FCD CN: 66/20
CN: 1157/16

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

1. **Jean Wesley Marthe**
2. **Monique Jacqueline Marthe**
3. **Jean Jimmy Alexis**
4. **Moussa Beeharry**

RULING

The four accused parties have been prosecuted for the offence of money laundering in breach of sections 3(1)(b), 6 and 8 of the Financial Intelligence and Anti Money Laundering Act, under different counts of the Information. They have all pleaded not guilty to the Information and were represented by counsel throughout the proceedings.

It is noted that the case has been transferred to the Financial Crime Division of the Intermediate Court. At the outset of trial, Mr Hawoldar, counsel for accused no.4 moved that the case been permanently stayed on the ground of abuse of process. The motion was argued solely on behalf of accused no.4.

Defence counsel couched his motion for abuse of process under the limb of double jeopardy. Both counsels offered oral submissions. It has to be noted that defence counsel chose to file written submissions to court in support of his oral submissions. It was well pointed out by counsel for the prosecution that the said written submissions were not communicated to him before the day of argument. Having perused the written submissions from the defence, a second limb of delay had been raised which of course could not be rebutted by the prosecution. Defence counsel

gave the indication in court that he would rely on his written submissions in so far as it is in accordance with his oral address to court. Hence the defence submissions will be restricted to those of double jeopardy. The main point was that if the accused has already been prosecuted for offences which arose from the same transaction, it would be unfair now to prosecute the accused for offences which could have and should have been prosecuted at roughly the same period of time when the first prosecutions were laid. It would be prosecution by instalment and therefore unfair to the accused.

At this juncture, the available evidence of a previous prosecution and conviction of the accused emanates from the examination of witness no.1 Mr Bholah, who was called by the prosecution for the purposes of the argument. He stated that the accused was prosecuted by the police under 8 counts and the lapse of time from that prosecution and the current one is about 6 to 7 years. The accused was convicted. It is noted here that it was the defence which first volunteered this information. It is understood that the accused has already served sentence for the offences he has been convicted. There is no other evidence as to the exact offences for which he was prosecuted and the circumstances which would show that the offences arose from identical facts or facts which are substantially the same to those of the present matter.

The burden of proof rests on the defence to prove double jeopardy, vide **DPP v Jahaly 2012 SCJ 159** where Halsbury's Laws of England 4th Edn, Vol. 11 para. 242 was cited; *The burden of proving the pleas of "autrefois convict" or "autrefois acquit" is upon the defendant. He must establish that judgment of conviction or acquittal has been legally given.*

The court cannot labour under the assumption that the offences for which the accused has been convicted were the predicate offences of the money laundering ones of the current Information. The defence did not adduce the required evidence, but also failed to provide the cause number of the previous case in question. The reasons for not granting a third postponement to defence counsel for the purposes of the argument are found ex facie the court record. Furthermore it has to be pointed out that there are three other accused parties in the case who run the risk of being prejudiced by repetitive postponements from one accused party. Under counts 4 to 24 of the Information, the criminal activity averred is with regards to drug related offences. The witness for the prosecution, under cross-examination stated that the dates and amounts of money involved in the offences of the previous prosecution differ from those of the present case.

The gist of the defence's contention is not that the accused is being prosecuted for the same or substantially the same offences, but more to the fact that the accused should have been prosecuted at roughly the same time as the first prosecution. The defence has mainly relied on section **10(5) of the Constitution** which reads: *No person who shows that he has been tried by a competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, except upon the order of a superior Court in the course of appeal or review proceedings relating to the conviction or acquittal.*

As submitted by the prosecution, **section 46 of the Interpretation and General Clauses Act (IGCA)** has refined the meaning of section 10(5) of the Constitution. The section 46 IGCA reads as follows:

Where an act constitutes an offence under 2 or more enactments, the offender shall be liable to be prosecuted under either or any of those enactments but he shall not be liable to punished twice for the same act.

The following extracts from **Komul v State 2010 SCJ 48** are of relevance:

After analyzing the provisions of section 46 of IGCA 1974 in the light of the previous provision of section 27 of the IGCA 1957 and section 33 of the UK Interpretation Act 1889, as well as section 10 (5) of the Constitution, The Court in Chutturbhooj [1988] had this to say:

"Notwithstanding the provisions contained in section 10 (5) of the Constitution the legislator has thought it fit to include in our present text section 46 quoted earlier which provides for one further protection to the citizen by adding to the already existing guarantee of no double punishment for the same offence the further guarantee of no double punishment for the same act."

We take the view that any case which calls for the interpretation of that section will have its own set of facts with their own circumstances and consequences, so that each case must be looked at on its own facts. To prosecute a person in respect of the same act or same set of facts under different offences does not necessarily mean that the person may not be in peril twice for the same act.

The legislator, in his wisdom, may have deliberately provided as he did in section 46 of the IGCA 1974 that "Where an act constitutes an offence under 2 or more enactments" and not "Where an act constitutes the same offence under 2 or more

enactments" that the offender shall not be liable to be punished twice for the same act.

In the absence of a more authoritative decision on the interpretation of section 46 and its application, it stands to reason that irrespective of that provision, it is within the discretion of the Director of Public Prosecutions, who must not in any way act in an oppressive manner, not to prosecution every offence arising out of the same set of facts; but where he chooses to do so it is incumbent on him to prove all the elements that constitute that different offence.

The defence seemed to suggest that the phrase 'for any other criminal offence of which he could have been convicted at the trial of that offence' at section 10(5) of the Constitution can be interpreted as follows:

An accused party if prosecuted for an offence arising from a set of facts, cannot be prosecuted for another offence from the same set of facts unless it has been laid in the same Information or in another Information but contemporaneous to the first. Such a proposition cannot stand. It would mean that if an accused party has committed multiple offences arising from one transaction, it would be a bar to prosecute the accused for all those offences, unless the prosecutions were grouped together contemporaneously. Nevertheless an extended period of time between prosecutions may raise issues of inordinate delay, but not pleas in bar for autrefois convict or autrefois acquit.

A reading of section 10(5) of the Constitution in conjunction with section 46 of the IGCA shows that an accused party cannot be prosecuted twice for the same offence, or if there were two possible offences for the same act emanating from two enactments, the accused party cannot be prosecuted for that other offence.

By analogy, the act of sexual intercourse with a minor under the age of 16 is covered by two enactments, namely section 249(4) of the Criminal Code and section 14(1) of the Child Protection Act. If an accused party has been prosecuted under section 249(4) of the Criminal Code and he has been either convicted or acquitted, he cannot be prosecuted again under section 14(1) of the Child Protection Act. The offence under section 14(1) would represent the phrase 'for any other criminal offence of which he could have been convicted at the trial of that offence' of our Constitution. Section 46 of the IGCA gives an added clarification to the above constitutional provision.

I therefore find no merit to the plea in bar from the defence at this stage of proceedings.

However, the court is alive to the fact that a period of time has elapsed from the moment the accused was first prosecuted and convicted to the current prosecution arising from the same set of facts or transaction. There is not enough evidence adduced at this stage to show the exact circumstances of the first prosecution. If it is assumed that the offences are closely linked to the present ones and could have been prosecuted together or contemporaneously, the issue becomes one of delay and the unavailability of concurrent sentencing. The general maxim from **Boolell v State 2006 MR 175** remains, so that such unfairness other than the trial itself being unfair may be remedied at sentencing stage, if conviction ensues.

The motion for abuse of process is therefore set aside at the current stage of proceedings.

P K Rangasamy
Magistrate of the Intermediate Court
05.10.21