

IN THE INTERMEDIATE COURT OF MAURITIUS

(CRIMINAL DIVISION)

Cause Number 113/2015

In the matter of:

THE INDEPENDENT COMMISSION AGAINST CORRUPTION

v

(1) THE HONG KONG AND SHANGHAI BANKING CORPORATION LTD

(2) THE MAURITIUS COMMERCIAL BANK LTD

(3) STATE BANK OF MAURITIUS LTD

Ruling

1. Factual Background

1.1. The Hong Kong and Shanghai Banking Corporation Ltd (HSBC), the Mauritius Commercial Bank Ltd (MCB), and State Bank of Mauritius Ltd (SBM), stand separately and individually charged under an information with 16 counts, with having wilfully, unlawfully, and criminally, accepted payment in cash 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. They have, through their representatives, pleaded not guilty to the respective counts against them.

1.2. The information as styled regarding the identity of the accused parties and their representation are as follows:

'THE HONG KONG AND SHANGHAI BANKING CORPORATION LTD, having its registered office at Places D' Armes Port Louis as represented by one MAHENDRA RAMDOYAL, 42 yrs, Branch Manager....'; 'THE MAURITIUS COMMERCIAL BANK LTD, having its registered office at 9-15 Sir William Newton Street Port Louis as represented by one MARIE FRANCOISE ROSELYNE ANTOINETTE RIVET born LEBRASSE, 60 yrs, Money Laundering Reporting Officer at the Mauritius Commercial bank Ltd....'; and 'STATE BANK OF MAURITIUS LTD, having its registered office at State Bank Tower, No 1 Queen Elizabeth Avenue, Places D' Armes, Port Louis as represented by one LOGANADEN CHOCALINGUM, 55 yrs, Bank Supervisor....'



1.2.1. Save and except for the sum of money which had been deposited in cash, the particulars under each of the sixteen counts of the information are couched in substantially similar terms with the reference to the accused bank as styled above, as appropriate and pertaining to the count of the information to which such particulars relate. In that respect, I propose to reproduce the particulars averred under only one of the counts of the information, to set the background to the point of law raised in context. Such particulars read as follows:

'On or about the date and place aforesaid, the said Hong Kong and Shanghai Banking Corporation Ltd as represented by the said Mehandra Ramdoyal accepted a cash deposit of Rs. 380, 000 from one Stephane Gerard Briand.'

1.3. It is undisputed that none of the abovenamed three persons in the information have personally accepted any of the payments in cash in excess of Rs.350 000. The alleged transactions took place over a period of about eleven months, the first transaction being effected barely a week after the FIAMLA came into operation¹. The payment in cash on all occasions, was made by one and same person, namely, one Stephane Gerard Briand. Prosecution was instituted on 04 February 2015.

1.4. Against this background, MCB, has, through its counsel, raised three preliminary points of law. The present ruling relates essentially to arguments heard following the first part of the motion of MCB inviting this Court to dismiss the present information on the ground that it is so fundamentally flawed and defective as to amount to no charge at all; which has been particularised under two limbs, namely, (a) it fails to disclose the identity of the 'physical person' (sic) or persons who allegedly committed the impugned act under each count and (b) it fails to state that the said impugned act is attributable to the corporate body so as to make it criminally responsible.

1.4.1. The second point of law, which relates to the infringement of the constitutional right to silence of an accused party by compelling the employees of the bank to give evidence on behalf of the prosecution, was not fully and specifically

¹ Proclaimed by [Proclamation No.31 of 2002] w.e.f. 10 June 2002



canvassed in the course of the submissions. Learned Counsel for MCB has brushed on the same when addressing the Court on the characterisation of the acts of the agents or employees capable of being imputed to the legal entity which, it is submitted, require that the said employees or agents be identified and designated by name.

1.4.2. The third part of the motion relating to a permanent stay of proceedings on the ground of delay and unfairness was not pressed.

1.4.3. HSBC and SBM have joined in the motion made on behalf of the MCB.

1.5. The Independent Commission Against Corruption (ICAC), the prosecuting authority, has objected to the motion.

1.6. All parties were duly legally represented by their respective counsel; arguments were heard from both sides; and those on behalf of the accused parties were led by Learned Counsel for MCB and learned Senior Counsel for SBM addressed the Court on certain specific issues raised in the course of submissions.

2. Issues

2.1. The actual issue for the decision of this Court appears to be a simple one that can be stated very shortly, namely, given that corporate criminal responsibility can only arise through acts of a natural person which can be attributed to it, should the information disclose the identity of the natural person/persons who had allegedly committed the unlawful act, where the accused party is a body corporate? In the affirmative, would the absence of such averment be fatal?

