ICAC V B HATON AND ANOR

2020 INT 44

CN:- 1576/12

THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Division)

In the matter of:-

ICAC

v/s

1. **Beediawtee Haton**
2. **Mandatta Haton**

JUDGEMENT

Accused no. 1 stands charged, under 15 counts of the Information, with the offence of "**Money Laundering"** in breach of sections 3(1)(a), 6(3) and 8 of the Financial Intelligence and Anti-Money Laundering Act (hereinafter referred to as the FIAMLA). It is being reproached of accused no. 1 that, on fifteen occasions, as more fully described in the Information, she deposited, into the saving bank account of her son Keshav Haton, different sums of money, which sums she had reasonable grounds for suspecting to have been derived, in part, directly from a crime, to wit : Drug related offences.

Accused no. 2 stands charged, under another 15 counts of the Information, with the offence of "**Money Laundering"** in breach of sections 3(1)(b), 6(3) and 8 of the FIAMLA. He is being reproached of having, on fifteen occasions, as more fully described in the Information, concealed different sums of money by giving same to his wife, accused no. 1, which sums he had reasonable ground for suspecting to have been derived, in part, directly from a crime to wit: Drug related offences.

They both pleaded not guilty to all the charges and were duly represented by counsel. The case for the prosecution was also conducted by counsel from the ICAC.

I have duly considered all the evidence on record as well as the submissions of learned counsels. The evidence for the prosecution consists of the oral testimony of the various prosecution witnesses as well as the documentary evidence produced in court. Accused 1 for her part elected

to depose under solemn affirmation while accused 2 elected to exercise his right to silence. The evidence on record consists of numerous pages which I do not propose to reproduce in this judgement.

Analysis

Section 3 of the FIAMLA provides as follows:

> ***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; or*
>
> *(b) receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any 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 realized, in whole or in part, directly or indirectly from any crime, shall commit an offence.*

The prosecution therefore had to prove the following elements of the offence of money laundering to establish the charge against the accused parties:

1. engagement of accused 1 in a transaction involving (Counts 1 to 15);
1A. concealment by accused 2 of (Counts 16 to 30);
2. property;
3. In part and directly the proceeds of crime;
4. Suspicion that property is derived, in part, directly from a crime.

Engagement of accused 1 in a transaction involving property (Counts 1 to 15) and concealment by accused 2 of property (Counts 16 to 30)

It is not disputed:

(i) by accused 1 that she indeed deposited the various sums of money into the saving bank account of her son Keshav Haton and that she engaged in a transaction involving money; and

(ii) by accused 2 that he indeed remitted the various sums of money to accused 1, as averred in the information.

The term 'Property' is defined under section 2 of the FIAMLA as including "*any balance held in Mauritius currency or in any other currency in accounts with any bank which carries on business in Mauritius or elsewhere".*
It is common ground that the sums of money, subject matter of the present offences, fall within the definition of "property" as provided under the FIAMLA.

I therefore have no qualms in finding these elements of the offence (items 1, 1A & 2 above) proved beyond reasonable doubt against both accused.

In part and directly the proceeds of crime

The law

Under section 6(3) of the FIAMLA, the prosecution does not have the burden of proving any particular crime from which the proceeds have been derived 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."*[1]

In the case of **The Director of Public Prosecutions v A. A. Bholah [2011] UKPC 44,** the Board highlighted as follows:

"33. 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.

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[1] Section 6(3) of the FIAMLA provides as follows:
"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 or 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."

At paragraph 21 in the case of **R v W (N**) **[2009] 1 WLR 965,** which was quoted by the Board in the case of **Bholah** (supra), one can read as follows:

"*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*."

In the case of **A R Ferrell v The Queen [2010] UKPC 20**, the Board held that:

"12. The only question is whether a jury was entitled to infer that it was drugs money. In the opinion of the Board, the answer to that question, at any rate in the absence of a credible explanation to the contrary, is yes. The only suggestion made by or on behalf of the appellant was that the cash came from working as a doorman and from smuggling tobacco into Spain. There was however no support for the evidence that it came from tobacco smuggling. On the other hand, there is evidence that the appellant was a drug dealer, albeit at a later time than he was laundering the money. It was open to the jury to reject his explanation and to conclude that there was no reasonable doubt that the money came from earlier dealing in drugs."

