

ICAC v O. K. Lungut

2023 INT 165

CN: 644/2018 [FCD CN: 92/2020]

IN THE INTERMEDIATE COURT OF MAURITIUS [FINANCIAL CRIMES DIVISION]

In the matter of: -

Independent Commission Against Corruption

v/s

Oodaye Kumar Lungut

JUDGMENT

Accused stands charged with the offence of wilfully and criminally receiving property which, in part, directly represents the proceeds of a crime in breach of section 3 (1) (b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002. [FIAMLA] Accused pleaded not guilty to the charge and was represented by counsel at the trial.

The undisputed facts are as follows:

- Accused is the sole director of Sunrise Academy Limited [SAL] since 2005.
- Accused proposed a training course to Mr Louis Sylvain Anna in favour of the latter's employees.
- An application was made by Mr Anna for a refund at the HRDC. Mr Anna was refunded the sum of Rs 91000 for the course which SAL provided. A cheque of Rs 91,000 which was issued in the name of SAL was received by Accused from Mr Anna and the said sum of money was credited in the account of SAL.

2 statements of Accused were read and produced in court by SI Nuckchady. She gave evidence that Sunrise Academy Limited made an application to the HRDC which was

approved. Statements were also recorded from manual workers who stated that they did not attend any course on the 7th and 8th of December 2013. One Marie Moothoola and Garbhatee Sookram did not sign the attendance list. The enquiry has also revealed that the cheque of Rs 91,000 was remitted to the Accused by Mr Louis Sylvain Anna. In cross-examination, she stated that Rs 91,000 was credited into the account of Accused. She conceded that the charge which was put to Accused is that Sunrise Academy Limited is suspected of having committed the offence of money laundering when the company received the sum of Rs 91,000 after a list of forged signatures were deposited at HRDC. Mrs Marie Therese Moothoola gave a statement to the effect that she never signed the register. No examination of the signatures was effected since the person herself said it was not her signature. She agreed that witnesses 6 and 7 wavered in their versions on this score and that it was SAL which made an application for approval at HRDC and requested payment. In re-examination, she stated that she was under no obligation to investigate the predicate offence.

Several documents were produced in court including a document which relates to a transaction of Rs 101,721 which is referred to as HRDC refund, a copy of a cheque issued in the name of Sunrise Academy Limited dated the 2nd of April 2014, the bank statement of Sunrise Academy Ltd and the bank statement of Mr Louis Sylvain Anna. Evidence was also adduced that Sunrise Academy Limited is registered company and that the Accused is the sole director of the company.

The main features of Mrs K D Mungur's testimony are as follows:

Her duties at the HRDC involve payment to employers who can apply for a refund for training costs in respect of levy grant scheme. The employer normally sends form G1 together with a detailed time table 3 working days before the courses begin following which the employer obtains an acknowledgment and he can proceed with the course. After the course is completed, he then submits an application form G3 which is an application or a refund. A certificate of attendance is also attached. It is the employer who decides which course to carry out and it is not in the mandate of the HRDC to verify if the courses which are offered meet the training needs of the employees. As regards the certificate of attendance, it is the training provider which issues the attendance register. An officer verifies the application G3 which is crosschecked by a higher officer before payment is

recommended. The payment is effected in relation to the contribution which has been made and the employer is informed via a notification letter that payment of refund has been effected. When an employer fills in the G 3 form, he has to ensure that all the details are accurate. A copy of the attendance sheet revealing the names of all the employees who have followed the training was sent by the employer. There is also an invoice in the sum of Rs 180,000 which Sunrise Academy Limited issued. The certificate of attendance has been signed by Mrs Lungut. In the end, Mr Louis Sylvain Anna obtained a refund by bank transfer in the sum of Rs 101,721.

It was elicited from her in cross-examination that it is the employer who submits the form. There is a database where information can be retrieved and that Mr Anna met the criteria with regard to contribution for levy but that she has no direct contact with the employer. The employer signed a declaration stating that all the information provided on the form is correct.ⁱ She effects payment of refund on the basis of the G3 form. The G1 form is not approved but only acknowledged. It was denied by her that Mr Louis Sylvain Anna is not an employer. She explained that Mr Anna contributed as per the levy grant scheme and that employers are liable if there is a declaration. She could not say whether Mr Anna signed in his capacity as Sirdar. She maintained that Mr Anna was contributing levy so he that could benefit from a refund.

The main features of Mr Padaruth's testimony are that he has been giving courses at Sunrise Academy Limited to all categories of workers. The form G 1 contains a list of workers, the objectives and dates of the courses. It is the company which provides a list of the participants. After the completion of the course, he and Accused went to see the employer with all the relevant documents. He could not say anything regarding the payment for the course and added that payment is effected as per MQA approval and that it is the employer who does the liaison with the HRDC. In respect of the course at Belle Rive, he was informed by the Accused that a refund was not obtained. When he was asked what his role was when the G 1 is deposited at the HRDC, he stated that he is not involved and that it is the MQA which gives the approval. Mr Padaruth attended the course to ensure everything is in order and he left the attendance sheet there. As regards the G 3 form, he left it with Mr Louis Sylvain Anna. He stated that Mr Lungut did not deposit the G1 form at the HRDC but when he was confronted with an inconsistent statement, he stated that it was indeed Mr Lungut who did so. He agreed that he was present on the 7th

of December 2013 and reached there after the break. There were about 50 persons present. The participants included the workers of Mr Louis Sylvain Ann and, Claudia Fashion. He could not say who requested the participants to sign the attendance sheet. Mr Juwaheer or Accused gave him the form G 3 and he filled in the form.