2.1.1. It is submitted by the prosecution that it ought not because, in essence, (a) when a corporate body 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; (b) it shall be sufficient for the information to comply with the provisions of Section 125 of the District and Intermediate Courts (Criminal Jurisdiction) Act by averring (i) the elements of the offence to be proved using the wording of the law and (ii) the identity of the



accused; and (c) sufficient particulars have been provided in the present matter and any other information sought regarding the identity of the natural person who had accepted the impugned payments, is a matter of evidence.

2.2. The broader questions which such issue entail, are not in the least simple and include:

- A. In what circumstances will the criminal responsibility of corporations be engaged?
- B. What ought to be averred in an information to engage the criminal responsibility of a body corporate? In that respect, is the nature of such offence, namely, whether it is one of strict liability or an offence which requires a mental element, relevant to determine the sufficiency of the averments in the information regarding the identity of the natural person who has committed the alleged wrongful/unlawful act?
- C. Would the right to a fair trial, enshrined in Section 10 of our Constitution, which includes the right of an accused party to know with certainty and precision all the facts and circumstances held against him/it in the preparation of his/its defence, require that the identity of the natural person, the acts or omissions of whom constitute the charge which a body corporate has to answer, be averred?

3. The Law

A. **The Constitution**

- 3.1. One of the fundamental principles of the criminal justice system requires that "*a person charged with an offence is entitled to know with certainty and precision all the facts and circumstances so that he may be enabled to judge whether they constitute an offence and to determine the species of offence.*"²



² *Ip Fan Yong V Queen* [1971 MR 28] referred to and applied in *L. Vigier de La Tour v The State* [2009 SCJ 19]

3.2. The right to a fair trial is enshrined in Section 10 of our Constitution which has been largely inspired by Article 6 of the European Convention on Civil and Political Rights.

3.3. The principle of fairness and the right of a person charged with a criminal offence to know before the trial all the facts and circumstances held against him to enable him to prepare his defence are enshrined in Section 10(2) of the Constitution.

B. The Information

3.4. Section 17 of the Criminal Procedure Act and Section 125 (1) of the District and Intermediate Courts (Criminal Jurisdiction) Act, give expression to the above principles. They require that the information be direct and certain as regards the party charged, the description of the offence charged in the words of the law creating such offence, and the material circumstances of the offence charged.

3.5. 'Material circumstances' are defined as "*those that can reasonably be expected to be given and must depend on the nature of the offence charged and its constituent elements...*"³

3.6. The basic principle when considering the issue of whether particulars should be furnished or not is that particulars are given as a matter of law when the offence is not sufficiently clear or particularized in the information⁴. Where particulars have been given, the test that has to be satisfied is "*do the particulars provided make clear to the defence the nature of the case they must meet*".⁵ Particulars must be distinguished from matters of evidence and must be clear and concise.⁶ The accused should be informed of the nature of the charge against him, and the material facts on which it is based, but not necessarily the evidence in support⁷.

³ *The Attorney-General v Saurty* [1963 MR 1], at p. 4.

⁴ *Ramburn v The State* [1996 SCJ 64] quoted in *Police v Kuderbux & Ors* [2012 SCJ 214]

⁵ *Blackstone's Criminal Practice* 1999 Ed, § D.9.8

⁶ *The Attorney-General v Saurty* [1963 MR 1], *DPP v Heng Ting Seng* [1977 MR 99] and *Banymandhub v The Queen* [1989 PRV 38] referred to in *Police v Kuderbux & Ors* (supra) at p. 8.

⁷ *Brozicek v. Italy*, 12 E.H.R.R. 371; *Mattocia v. Italy* (2003) 36 E.H.R.R. 47



3.7. The prosecution will be required to furnish particulars where for instance, the case is a complicated one and *'the furnishing of particulars would help to clarify matters by identifying the issue or the issues which have to be determined'*⁸.

3.8. This being said, *'the prosecution should not be burdened with the task of furnishing particulars where such an exercise would draw the prosecutor into stating matters of evidence..... a request for particulars ought not to be stretched to such an extent that it requires the prosecution to disclose and set down the evidence that would be used later in the case. The reasoning behind this is quite obvious. The prosecution is bound to aver in the information what it intends to prove and to prove what it has averred. Since particulars are closely connected with the information, it would be improper to require the prosecution to aver matters of evidence in the guise of particulars and later contend that the prosecution is bound to restrict itself to such evidence.'*⁹

C. Statute creating the Offence

3.9. Section 5 of the FIAMLA as it then stood, made it an offence, under sub section 1, for any person to make or accept any payment in cash in excess of 350,000 rupees or an equivalent amount in foreign currency, or such amount as may be prescribed; unless as provided under sub-section 2, the transaction was an exempt transaction as defined under Section 2 of FIAMLA.