Applying the law to the present facts

Accused 1

In a gist, witness 1, the main enquiring officer, deposed to the effect that his enquiry revealed that the sums of money deposited at the bank did not commensurate with the income derived by either accused 1 or accused 2 during that period. He stated that at the time of the offence, accused 1 was working as a hospital attendant and was drawing a monthly salary of about Rs 14, 000. Her salary remained untouched for a period of about 6 months at the bank. With respect to accused 2, he stated that the latter used to hold a stall at the Rose Belle market fair where, on Sundays, he would sell vegetables that he cultivated during the period the alleged offences took place. It also came out that whilst most of the offences were committed in the year 2006 and twice by each accused in the year 2009, the enquiry revealed that (i) accused 2 started cultivating a crown land, belonging to witness 5, one Soonity Boodhun, only in the year 2008 and (ii) the land belonging to accused's 2 brother, over which accused 2 claimed to have grown mixed vegetables in his out of court statement, was found to have been under cardamom cultivation

prior to the year 2006 and the land remained uncultivated for the period 2006 to 2008; it is only as from the year 2008 that accused 2 started cultivating mixed vegetables on the said land. The enquiry therefore revealed that accused 2 has not been in continuous cultivation of any plot of land so as to derive the impugned sums of money at regular intervals. The evidence of witness 1 has remained unrebutted in court.

Accused 1 deposed under solemn affirmation and affirmed to the correctness of her defence statements. She explained that accused 2 gave her the different sums of money to be deposited into their son's bank account as accused 2 was illiterate and was not comfortable with the various procedures at the bank. She added that she used to help her husband both in the plantation and at the market fair and thus she knew how much money her husband was gaining from such activities. She stated that the money she deposited at the bank were her husband's earnings. In cross examination she denied that she stated the following in her defence statement: "*Mo pa ti garde l'argent dan mo compte la banque parski mo missier ti ena case la drogue et mo conner si mo garde l'argent dan mo compte, la police pou penser l'argent la drogue sa. Mo missier ti deja informe moi a cause ena problem ladan pas garde aucaine l'argent dan mo compte.*" She maintained that she never made such a statement to the police and denied that she was lying in court. She further maintained that her husband was cultivating the land of Soonity Boodhun. She agreed that accused 2 was not registered with the Small Planters Welfare Fund prior to the year 2010 and explained that accused 2 did not find it necessary to do so. She further agreed that accused 2 never cultivated the land of Pooranan Haton, the brother of accused 2. She denied that the money that she deposited on various occasions into the bank account of Keshav Haton were the proceeds of drugs.

A thorough assessment of the evidence on record shows that the version of accused 1 in court is in contradiction with her version in her defence statements. In her out of court statement, she gave a different version where she stated that the monies that she deposited in the year 2009 had been given to her by accused 2 and that she did not know from where the said money came from. She further stated that accused 1 started rearing pigs, over and above cultivating vegetables, when he was released from jail in the year 2004 and that the monies that she deposited into her son's account for the period 2005 to 2006 were derived from such activities. She however did not know how many animals were being reared, from whom the animals had been bought or to whom the animals were sold despite her claim that she used to assist her husband in his activities. She also stated that only accused 2 would be in a position to explain about the source of such funds and that the latter only told her that the money was derived from

his farming activities. It is interesting to note that accused 1 declared accused 2 as her "dependant" in her tax returns, (which suggests that during such period accused 2 was not deriving any taxable income) although she clarified that she had been ill-advised to do so.
I have also given due consideration to the fact that accused 1 complained in court that she never stated a few things that appeared in her out of court to the police. However, I find that there is nothing on record to make me doubt the version of the prosecution. The record shows that the out of court statement was read over to her by the recording officer during enquiry and that it was only after taking cognizance of its contents that she affixed her signature on same. She never complained about any irregularity to the police. In court, she solemnly affirmed to the correctness of such statement when she testified and when witness 1, the recording officer, read and produced the said statement, her said version was never put to him. All the above tend to show that accused 1 is lying and that she came up with such version at the eleventh hour in court in the hope that she would be believed and that she would escape the consequences of her acts. Bearing in mind the above and the various contradictions in the version of accused 1, I find that her version is not credible and that same cannot be believed. On the other hand, I find that the version of the prosecution can safely be relied upon.

