc AC).

4. All the above receipts show that they were part-payments to the accused company from one John Dean Yee Sak Chan, witness no.8, for the acquisition of a motor vehicle.

5. The witness stated that the enquiry started as a result of an FIU referral against witness no.8. The latter acquired the motor vehicle for the sum of Rs1,135,000. The enquiry further revealed that a sum of Rs535,000 was accepted by the cashier of the accused company as one payment in cash and she split the payment into two receipts. Witness no.8 also stated during enquiry that he effected a payment of Rs535,000 as one transaction.

6. Witness no.2 stated that in May 2010 he was the sales manager of the accused company and he was therefore in charge of the sales team. The sale procedure was described, and with regards to customers effecting a purchase without financial assistance, a deposit in cash or bank transfer is initially made. All payments must be made by latest upon delivery of the vehicle. He gave evidence to the effect that the witness no.8 was a customer of the accused company and he purchased a car 'Nissan Silfy' for the sum of Rs1,135,000. The cashier, witness no.3 processed the payment who was working at the cash office at the time.
   During cross-examination the witness further stated that settlement in cash does not necessarily mean payment by cash but rather payment through no credit facility. He further stated that he was made aware of the email (Doc AC) sent by the finance manager and that all staff members of the accused company should not accept a cash payment in excess of Rs500,000. The sales team, as he stated, had nothing to do with receiving payment.

7. Witness no.3 was a cashier at the accused company in 2010 and she still was at the time of trial. She stated that customers would normally effect payment by cash, visa or bank transfer. She gave further evidence to the effect that witness no.8 purchased a vehicle from the accused company on 18.05.10. She accepted the payment for the vehicle and when shown the different receipts (Docs AB, AB1, AB2 and AB3), she stated that a total sum of Rs835,000 was paid for the vehicle in question, of which Rs535,000 was in cash. The rest was paid by cheque. After having refreshed her memory, she confirmed that the sum of Rs535,000 was paid to her in cash, in one go. She also confirmed after having been confronted to a previous inconsistent statement that she split the payment of Rs535,000 in cash into two receipts of Rs300,000 and Rs235,000. She could not give a clear reason for her doing so. She also confirmed that she had read the email (Doc AC) sent to her which instructed employees not to accept payment in excess of Rs500,000 in cash.
   During cross-examination, the witness agreed that she was aware that she was not supposed to accept any cash payment in excess of Rs500,000 but she was not aware that she was not allowed to split the payment into two and issue two receipts.

CASE FOR DEFENCE

8. The defence elected not to adduce any evidence.

ASSESSMENT OF THE COURT

9. The factual issues are largely undisputed in the case. The witness no.3, the cashier at the material time accepted a cash payment of Rs535,000 which she split into two and consequently issued two receipts of Rs300,000 and Rs235,000 respectively. It is clear that she was made aware and admitted as such, that cash payments in excess of Rs500,000 could not be accepted. On the other hand, her motive behind the act of splitting the payment into two is less clear. There is no evidence to show that she had any specific reason to accept the cash payment even at the cost of flouting the law. In fact one speculative inference would be that she had tried to conceal the impugned transaction to the benefit of the accused company as there would be no other

likely beneficiary. However, the prosecution did not adduce any evidence as to whether such an act was acquiesced by the accused company.

10. In absence of such evidence, the defence submitted that the witness no.3 acted of her own volition and therefore could not entail the liability of her employer, the accused company. The defence relied on the following cases; **CEB v State 2010 SCJ 75, Shibani Finance v ICAC & The State 2012 SCJ 413, DPP v La Clinique Mauricienne 2014 SCJ 70.** The prosecution offered no submission on the issue of corporate liability.

11. The court notes that it is not the case of the defence that the transaction was exempted and therefore such will not be addressed, vide **Beezadhur v The Independent Commission Against Corruption and anor (2013) PRV 83.**

The law

12. **Financial Intelligence and Anti-Money Laundering Act 2002 (FIAMLA), Section 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.

Subsection (1) shall not apply to an exempt transaction.

Requirement of mens rea

13. Mr Glover SC for the defence raised the issue as to when to engage corporate liability with regards to the requirement of mens rea. The burden rests on the prosecution to prove that the body corporate has the necessary mens rea for any criminal offence which does not fall in the strict liability category. The defence submissions centred on the premise that the above offence under section 5(1) FIAMLA is not a strict liability offence.

14. The relevant extract is from **Meeajun v State 2011 SCJ 141** where the Supreme Court held the following:
It follows, then, that the charge under section 5(1) of the Act is a criminal offence requiring mens rea and not a technical offence irrespective of the existence of mens rea. If X takes 50,000 GBP cash from the drawer of Y and proceeds to make a payment for a transaction at a shop or a financial institution Y cannot be charged for the offence under section 5 of the Act unless he knew what X was doing. But if he did not know, he cannot be found guilty under the section. Mens rea is an essential element of the offence.