D. Corporate Liability

3.10. An incorporated company is a legal person, which can only act through human agents. It is a settled proposition of the law that corporate liability may arise either because (i) the company has breached its duty personally or (ii) liability is imputed to a company as principal for an offence committed by its employee(s); but in either case the unlawful act or omission has to come about through human agency¹⁰.

3.11. Section 44 of the Interpretation and General Clauses Act (IGCA) to a certain extent illustrates the above principle in statutory form and provides a statutory defence to

⁸ *The State v Treebhooon & Anor* [2012 ŠCJ 214].

⁹ *Ibid.*

¹⁰ *Corporations and Criminal Responsibility*, Second Edition, Celia Wells, at p. 102

(a) a director or a person involved in the management of the body corporate who is prosecuted for an offence committed by a body corporate itself or (b) a body corporate where it is charged with the same offence committed by its agent¹¹.

4. Applying the Law to the Facts

4.1. I have duly considered the arguments put forward by learned counsel for both parties, including all the relevant principles that have emerged from the authorities that have been placed before this Court. For reasons which will become apparent below, I do not however propose to necessarily address the points argued in the order they were raised.

4.1.1. Notwithstanding the fact that, at this stage, the question to be determined is not whether the natural person who has physically accepted the payment in cash satisfies the legal requirements such that his/her acts are the acts of the bank, the alleged defects which the accused banks have put forward to challenge the validity of the information cannot be assessed in the abstract.

4.1.2. An outline of the pre-requisites and the manner in which corporate liability is engaged and the categorisation of offences provide a useful pointer, if not the answer, to the questions raised by the defence in the course of the present arguments, as will become apparent below. Furthermore, they put the issue raised in context, a correct and reasoned determination of which, cannot be reached without setting out the same.

Engaging the criminal liability of corporate bodies

4.2. In general, a corporation is in the same position in relation to criminal liability as a natural person. Given that a corporate body has no mind of its own any more than it has a body of its own, it can only act through human agents; hence there is a presumption of fact that any acts and/or omissions which are reproached of the company, have, in effect, been directly or indirectly physically done or omitted to be done by a natural person.



¹¹ Per Sir Victor Glover CJ in *Dookhee v R* [1992 SCJ 63] at page 4.

- 4.3. Now, the fact that a company acts through human agents does not automatically render it vicariously liable. A corporate body may be prosecuted for having committed a prohibited act personally where the primary liability lies with the corporate body and not its human agents as will be considered in more details below. In the latter event, not all acts of all employees can and will necessarily be attributed to the corporate body to engage its criminal liability.
- 4.4. In the present matter, *ex facie* the information, we are concerned with corporate liability, where the banks are being prosecuted, for acts and doings which, presumably in law, remain at all materials times those of the banks and can be imputed to them as corporate persons.
- 4.5. Although the history of criminal liability of corporations is not easily reconciled and still poses difficulty whenever courts are called upon to determine the extent of such liability, it can be deduced from the background discussion leading to the conclusions reached in the leading English authorities cited and considered including the learned authors of Archbold and Blackstone's Criminal Practice and which are echoed by the learned French authors of Encyclopédie Dalloz and the two authorities of the Cour de Cassation Chambre Criminelle in their approach, on this topic, that the pre-requisites to engage criminal corporate liability and determine the applicable rule of attribution fall to be determined primarily by the categorisation of the offence in question subject to the usual canons of statutory interpretation coupled with the constitution of the company, as will become apparent below.
- 4.6. Offences may be classified as criminal or quasi-criminal and they can further be subdivided as absolute/strict liability offences or offences requiring some proof of *mens rea*.
- 4.6.1. In general, strict liability offences are defined in such a way that the corporate body satisfies the definition of the offence; hence the corporate body, on whom a duty is thrown, is responsible, whether it has delegated its duty or whether it has acted through a servant. The company is not being held responsible for a particular act of an employee.