It was admitted by Mr Padaruth under cross-examination that the fees claimed by the attendees are fixed by the MQA, Mr Juwaheer is a registered trainer with the MQA and that he met Mr Louis Sylvain Anna and filled in the form G1 at Belle Rive at the office of Mr Anna who provided him with a list of the workers who would participate in the course. He left the list of participants with Mr Juwaheer. The attendance sheet which was given to Mr Juwaheer is based on the list provided by Mr Anna. He also stated that Sunrise Academy Limited provided courses on Saturday and Sunday and that the trainer worked on those days.

The main features of Mr Juwaheer's testimony are that he gave courses for Sunrise Academy Limited on the 7th and 8th of December 2013 to Mr Anna's workers and workers from Claudia Fashion. The course was conducted partly in the compound and partly outside. He has received partial payment for the course. The attendance sheet was handed over to him by the Accused and Mr Padaruth and he left it on the table. After the completion of the course, he returned the attendance sheet to Mr Padaruth or Accused. It was admitted by him that he signed the attendance sheet. He added that the director of Claudia Fashion was present and that he informed all the participants that they have to sign the attendance sheet.

The gist of Mrs P Sookram's testimony is that she has been working for Mr Anna as labourer. She followed all kinds of courses organised by Mr Anna. She maintained that she did follow one course. When a previous inconsistent statement was put to her, she stated that she did not know what was being recorded in her statement. She added that she was stressed when she mentioned that she never attended any course. When page 9 of document B was shown to her, she was unable to identify her signature. It was elicited from her in cross-examination that the course was held on a Saturday at Belle Mare and that she went by bus with other workers to attend the course. The bus of 14 seat capacity was half full. She agreed that Mr Anna was also present and he stayed until late. It was maintained by her that she wrote her name on the attendance sheet and that she signed

too. When document B was shown again to her, she stated that her signature appears on it and added that she could not see well earlier. In re-examination, she stated that she did not attend any course on Saturday and that maybe someone went in her place. She then stated that her signature appears on the attendance sheet of Sunday but retracted from her version.

Mr Saubah gave evidence that he is the owner of AS Villa. He agreed that he received the sum of Rs 10,500 from Sunrise Academy Limited. Under cross-examination, he stated that he did not meet the Accused and that it is Mr Munglah who gave him the money. He denied that he met Accused to negotiate the price.

Mr Louis Sylvain Anna testified and the following facts were admitted by him under cross-examination:

- 3 courses were given by Accused to his workers
- more than 12 persons attended the course
- on the 9th of January 2013, a cheque was paid into his account from HRDC in the sum of Rs 101,511 following which he issued a cheque in the name of SAL in the sum of Rs 91,000 and gave it to Accused.

He further explained that the third course which was provided at Belle Mare was held on the 7th of December 2013. Although Accused proposed a 2-day course, the workers were not agreeable and hence the course was conducted only one day. About 12 workers attended on the 7th. He submitted a list of 12 persons to Accused. Accused provided a bus to pick up the employees and he accompanied them on the 7th. He added that some employees who could not attend were replaced by other employees. Accused's team member recorded the attendance. He stated that the courses were given by Accused and that his workers were satisfied. In re-examination, he stated that he never gave any cash to Accused for the courses held on the 7th and 8th of December 2013. He maintained that his workers did not wish to follow the course on the 8th of December and hence there was no course on the 8th.

In his unsworn statements which were produced in court, Accused stated that his program officer Mr Padaruth helped to fill in the application forms G1 following which the company submitted the application with all supporting documents. A list of attendance of the

participants is prepared by Mr Padaruth, the programme co-ordinator which the participants have to sign. Accused further admitted having provided a course at IS Villa Belle Mare in favour of Mr Anna's employees. Mr Anna provided him with a list of names of the workers. He was unable to recall the number of participants who attended the course. He added that it is Mr Padaruth who submitted the application. He could not recall at what time the course started and ended. His lecturer, one Yash Jawaheer managed the course and made all the arrangements. He was present on the 7th and 8th of December 2013. About 12 persons participated in the course at IS Villa on those 2 days. He could not say who asked the participants to sign on the attendance register but maintained that all the documents were with the program co-ordinator. When the Accused was confronted with the register, he could not confirm whether it was indeed the attendance in respect of the said course since all the documents were with Mr Padaruth. He agreed that the 2 receipts were issued by Sunrise Academy Limited but he could not recognize the signature on the receipts. He agreed that Mr Anna paid by cheque the sum of Rs 91000 for the course he provided to Mr Anna's employees and the said sum was credited in the account of Sunrise Academy Limited. Accused denied that he filled in any application form. He however confirmed that Mr Anna effected payment to Sunrise Academy Limited. When he was confronted with the allegation that a register of attendance was submitted to the HRDC and that there were some forged signatures on same, he stated that he is not aware since it is the programme officer who was responsible for those documents. He stated that he does not know the names of the employees who participated in the course he provided on the 7th and 8th of December 2013. He denied that no course was provided by SAL at AS Villa on the 7th and 8th of December 2013 and he denied that SAL committed the offence of money laundering.