Taking the evidence as a whole therefore, I find that it can reasonably be inferred that accused 1 was well aware that accused 2 had been involved in drug related offences and that she received the proceeds from accused 2, which she deposited into the bank account of her son, knowing fully well that such proceeds had not been derived from any lawful activity of accused 2.

For all the reasons given above, I find that the prosecution has proved this element of the offence to the required standard against accused 1.

Accused 2

Accused 2 did not adduce any evidence in court. His version as per his defence statement is that he was earning about Rs. 2,500 on each Sunday by selling his vegetables at the market fair and after deducting all expenses. He did not have any other source of income. He used to give money to his wife for household expenses. As far as the various deposits into their son's bank account are concerned, accused 2 stated that he does not know anything about same as he gave money to accused 1 only for household expenses; the maximum amount that he could have given to her on a Sunday was in the sum Rs. 5,000. He stated that he could not recollect whether he gave the various sums of money to accused 1 to be deposited at the bank but if he did, the money came from the sale of vegetables and not otherwise. He used to cultivate two portions of land –

one belonging to one Soonity Boodhun and the other one belonging to his sister in law, the wife of his brother. It further came out from his defence statement that he was not involved in cattle rearing after the year 2004.

The evidence for the prosecution however reveals that the said plots of land were never cultivated by accused 2 during the period 2005 to 2006 and in the months of July and August 2009, during which time the offences were allegedly committed. In addition to the evidence of witness 1, the evidence on record shows that:

- Mrs Soonity Bodhun, witness 5, leased her portion of land to accused 2 only in the year 2009 and that she had herself obtained a lease from the government in the year 2008 as evidenced by Doc T. She stated that the land was not cultivated by accused 2 prior to the year 2008. In cross examination she stated that after the death of her husband, the land remained uncultivated. She did not go on the land due to her ill health and could not say whether the accused parties had been cultivating the land.

- Mr Janath Hossen Ketwaroo, witness 10, Senior Technical Officer at the Ministry of Agro Industry and Food Security, stated that in the year 2003 he effected a site visit on the land leased to Mrs Kavita Haton and found that there was a cardamom plantation on the said land. As from the year 2008, there was no cultivation on the said land. He further stated that the sole purpose of these lands was for cultivating of vegetables and that cattle rearing was not allowed on the said plots of land.

- Mr Devianand Mahadeo, witness 6, Extension Assistant at AREU (Crop), stated that accused No.2 is the holder of the permit of "Gramokjaune" only as from 25 March 2011(DOC AB).

- Mr Shri Swami Akhilalandjee Goolaub, witness 7, Principal Extension officer at AREU(Crop) stated that accused 2 was not borne on record as a vegetable planter with the AREU.

- Mr Parmanand Pothunah, witness 4, Senior Health Inspector at Grand Port Savanne District Council, stated that accused 2 was not registered with the Council as a livestock breeder. He is however, holder of a hawker permit for selling fruits and vegetables on Sundays only at Rose Belle Market Fair since 31 October 2007.

I find that the above evidence, which has remained unchallenged, is not in line with the version of accused 2. Such evidence shows that accused 2 was not in extensive cultivation of vegetable at any point in time, such that it cannot be said that he could have derived the impugned sums of money therefrom.

After assessing all the evidence on record and considering the fact that accused 2 stated the following in his statement: "*Lané 2000 à 2004 mo pas tipé travay parski mo ti endans, c'est à dire mo ti fermé dans prison Beau basin pour ene case gandia"* (folio 96817) and *"li vrai ki a ce jour mo fine fini gagne trois cases la drogue"* (folio 96822)*,* I find that it can be reasonably inferred that the money, which accused 2 gave to accused 1 to be deposited into the bank account of their son, were not derived from the lawful activities of accused 2 but were rather the proceeds of accused's 2 drug business.