4.6.2. Where an offence requires *mens rea*, the rules are as follows: a corporation is personally liable if (a) the offence is committed in the course of the corporation's business by a person in control of its affairs to such a degree that it may fairly be said to think and act through him¹²; hence the acts and state of mind of one of the above category of persons are identified with the company itself¹³; or (b) the Court construes the statutory provisions as permitting the attribution to the corporation of the acts and state of mind of the individual in question¹⁴. Hence, the concept of a company's 'directing mind and will' in English law which originates in the celebrated speech of Viscount Haldane L. C. in **Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd**¹⁵.

4.6.2.1. Natural persons considered as the directing mind and will of a company, consist generally but not exclusively, of the board of directors, the managing directors, and maybe other superior officers of a company carrying out the functions of management and speak and act as the company¹⁶. Different persons may for different purposes satisfy the requirements of being the company's directing mind and will¹⁷.

The Offence

4.7. It is undisputed that the purport of the statute providing for the present offence is to combat money laundering offences. In that respect, the close monitoring and control of cash transactions is an important consideration. "*By enacting sections 5, 6 and 8 of the Act, the policy of the legislator was clearly designed to achieve the compelling objective of safeguarding the national and international financial system against any*

¹² Halsbury's Laws of England, Criminal Law (Volume 25 (2016), paras 1–418; Volume 26 (2016), paras 419–860) > 1. Principles of Criminal Liability.

¹³ **Tesco Supermarkets Ltd v Natrass [1972] AC 153**

¹⁴ **Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500; Ferguson v British Gas Trading Ltd [2009] EWCA Civ 46**

¹⁵ [1915] A. C. 705, 713

¹⁶ **Tesco Ltd v Natrass [1972] AC 153** per Lord Reid at 171 F

¹⁷ **El Ajou v Dollar Holdings [1994] 2 All ER 685** per Hoffmann LJ, as he then was, at p. 706



disruptive intrusion which may be caused by the perpetrators of certain criminal activities.."¹⁸.

- 4.8. It is well recognised and there is a long standing presumption that *mens rea* is an essential ingredient of every offence unless Parliament has expressly or by necessary implication provided that it is not.
- 4.9. In the case at hand, although the wording of Section 5 of the FIAMLA in itself is silent on the mental element; it has been averred in the body of the information.
- 4.9.1. Notwithstanding the above, whether the present offence is truly criminal character or one prohibited in the public interest and the question of whether the present provision imposes strict liability, is at the end of the day a matter of construction which depends on both the wording of the provision and the subject matter which it seeks to regulate.
- 4.9.2. This being said, I note that the Supreme Court of Mauritius sitting in its appellate jurisdiction, has made a determination on the nature of the present offence, where it was held that the language of Section 5 of the FIAMLA leaves no doubt that the offence created by that section is more in the nature of a strict liability¹⁹.
- 4.10. I do not propose to address this issue further as it has not been specifically raised at this stage, hence outside the ambit of the present ruling.

Averments as to Identity of natural person and attribution of act of natural person to the corporate body

- 4.10. In essence, it is submitted on behalf of the MCB that by failing to disclose the identity of the natural person who did the alleged wrongful act, i.e. 'who did what?' and to attribute such wrongful act to the banks, in other words, 'ascribing responsibility to the legal entity from the acts of the person having committed the offence' (sic), the information in the present matter, is so fundamentally flawed and defective, as to

¹⁸ **Abongo v The State [2009 SCJ 81]**, cited in part in **Meeajun v The State [2011 SCJ 141]** and referred to in **Beezadhur v The ICAC [2014] UKPC 27**

¹⁹ **Beezadhur v The State [2013 SCJ 292]** at p. 13



amount to no charge at all. Furthermore, the defence submits that it would be virtually impossible to find potential lines of defence until and unless the natural person who has committed the alleged prohibited act is identified.

4.11. The misconception in the above reasoning are the propositions that:

- (i) The information as preferred discloses an offence in the abstract because the only natural persons mentioned under the sixteen counts of the information are the representatives of the accused banks and they have no physical role to play in the commission of the alleged offences.
- (ii) The information as couched does not aver vicarious liability either and the accused parties have not been put on notice of the species of liability they have to answer. Hence, it does not appear *ex facie* the information whether the banks are being prosecuted in their own capacity or in their capacity as employer/principal of the perpetrator of the offence.

4.12. In the present matter, the averments in the information convey in plain and unequivocal terms that the three banks are being prosecuted in their own capacity as corporate bodies and the appropriate averments have not been made to bring the offence under any of the sub sections of Section 44 (1) of the IGCA. Of note, the law does not provide for a specific statement of an offence where a body corporate as opposed to a person who is concerned in its management at the time of the offence is being prosecuted.