Submissions

Mr Pentiah submitted that Accused has been prosecuted in his own name but payment was made to Sunrise Academy Limited and there is no evidence that Accused has received any money. The witnesses for the prosecution have contradicted each other and their versions cannot be relied upon. There is no evidence to indicate that Accused has forged the attendance sheets or that the attendance sheets emanate from the Accused. Witness Padaruth who was present when the course was provided testified. Witness Harringer confirmed that courses were indeed provided.

Mr Naga submitted that the courses which were scheduled on the 7th of 8th of December 2013 were bogus courses and that the refund was obtained as a result of bogus courses. The participants were taken to Belle Mare public beach. Although the cheque was drawn in the name of Sunrise Academy Limited, Accused committed the offence in his personal name. One participant stated that she never attended the course. Accused submitted forged documents to obtain a refund.

Analysis and findings

The particulars of the offence are that Accused received a cheque in the sum of Rs91,000 from one Mr Anna representing a refund from the HRDC for the alleged conduct of training at IS Villa where Accused had reasonable grounds to suspect that the property was derived from criminal activity.

Section 3 (1) (b) of the FIAMLA 2002 provides that any person who receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which in whole or in part, directly or indirectly, represents the proceeds of a crime where he suspects or has reasonable grounds for suspecting that the property is derived or realised, in whole or in part, directly or indirectly from any crime, shall commit an offence.

It is incumbent on the prosecution to prove that

1. Accused received property within the meaning of section 2 of the FIAMLA;
2. The property in question represents the proceeds of any crime;
3. Accused had reasonable grounds for suspecting that the property is derived from any crime.

It is clear in the light of section 2 (b) (i) of the FIAMLA that the mere act of receiving a cheque does not amount to receiving property. It is apposite to reproduce section 2 (b) (i) of the FIAMLA which includes as definition of property “any *negotiable instrument capable of being negotiated which is payable to the bearer or endorsed payable to the bearer*”. The copy of the cheque which was produced in court reveals that the sum of

Rs 91, 000 was payable, not to the Accused, but to SAL. It follows that it was SAL which was entitled to receive payment of the Rs 91000.

The bank statement of SAL clearly reveals that it is SAL which received the sum of Rs 91,000. It is significant that the charge which was put to the Accused is that SAL committed the offence of money laundering when SAL received the sum of Rs 91,000 into its account after a list of forged signatures was deposited at the HRDC and that there was in fact no course which was conducted on the 7th and 8 of December 2013. One cannot overlook that it is Mrs Lungut, the manager of SAL, who made the claim from Mr Anna. For the above reasons, I am unable to agree with the submissions of Mr Naga that Accused committed the offence in his personal name.

It is appropriate at this juncture to refer to the applicable principles when a natural person is being prosecuted in his personal name but the offence has been allegedly committed by a body corporate having a legal personality. There a long line of authorities which has established that certain conditions have to be met to the extent that the degree of involvement of a natural person in the activities of a body corporate is an essential element of the offence. It was held in the cases of **JJR Desvaux de Marigny v State [1999] SCJ 414** and **Toorbuth v State [2010] SCJ 417** that *“If the prosecution elects not to prosecute the company, but the individual who at the time of the offence was committed, was concerned in the management of the corporate body, then the charge must contain these averments to make it disclose an offence under section 44 (1) (b) of the IGCA.”* The following excerpt from the case of **Jhummun S v The State [2016] SCJ 296** which was quoted with approval in the case of **A K Jhungee v The State [2019] SCJ 40** is also worth reproducing *““However there is no averment in the body in the information that the appellant, then accused, who was being prosecuted in his personal capacity, was concerned with the management of the company or was purporting to act in that capacity. The mere description of the accused as a director of a named company cannot be equated to an averment that he was concerned in its management... For all the above reasons, we hold that the appeal is rightly not resisted. The lack of averments which would constitute the very foundation of the charge as essential elements thereof is fatal thereto”.* Another relevant case is that of **Coindreau MR v State [2013] SCJ 471** where the Appellate Court held *“If it is averred in the information that a person committed an offence without any reference to the corporate body involved in it, then the prosecution has to*

prove that the person personally did the actus reus constituting the offence. The fact that the prosecution has established in evidence that the person was the director of the corporate body will not be sufficient to render him liable under section 44 (1) (b) of the IGCA.” [emphasis added]

Suffice it to say that there is no averment in the information that Accused is being prosecuted under section 44 (1)(b) of the IGCA as a person who is concerned with the management of SAL.

For the above reasons, I find that the prosecution has failed to prove beyond reasonable doubt that the Accused did receive any property and I dismiss the charge against the Accused.

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

[Delivered this 27th of June 2023]