Now, it is a fact that, as part of their case, the prosecution has produced, a copy of the certificate of previous convictions of accused 2 – Doc x – witnessing that the accused 2 is borne on record for drug related offences and that the defence did not object to the production of the said document in court. Defence counsel nevertheless submitted that "*by relying on the previous convictions of the Accused No (2) without ushering further evidence, the Prosecution has caused the whole trial to be vitiated by unfairness (see section 10 of the Constitution)".* Defence counsel further moved that the Information be struck out against accused 2 on the ground that the latter would not benefit from a fair trial in view of the fact that the Information provided, in the list of witnesses, for the Commissioner of Police to depute an officer to provide the certificate of previous convictions of accused 2, thus suggesting that accused 2 had a record of previous convictions. Counsel for the prosecution on the other hand submitted that it was "*perfectly legal for the prosecution to summon the Commissioner of Police to depute the relevant officer to produce the past convictions"* of accused 2. It was further submitted that "*the very nature of the case of money laundering means that there will be reference to the past convictions of accused parties. The nature of the offence means that your honour will have to be made aware of the criminal activity of the Accused Parties. The moreso that the information contains the particulars of the criminal activity."*

I have duly considered the submissions of both counsels. I find that the case for the prosecution does not rest essentially on the faith of the certificate of previous convictions of accused 2, as already found above. The evidence of the previous convictions of accused 2 has been ushered in addition to the evidence that stands against accused 2 and also in an endeavor on part of the

prosecution to establish the predicate offence i.e Drug related offences, against accused 2, although in law there is no burden on the prosecution to establish same and strictly speaking ought not have been produced in court. The issue therefore is whether by ushering such evidence in court, the prosecution has caused the trial to be tainted with unfairness such that accused 2 cannot benefit from a fair trial. To my mind it is not the case in view of the overwhelming nature of the evidence that stands against accused 1. The court has thus treated such evidence with the required caution. In any event, it is to be noted that accused 2 has himself admitted in his defence statement, that as at the year 2011, he has had three convictions for drug offences (vide folio 96822). It goes without saying therefore that the production of the certificate of previous convictions of accused 2 in court did not bring any new element which could have poisoned the mind of the court or which could have prejudiced accused 2 in his defence. In the given circumstances, I find that it cannot be said that accused 2 was prejudiced by the production of the certificate of previous conviction during trial.

Can the same cannot be said about the fact that the Information disclosed that accused 2 has a record of previous convictions as averred above? In the case of **Madelon E & Anor v The State 2009 SCJ 208,** the Supreme Court found that "*the unnecessary averment of the previous conviction itself in the information is a gross irregularity which flies in the face of section 10 of the Constitution"***.** In the said case the appellants were jointly charged before a Judge sitting without a jury, with the possession of 102.5 grams of heroin for the purpose of selling under section 30(1)(f)(ii) of the Dangerous Drugs Act 2000 and the Information further averred that pursuant to section 41(1)(k), (2) and (3) of the Act, that having regard to all the circumstances of the case, all three appellants were drug traffickers, and secondly, that the first and third appellants had been previously convicted of an offence connected with dangerous drugs. The appeal was allowed on the ground that the appellants had been prejudiced by the fact that the Information averred that the appellants had been previously convicted for drug offences.

However, their Lordships also highlighted in the case of **Madelon (supra)** 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. An instance of such an information would be one charging an accused party with an offence under section 34(1) of the Firearms Act 2006 which reads as follows –*

34. Prohibition on person convicted of crime

(1) A person who has been sentenced to penal servitude or to imprisonment for a term of 3 months or more for any crime shall not at any time during a period not exceeding 5 years from the date of his release, have a firearm or ammunition in his possession.

The previous conviction contemplated here forms part of the facts which constitute the offence. Likewise with the offence of driving whilst under disqualification: the fact that the accused has already been convicted of a driving offence and has been disqualified is an associated element of the offence."

The question that arises therefore is whether the previous convictions of accused 2 in the present case is associated with the facts which constitute the offence charged under section 3[2] of the FIAMLA, in which case reference to the previous convictions of accused 2 in the Information would not be prejudicial to him. I find that the answer to such question is in the negative and that for an offence under section 3 of the FIAMLA, the previous convictions of an accused party is not associated with the facts which constitute the offence. Indeed, the term "crime" under section 3 does not necessarily connote to a conviction of an accused party. In any event, as was highlighted in the case of **Bholah (supra) "***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."* For such reasons therefore, I find that it was most irregular, unfair and in breach of the accused's constitutional rights under section 10 of the Constitution to aver in the Information that accused 2 had a record of previous convictions.