4.13. On the face of the information, it cannot be said that the present offence is one which is totally unknown to the law or has been wrongly described or one where a corporate body cannot be convicted or one where a company would lack the basic qualification for liability. It cannot further be said that the present offence falls within the category of offences where the corporate body cannot be convicted of the alleged offence in the absence of evidence establishing the guilt of an identified human individual, in other words where the identification principle is the only basis for corporate liability.

4.14. Hence, the identity of the natural person, in so far as to put the corporate body on notice in which capacity it is being prosecuted, is neither here nor there. The Court is



therefore satisfied that the information is sufficiently worded to answer and clear any doubts which the banks claim to entertain on that score.

4.15. There is a succinct line between averring the identity of the natural person who has committed the alleged wrongful act on the principle that a corporate body can only act through human agents *simpliciter* and the requirement for such averment to bring it in line with the 'identification principle' where a corporate body can be convicted for a criminal offence only if, an individual who can be identified with the company as its directing mind and will has acted with the requisite fault. The former in itself has no legal bearing, it is merely a presumption of fact which constitutes the substratum on which the identification principle/attribution rule may be founded in that it follows that not all acts of all employees can be attributed to the company. Hence, the identity of the natural person who has accepted the cash payment, in itself, is neither here nor there but assumes all its importance and relevance for the purpose of the attribution rule, the extent of the application of which, is directly related to the type of offence under consideration.

4.15.1. The two are inter-linked and cannot be considered in isolation. The identity of the individual cannot be averred in the abstract. This is where learned counsel for the MCB departs from the grounds relied upon to challenge the validity of the information which blur the line of demarcation which she later forcefully pressed should be observed. She is arguing on the one hand that based on the principle that corporate liability can only arise through acts of human agents, the prosecution is not dispensed from averring the identity of the natural person *simpliciter* and the question of identification is based on a different legal principle; on the other she submits that the information amounts to no charge at all because it fails to disclose the identity of the natural person who has allegedly accepted the cash payment **and** it fails to state that such act is attributable to the corporate body. Whilst the latter proposition may be true in certain specific circumstances, such requirement is not of general application.

4.15.2. One cannot but agree, that, at this stage, the Court is not called upon to decide whether the natural person whose act is in fact imputed to the company satisfies the legal requirements to engage the criminal liability of the company; hence



indeed the question of 'identification' is based on a different legal principle. Whilst the constitutional right of an accused party to be informed in detail of the nature of the offence can never be overstated, on the other side of the equation are established statutory provisions governing what should be averred in an information. There is to date no legal provision for a particular statement of offence which should be generally adopted whenever a corporate body is amenable to prosecution, averring that the physical act of an identified person is attributed to the corporate body, for obvious reasons, some of which have already be addressed at the beginning of this ruling and others will be considered below. In essence, an information needs only aver what must be proved and similarly what must be proved should be averred; that relates to the essential elements of the offence, not the evidence by which such elements are to be factually established. But the attribution rule, is a question of law which arises depending on the particular offence under consideration; not an element which has to be proved when the accused party is a body corporate.

4.16. Besides, the well-established principles regarding the criminal liability of corporations pronounced by the English and French authorities mentioned earlier in the ruling, the local authority relied upon by learned counsel for the MCB in support of her contention that the information is fundamentally defective because it fails to ascribe 'responsibility to the legal entity from the acts of the person having committed the offence' (sic) relates to a charge of involuntary homicide by imprudence²⁰. The two other authorities²¹ cited in that case underlying the *ratio decidendi* relate to the same type of offence. The position in French law is similar and this includes one of the decisions of the Cour de Cassation²² referred in the course of the present hearing.

4.16.1. The settled principle derived from the above decisions is that a non-human accused cannot be convicted of the offences with an element of negligence and/or imprudence in the absence of evidence establishing guilt of an identified human individual.

²⁰ **The Director of Public Prosecutions v La Clinique Mauricienne [2014 SCJ 070]**

²¹ **The Central Electricity Board v The State [2010 SCJ 75]** and **A. G's Reference (No.2 of 1999) [2000] 3 All ER 182**

²² No de pourvoi: 99-80318; chambre criminelle; publié au bulletin criminel 2000 No 28 p.68



4.17. Learned Counsel for the MCB has also referred the Court to a decision of the Intermediate Court²³ which relates to the same offence as the present one; the information laid against the bank in its own name; the particulars of the information do not disclose the identity of the natural person who has physically accepted the questioned payment but the latter, who turned out to be tellers at the bank, testified in the course of the trial. The Court in that case when assessing the *mens rea* of the accused bank and holding that criminal liability could not be imputed to the bank without identifying the individual behind the fault, relied *inter alia* on a passage of the **CEB case**²⁴, which is one of the authorities relating to a charge of involuntary homicide by imprudence referred in the preceding paragraph.