15. However doubt was cast on the above pronouncement of law in **Beezadhur v ICAC & anor 2013 SCJ 292** where the following was stated:
Applying the above principles, the language of section 5 leaves no doubt that the offence created by that section is more in the nature of a strict liability offence. The whole purpose and the main objectives of the Act are to offer a legislative framework to combat money laundering and the financing of terrorism in Mauritius which are of great public concern and may pose a real threat with serious consequences to the economy of the country, its political stability and be a social danger, and to bring Mauritius into line with the recommendations of the International Monetary Fund ("IMF"), the Financial Action Task Force ("FATF") and other international anti-money laundering standards. Among the means used by the legislature to promote and achieve the objects of the Act, it has deemed fit to prohibit the making or acceptance of cash transactions above a prescribed limit.

16. It is not by mere fortuity that the Supreme Court chose to use the phrase 'the offence created by that section is more in the nature of a strict liability offence', without holding unequivocally that the offence is a strict liability one. The purpose of the argument involving the requirement of mens rea in Beezadhur (supra) was ancillary to the main issue of; who bears the burden of proving that the impugned transaction was an exempt transaction. The offence being more in the nature of strict liability, without necessarily being in that category, would give an insight as to the intention of Parliament with regards to burden of proof when it comes to exemption transactions. Indeed when the Privy Council dealt with the issue of burden of proof on appeal vide Beezadhur v ICAC 2013 PRV 83, [2014] UKPC 27, their reasoning did not include the argument on mens rea.

17. More to the point, the general principles of mens rea were canvassed in **One Shabs Ltd v Ministry of Health and Quality of Life 2017 SCJ 160:**
In Gammon (supra), cited with approval in the case of P.K. Jugnauth v The Independent Commission against Corruption & Ors [2016 SCJ 187], their Lordships came up with the following propositions of law distilled from Sherras (supra), Lim Chin Aik (supra) and Sweet v Parsley (supra). They are as follows:
"(1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;
(2) the presumption is particularly strong where the offence is 'truly criminal' in character;
(3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
(4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue;
(5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

18. The offence of limitation of payment in cash carries a maximum sentence of penal servitude for a term not exceeding 10 years and a fine not exceeding 2 million rupees as it stood before amendment. The offence is of a truly criminal nature and the requirement of mens rea is not expressly negated under FIAMLA.

19. There is no doubt that money laundering offences are a growing social concern and the international scrutiny on such offences, require conscientious practices to be in line with the agreed international standards. At the same time, the law has to be applied albeit rigorously, but not rigidly so as to disturb the fine balance between human rights and the need to stamp out social evils. I take inspiration from **Manraj & Ors v ICAC 2003 SCJ 75** where the Supreme Court opined the following:
The averment is that "ICAC has reasonable ground to suspect that the ... companies and persons ... had reasonable grounds for suspecting that ..." they were handling money from tainted source. This assumes that anti-corruption laws and anti-money laundering laws are crimes of strict liability. As such, it does not matter whether the companies and persons had or did not have the

required criminal intent. On such an interpretation, it would suffice to impute the mens rea (mental state) of a reasonable man upon all these companies and persons and put them behind bars. The law would not allow any consideration as to whether they had the subjective mens rea or not. The least said about such an interpretation the best.

20. I therefore find that the offence of limitation of payment in cash under section 5(1) FIAMLA is not a strict liability offence, as mens rea is an essential element, in line with Meeajun (supra). This opens the discussion of when to engage corporate liability when a non-strict liability offence is involved.

Corporate liability

21. This area of law was reviewed by the Supreme Court in **CEB v State 2010 SCJ 75**. The following extract encapsulates the common factor between English and French law which was then made applicable to our law.

[40] With respect to (b), the circumstances in which "criminal negligence" may be imposed upon a corporate body is a matter of both law and fact. In English law, in the case of A-G's Reference (No. 2 of 1999) [supra], the court held that there cannot be a finding of criminal negligence against a corporate body in the absence of evidence establishing the guilt of an identified human individual. In Mauritian law, it makes sense, in the light of the above, and in the absence of a legislative text on the circumstances in which corporate criminal liability may be established, to adopt the "identification principle."
[41] In French law, a similar decision has been given by the Cour de Cassation on the interpretation of criminal liability against a corporation. It is not enough to make a general impersonal finding of negligence against unnamed persons concerned in the corporate body. The negligence must be attributable to identified person or persons capable of engaging the responsibility of the corporate body, not any agent or representative.

22. The identification principle puts a face (personne physique) on the body corporate (personne morale) with regards to acts done on behalf of the body corporate. Moreover the identified person must be capable of engaging the responsibility of the body corporate.

23. Such was reiterated in **The Director of Public Prosecutions v La Clinique Mauricienne 2014 SCJ 070** where the following was stated:
It is to be noted that the Court in the CEB case found the French law relating to corporate criminal liability to be similar to the English law, and that at paragraph 25 of its judgment, the Court quoted a pronouncement in A.G's Reference (No. 2 of 1999) [2000] 3 All E R 182 to the effect that a company could not be criminally liable unless the relevant criminal conduct of an identified individual could be "attributed" to the company.