At this juncture, I find it of relevance to refer to the following passage in the case of **State v S. J Wasson & Ors** [2008 SCJ 209]**,** where the Supreme Court explained that *"In exercising its power to ensure that there should be a fair trial in accordance with these norms, a criminal Court*

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[2] **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; or

(b) receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any 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 realized, in whole or in part, directly or indirectly from any crime, shall commit an offence.

has a general and inherent power to stay proceedings not only to protect its process from abuse but also to secure a fair trial to those persons who are charged with a criminal offence."

I also find the following passage in the case of **Madelon (supra)** pertinent and it reads as follows:

*"As held in **Babet v The Queen** [1979 MR 222], the provisions of the Constitution requiring a fair trial constitute an absolute command and once it is proved that there has been a breach of the principle of a fair trial, the appellate court must quash the conviction without enquiring as to the strength of the evidence. Authority for that proposition is to be found in the following passage of the judgment of Rault, CJ:*

"It has been suggested that in spite of the gross irregularity which occurred, we should uphold the conviction on the ground that proof of guilt was overwhelming. That is tantamount to saying that a person may be deprived of his liberty even after an unfair trial provided he is guilty. I cannot conceive of a more insidious doctrine. ... ... To protect the liberty of the subject against oppressive prosecutions, the only safeguard is to insist that the provisions of the Constitution requiring a fair trial is an absolute command. Once it is shown that a trial was unfair, that is an end of the matter. The Court should quash the conviction without enquiring further about the strength of the evidence. How can justice endorse a conviction obtained by unjust means without renouncing the very soul which keeps it alive?""

In light of the above therefore, I find that despite the overwhelming nature of the evidence that stands against accused 2, the reference to the record of previous convictions of accused 2 in the Information has tainted the present proceedings with unfairness and has vitiated the whole process before this court.

Reasonable suspicion to believe that the property was derived from a crime

Accused 1

In the case of **Antoine v The State** [2009 SCJ 328], it was held that:

"Since suspicion has to be based on facts, it is the duty of the Court to analyse the whole of the evidence on record in order to determine whether or not it can be inferred, from the facts and circumstances of the case, that the accused reasonably suspected that the proceeds were proceeds of crime."

In view of the contradictions in accused's 1 testimony as highlighted above and the fact that both accused were married and living together; that she was aware that the only source income of her husband was from the vegetable plantation; that accused was selling vegetables on Sundays only and that on such day he would earn at most Rs. 3,000; that he took care of the household expenses; and that she knew her husband had previously been convicted for drug related

offences, I find that accused 1 ought to have known that the different sums of money that accused 2 gave her were derived from sources other than honest hard-earned ways. I therefore find that it can reasonably be inferred that accused 1 had reasonable grounds to suspect that the money she received from accused 2 and which she deposited at the bank was derived from proceeds of crime. I am further comforted in my findings when I read accused's 1 statement at folio 907221 to 90722 where she stated the following:

"Dans les annes 2002 ou 2003.....mo beaupere ti ena ene van .....et mo ti vende li et mo ti gagne Rs 45,000...et mo ti vende tous bane animaux ki reste pou mo missie, mo ti gagne environs Rs 100,000. Moti prend sa Rs 145,000 et mo ti donne li mo mama pou li garde li avec li dans mo compte la banque parski mo missie ti ena case la drogue et mo kone ki si mo garde l'argent la dans mo compte la police pou pense l'argent la drogue sa. Mo misie aussi ti deza informe moi ki akoz li ena problem ladrogue pas garde aucaine l'argent lors mo compte"

From the above, I find that it can reasonably be inferred that accused 1 indeed had the knowledge that the different sums of money were derived from a crime.

Accused 2

Having found the above against accused 2, I find that it will be a futile exercise for me to consider whether this element of the offence has been proved against him.

Conclusion

For all the reasons given above therefore, I find that the prosecution has proved its case beyond reasonable doubt against accused 1 under all 15 counts of the Information. I accordingly find her guilty as charged in respect of all counts of the information.

With respect to accused 2, this court finds that, in light of the above, it has no other alternative than to stay the present proceedings against him.

I.Dookhy-Rambarun (Mrs)
Magistrate of the Intermediate Court (Civil Side)
24 February 2020