4.17.1. Suffice it to say that the above authority referred to is merely persuasive and not binding authority. The conclusions reached do not and cannot seek to establish as a general and authoritative proposition that, whenever a corporate body is prosecuted, it cannot be held criminally liable unless and until the relevant criminal conduct of an identified individual which can be attributed to the company, has been averred in the information. Reason being that, whose acts can be attributed to the company by applying the 'directing mind and will' test so that the person's fault or knowledge becomes the company's fault or knowledge, is not appropriate and determinative in all circumstances. It is a question of construction in each case 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.

4.18. This Court cannot therefore agree with the submissions of learned counsel for the MCB and the SBM suggesting that the identity of the natural person whose act is questioned and ascribing responsibility to the body corporate from the such impugned act, are two necessary averments whenever a corporate body is being prosecuted, and this irrespective of the nature of the offence under consideration. Such reasoning is flawed for the following additional reasons, namely,

²³ ICAC v State Bank of Mauritius LTD [2018 INT 189]

²⁴ The Central Electricity Board v The State [2010 SCJ 75]



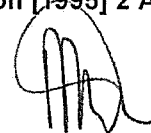
- 4.18.1. All the discussions and debate surrounding and flowing from the principle that the personality of a company is a legal fiction and the company does not itself have a mind are only relevant where the offence in question is one where proof of state of mind is an element of the offence. This is where the 'directing mind and will' of the company comes into play²⁵.
- 4.18.2. Hard and fast rules about which employee is so identified cannot be laid down and *'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.'*²⁶
- 4.18.3. A weaker rule of attribution based on the interpretation of the particular statute is generally adopted for offences with a mental element and not falling within the ambit of offences with an element of negligence/imprudence²⁷.
- 4.18.4. Indeed, *'the prosecution is not required to establish with precision the identity of the person who is the directing mind and will of the body corporate'*²⁸ and it suffices that *it is proved that somebody who is concerned in the management of the body corporate is involved.'* Such was the finding of the appellate court where the offence charged was similar to the present one and the *préposé* of the accused company who had dealt with the customer could not state who authorised the impugned transaction she had effected.
- 4.18.5. It can be deduced from the above decision that the identity and/or status of the natural person who has actually and physically effected the transaction, even if known, and for the sake of argument, averred, is in itself, neither a determining factor nor the test to be applied in deciding whether the criminal liability of the corporation has been engaged. This enjoins the proposition that it may be possible

²⁵ **Halsbury's Laws of England, Criminal Law (Volume 25 (2016), paras 1–418; Volume 26 (2016), paras 419–860)** > 1. Principles of Criminal Liability; **Blackstone's Criminal Practice 2001**, Corporate Liability § A5.11 p.83

²⁶ **Tesco Supermarkets Ltd v Natrass** (supra) per Lord Reid at p. 170

²⁷ **Meridian Global Fund Management Asia Ltd v Securities Commission [1995] 2 AC 500**

²⁸ **Shibani Finance Co Ltd v The ICAC & Anor [2012 SCJ 413]**



to combine proof of the *actus reus* on the part of an employee of the corporation who would not form part of the controlling mind with proof of *mens rea* on the part of a person who does form part of the controlling mind²⁹.

4.18.6. Hence, an analysis of all the above decisions show that the attribution/identification rule has been applied to different extents fitting the particular purpose and tailored as it always must be to the terms and policies of the substantive rule.

4.19. In the absence of any provision of the law for a specific statement of an offence where a body corporate is prosecuted coupled with the fact that there is no requirement that the identity of the natural person be given as an element of the offence and establishing the guilt of an identified human individual for the crime for which the body is being prosecuted not being a condition precedent for the present offence, disclosing the identity of the natural person whose act is questioned, in the information, could at most only have been in the nature of 'particulars'.