24. It follows that even if the agent is identified, his or her acts must be attributable to the company. It is clear that witness no.3, Mrs Moothoosawmy was the identified agent. The question is whether the accused company is responsible for her acts when she admitted having accepted a payment in excess of the prescribed limit.

25. Under English law the body corporate endorses the acts of its agents so long as they can make the body corporate responsible, vide **R v Andrews Weatherfoil Ltd (1972) 56 Cr.App.R. 31**;

It is not every "responsible agent" or "high executive" or "manager of the housing department" or "agent acting on behalf of a company" who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself. It is often a difficult question to decide whether or not the person concerned is in a sufficiently responsible position to involve the company in liability for the acts in question according to the law as laid down by the authorities. As Lord Reid said in ***Tesco Supermarkets Ltd. v. Nattrass [1971] 2 W.L.R. 1166 , 1176:***

"It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."

Lord Reid added, at p. 1179:
"I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the

criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company."

26. It is construed that the acts of the agent of the company must be attributed to the company itself by virtue of law, statutory or otherwise. In some cases, as it is in the present matter, the law might be silent as to how and to what extent such acts can be attributed to the company. Consequently the court will have to fashion a special rule of attribution having regard to the internal practice of the company and general rules of agency.

27. If the board of a company had taken precautions deemed sufficient as per the relevant law, those would be counted as precautions taken by the company. Acts of negligence done at a lower level of management may not be attributed to the company, vide **Tesco case [1971] 2 W.L.R.** (supra). The House of Lords in the said case examined the relevant law and provided a defence to what would otherwise have been an absolute offence.

28. On the other hand the House of Lords in ***In re Supply of Ready Mixed Concrete (No.2) [1995] 1 A.C. 456.***, held that *for the purposes of deciding whether the company was in contempt, the act and state of mind of an employee who entered into an arrangement in the course of his employment should be attributed to the company. This attribution rule was derived from a construction of the undertaking against the background of the Restrictive Trade Practices Act 1976: such undertakings by corporations would be worth little if the company could avoid liability for what its employees had actually done on the ground that the board did not know about it.*

29. The above two cases were considered by the Privy Council in **Meridian Global Funds Management Asia Ltd v Securities Commission (1995) 2 A.C. 500 PC** where the principles of attribution were reviewed. The court recognised that not every rule of attribution has to be forced into the same formula. It is a question of construction rather than metaphysics. In the words of Lord Hoffman ... *their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.* In some cases it will be appropriate.

30. On the other hand, *the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.*

31. In light of the above pronouncements, it is acknowledged that there cannot be one general formula as to when to engage corporate liability, when the substantive law is silent. The prosecution evidence purported to show that the cashier (witness no.3) had accepted a payment in excess of Rs500,000. There was no evidence of the internal practice of the company with regards to anti-money laundering compliance measures in place, except that an email (Doc AC) was sent to all staff stating that cash payment in excess of Rs500,000 should not be accepted. The email was sent by the finance manager of the company. The cashier admitted being aware of both, the said email and the fact that she was not allowed to accept such a payment. Her only explanation was that she was not aware that she was not allowed to split the payment into two receipts.

32. Section 5(1) FIAMLA was considered in **Shibani Finance Co Ltd v The Independent Commission Against Corruption & anor 2012 SCJ 413**: *In any event, as rightly submitted by learned counsel for the second respondent, when a body corporate is charged with a criminal offence, the prosecution is not required to establish with precision the identity of the person who is the directing mind and will of that body corporate. It is sufficient if it is proved that somebody who is concerned in the management of the body corporate is involved. And there was sufficient evidence on record to allow the learned Magistrate to come to the conclusion that the person who authorised Mrs Gonneea to go ahead with the transaction had the necessary authority to represent and decide for the appellant.*

33. The policy behind the legislation against money laundering is to guard against the unchecked use of our financial system. Financial institutions or companies dealing in cash are to be compliant with set standards so that there are checks for every step of the way. It was incumbent on the prosecution to show that such measures were not in place at the accused company. Whilst the cashier (witness no.3) was an agent of the company, the

latter's liability cannot be automatically invoked for the legal reasons set out above but also for the fact that the financial services cannot buckle at the whims of employees. In the present case even if the accused company did not expressly authorise the transaction, it should have been shown that there was a lack of supervision or procedures in place against potential wrongful practices. The email (Doc AC) being the only evidence giving an indication on the internal practice of the company, is well in favour of the accused. With the added admission of the cashier that she was aware of the company policy not to accept such payment, there is not enough evidence to engage the liability of the accused company.

34. In light of the above assessment, I find that the prosecution has not proved its case beyond reasonable doubt and the case against the accused is consequently dismissed.

P. Rangasamy
Magistrate of the Intermediate Court
30.08.21