4.19.1. Applying the principles governing the furnishing of particulars to the facts of the present matter, given that (a) a company may be prosecuted even where it is not being held responsible for a particular act of an employee; (b) it may be possible to combine proof of the *actus reus* on the part of an employee of the corporation who would not form part of the controlling mind with proof of *mens rea* on the part of a person who does form part of the controlling mind; and (c) the prosecution is not required to establish with precision the identity of the person who is the directing mind and will of the body corporate, the need to aver the identity of the natural person whose physical act is concerned and stating that the said impugned act is attributable to the corporate body so as to make it criminally responsible, would be a disguised way of burdening the prosecution with the task of furnishing particulars where such an exercise would draw the prosecutor into stating matters of evidence with the improper result that the prosecution may be unduly bound to restrict itself to such evidence, where the law does not so require.

4.20. The propositions canvassed by learned counsel for the MCB as set out at paragraphs 4.12 (i) and (ii) above, reflect the comments and findings of the appellate court in

²⁹ Archbold Digital Edition, **Offences by Corporations para 17-32 (a)**



Vigier de la Tour v The State [2009 SCJ 19] at pages 5 and 7. Whilst there is no dispute regarding the provisions and the statement of the law, learned counsel for the MCB appears to have overlooked the fact that in the latter case, the accused was a natural person who was prosecuted as director of a company and the information had failed to aver that he was concerned in the management of the body corporate which had committed the offence. Section 44 (1) of the IGCA provides for a statutory defence which laid an evidential burden on the natural person so prosecuted to show that the offence was committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence. Hence, the passages on which learned counsel for the MCB has relied upon assumed all their importance on the given set of facts and circumstances in that case. But such reasoning lacks justification where the body corporate is being prosecuted personally as in the present matter, as the provisions of Section 44 (1) do not find their application.

4.21. Learned Senior Counsel for the SBM has indicated in the course of his submissions that the bank intends to rely on the application of the exemption under Section 5(2) of FIAMLA and in that respect, the *'mental element of that person who was giving the money at the time becomes important if that person believes that it was an exempt transaction.'*(sic) Now, the submissions of learned Senior Counsel for the SBM is not clear when he refers to the person 'giving the money', considering that the particulars clearly aver that the bank, the other party to the alleged cash transaction has accepted the alleged sums of money from Mr. Briand and the submissions led in the present hearing as to the requirement for the identity of the natural person who has accepted such payment at the relevant bank.

4.21.1. Be that as it may, the Court bears in mind that *'where there is an evidential provision which only operates when a particular fact is found to be in existence, then this fact which needs to be proved for the evidential provision to come into play has to be averred.'*³⁰



³⁰ **Vigier de La Tour v The State [2009 SCJ 19]** at p. 6 commenting on the reasoning in **Ip Fan Yong v The Queen [1971 MR 28]** at page 31.

4.21.2. In that context, without going into the merits of the application of the statutory defence available under section 5 (2) of FIAMLA, the Court notes that the burden of proving that the transaction was an exempt one is on the accused. The nature of such defence relates essentially to the bank's knowledge of who is its established customer and its customer's activities and the facts to be proved to avail itself of such a complete defence are within the peculiar and exclusive knowledge of the bank. Are also relevant the shared responsibility of the bank and its customer for ensuring that a cash transaction is covered by the exemption; the offence is committed by both the person who makes the cash payment and the person who accepts; and the fact that there is no exemption for banks as such in their dealings with their customers³¹.

4.21.3. Hence, it cannot be said outright that the identity of the natural person or persons who has accepted the cash is a fact which needs to be proved for the evidential provision under Section 5(2) of FIAMLA, as it then stood defined under the interpretation section of the Act, to come into play, so that it has to be averred, especially having regard to the nature of the present offence and the elements which have to be proved by the prosecution as set out in **Beezadhur v The State [2013 SCJ 292]** and **Beezadhur v The ICAC [2014] UKPC 27**.

4.21.4. The issue of whose act or knowledge, if applicable, will be considered in effect as that of the bank, for the exemption to come into operation, is dependent on a number of factors, some of which are matters of evidence yet to be determined, including (a) the type of offence under consideration; (b) the capacity in which the body corporate is being prosecuted and the availability of a statutory defence, in the nature of the one considered at paragraph 4.20 above, if any; and (c) the fact that it may be possible to combine proof of the *actus reus* on the part of an employee of the corporation who would not form part of the controlling mind with proof of *mens rea* on the part of a person who does form part of the controlling mind.



³¹ **Beezadhur v The ICAC [2014] UKPC 27**

Constitutional Right of an accused party to silence and calling of witnesses

- 4.22. It is essentially submitted on behalf of the MCB that the identification of the individual and the designation by name would be of specific importance to apprehend whether the prosecution can call a witness because if, for instance, the name of the natural person who had physically perpetrated the alleged had been averred in the body of the information, the prosecution would probably not have been entitled to put those very names on its list of witnesses taking into account the privilege against self – incrimination.
- 4.23. The above reasoning can to some extent be said to reflect a point raised by learned senior counsel for the then accused in the case of **The DPP v La Clinique Mauricienne**³² where, he had moved for a dismissal of the information as according to the prosecution the acts of negligence (emphasis added) were committed by a person who was in fact a witness on the list of witnesses for the prosecution, such that the information disclosed no cause of action against the accused.
- 4.24. At the risk of repeating itself, in the light of all the matters addressed at paragraphs 4.19 to 4.19.6, the possibility envisaged by learned counsel for the MCB does not find its application in the present matter. Such proposition cannot derogate from the fundamental principles of law on the one hand pertaining to the competence and compellability of witnesses with due regard to those of bankers subject to the safeguards provided under Section 39 of the Banking Act; and on the other, that, in criminal cases, the privilege against self-incrimination is restricted to the person claiming it; the privilege is that of the witness; and neither of the parties can take advantage from it.

5. Conclusion

- 5.1. The answers to the three main reasons put forward on behalf of the MCB to support its submissions as set out at paragraphs 4.11, 4.12 (i) and (ii) above, are, where relevant, found in the averments of the information itself or in the interpretation of the statute creating the present offence, having regard to its object, the words used, the nature of the duty laid down, the person on whom it is imposed, the person by whom

³² Supra.



it would in ordinary circumstances be performed, and the person on whom the penalty is imposed.

- 5.2. For all the reasons given at paragraphs 4.13 and 4.14 above, the Court is satisfied that the information in the present matter discloses an offence. It is sufficiently particularised in that it satisfies the test of certainty and precision. Indeed, it sets out the sections of the statute and the words of the law creating the offence; it identifies the party charged; it gives a description of the offence with which the accused banks are charged; and it discloses the constitutive elements of the offence.
- 5.3. As explained at paragraph 4.15, the heading and the wording of the information also clearly convey that the three banks are prosecuted personally as corporate bodies and not as principals for acts of their agents as envisaged under Section 44 (1)(a) of the IGCA. Furthermore, the particulars provided already set out the material circumstances of the offence in that they make clear to the defence the nature of the offence they have to meet.
- 5.4. Notwithstanding the fact that by prosecuting the banks in their own names, the act (s) of a natural person or persons is/are the act(s) of the banks themselves and not all acts of all employees can be attributed to the banks, for reasons given at paragraphs 4.16, 4.17, 4.19 and their respective sub-paragraphs above, the identity of the natural person whose physical act is questioned and ascribing responsibility to the corporate body from such impugned act, cannot be said to be two necessary averments whenever a corporate body is being prosecuted, and this irrespective of the nature of the offence under consideration. Nor can such identity be, as a matter of law, ordered to be furnished as 'particulars' for the reasons stated at paragraphs 4.20 and 4.20.1. At the end of the day, the focus shall be on the statute that creates the offence in order to determine the rules of attribution applicable to it³³.
- 5.5. In view of the matters addressed at paragraphs 4.21, 4.22 to 4.22.4, it cannot be said that unless the identity of the natural person whose physical act is questioned is averred, it will be impossible to identify potential lines of defence. The available and

³³ Meridian Global Fund Management Asia Ltd v Securities Commission [1995] 2 AC 500

potential lines of defence are exhaustive and depend on the provisions of the statute creating the offence.

- 5.6. For the reasons enunciated at paragraphs 4.24 and 4.25 above, this Court is, at this stage, not prepared to hold that the constitutional right of silence of the banks are being infringed by compelling the employees of the bank to give evidence on behalf of the prosecution.
- 5.7. In the light of all the legal principles governing the criminal liability of corporate bodies and the matters considered at paragraphs 4.2 to 4.25 and their sub-paragraphs where applicable, above, I am satisfied that the information in the case at hand complies with the constitutional and legal statutory requirements and makes clear to the defence the nature of the case which it has to meet. The accused parties cannot therefore be said to be deprived of their constitutional rights to know in details the case they have to meet.
- 5.8. HSBC and SBM having joined in the motion made on behalf of the MCB, all the findings and observations made in the present ruling apply equally to the three accused banks.
- 5.9. The motion to dismiss the information against all three accused banks, is accordingly, overruled.



A. HAMUTH (Miss)

[Delivered by: A.HAMUTH (Miss), Magistrate Intermediate Court]

[Delivered on: 09 August 2019]

