CN 1197/15
(FCD CN 7/2020)

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIME DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

SBM BANK (MAURITIUS) LTD

JUDGMENT

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

2. It is noted that the case has been transferred to the Financial Crime Division of the Intermediate Court.

CASE FOR THE PROSECUTION

3. Witness no.6, produced the following documents to court:

    a) Defence statement of the accused (Doc A)
    b) Letter dated 17.03.15 signed by the Chief Financial Officer of the SBM (Doc B)
    c) A copy of a cash deposit voucher dated 06.04.09 (Doc C).

d) Bank statement of Mr Raj-Rohan Toofanny for the period of 01.01.05 to 13.08.12 (Doc D).

4. It was made clear during cross-examination that the accused's representative was not confronted with any documentary evidence at enquiry stage, although the facts of a document (Doc D) as interpreted by the recording officer were communicated to him. The accused gave his explanation in reply to those facts put to him. It was one Miss Mutty, witness no.4 who accepted the cash deposit. Furthermore the policy of the accused company (SBM) was that any cash in excess of Rs500,000 should not be accepted unless authorisation is obtained by the manager of the branch. In this instance, the said manager is the representative of the accused company at trial. The latter stated to the witness during enquiry, that at no point in time the teller (W4) informed him of the impugned transaction.

5. It was further borne out that the accused, as representative of the bank reported the matter to the MLRO, witness no.3 as soon as he became aware of a transaction of Rs 1 million. Thereafter the ICAC started its investigation upon a referral from the Financial Intelligence Unit (FIU).

6. Witness no.2, Dr Toofany testified to the effect that he and his wife opened a savings bank account in 2009 for their minor son. The parents were the signatories of the bank account which was opened at the SBM, SSRN branch. There were not many transactions effected via the said bank account with one major exception.

7. When shown Doc C, a cash deposit voucher, the witness confirmed that on 6th April 2009, he deposited in cash Rs 1 million into his then minor son's bank account. He explained that his eldest brother, a resident of England wished to buy shares of the Apollo Bramwell in the name of the said son as a gift. It is noted that Doc D (Page 41), the statements of the account in question shows that a cash deposit of Rs 1 million was effected on 06.04.09 and the amount was transferred on the same day to Bramer Investment. No documentation with regards to the purchase of shares, was provided to the bank on the day of the deposit.

8. During cross-examination, the witness stated that he has been practising as a doctor for the state throughout his career, but he was also involved in the running of his wife's pharmacy. The witness could not say clearly that he was

a high value customer of the bank or the manner in which the bank viewed him as a customer. He reiterated that the money came from his brother to buy shares as a gift to his son.

9. Doc C was shown to the witness where he had written personal savings as source of funds on the back of the cash voucher. Through extensive questioning, he explained that, had he known about the legal implications he would have written the true source of funds, even if he did inform the teller of the purpose for his deposit.

10. Witness no.3 was the Money Laundering Reporting Officer (MLRO) at the SBM at the material time. He confirmed having provided Docs C and D to the ICAC in the course of the investigation of this case.

11. Witness no.5, a compliance officer at the Registrar of Companies produced Doc E which is a letter showing the registered name of the accused company.

12. Witness no.4 Mrs Mutty, the teller at the material time gave evidence as to what she understood to be the practice in place in 2009 with regards to accepting cash deposits in excess of Rs500,000. She stated that the source of the fund will be queried to see if it is commensurate with the business or profession of the customer. The profile of the customer would be looked into along with the frequency of the customer's dealings with the SBM. Another marker in deciding the regularity of the customer would be the information the customer has inserted at the back of the cash voucher describing the source of funds. If explanations given by the customer raised doubts as to the legitimacy of the information gathered up to that point, the matter would be referred to the supervisor or manager. There was therefore a degree of discretion bestowed upon the teller to decide whether the transaction can be processed or referred to a superior officer.

13. With regards to Dr Toofany (W2), the witness stated that the former is accustomed to make deposits into the company bank account of his pharmacies. She was shown Doc C and she confirmed that she signed the cash voucher and also processed the transaction involving the cash deposit of Rs 1 million. She further stated that, knowing Dr Toofany as a regular customer and the fact that he had inserted personal savings as source of funds, no further documentary evidence was sought from him. She processed the transaction even if she admitted that witness no.2 had previously never

made any transaction up to that amount. She did not question the witness no.2 any further with regards to the 'personal savings' inscription at the back of the cash voucher. Dr Toofany did not offer any explanation other than the one he wrote on the verso of the cash voucher (Doc C).

14. During cross-examination, the witness stated that Dr Toofany was dealt with as an established customer as he was a regular customer of the bank. She further gave evidence, with regards to what would be one of the main issues in the case, to the effect that the policy at the bank was to notify a supervisor every time a transaction in excess of Rs500,000 was made. It is noted that she stated at one point that the Dr Toofany has had numerous such transactions in the past, but never one up to Rs 1 million. In that particular instance she did not seek approval from the supervisor. During re-examination, when put the question whether she had to go to the supervisor for every transaction in excess of Rs500,000 or it was up to her to decide when to see the supervisor for guidance, she replied both. The court has observed reluctance on the part of the witness when answering questions during cross-examination on that issue.

15. The evidence of witness no.1, the investigator in the case, shows that the documents secured were not confronted to the accused when the latter put up his defence statement. The witness clarified that the accused was informed of the content of the documents at the time he gave his out of court version. The court is alive to the subtle distinction.

CASE FOR DEFENCE

16. The defence elected not to adduce any evidence of their own.

ASSESSMENT OF THE COURT

17. It is undisputed that the witness no.4, the teller accepted a cash deposit of Rs1 million from witness no.2, Dr Toofany. A cash deposit voucher (Doc C) dated 06.04.09 was produced to that effect.

18. The last point raised by the defence at submission was with regards to the validity of the Information in as much as section 44(2) of the Interpretation of

General Clauses Act (IGCA) was averred without specifying the paragraph of the said subsection. Furthermore the Information did not disclose the fact that the representative was duly authorised by the accused company.

19. The **section 44(2) of the IGCA** can be read as follows:

(a) Where a company, société or other corporate body is charged with an offence, a representative may appear before the appropriate Court and enter a plea of guilty or not guilty on behalf of the company, société or other corporate body.
(b) For the purposes of paragraph (a), "representative" means a director, or the secretary, of the corporate body or a person duly authorised by the corporate body to represent it.

20. The case C.E.B. v State 2010 SCJ 75 which was relied upon by the defence can be distinguished with the present matter. In the said case, the Information was laid under section 44(1) of the IGCA, hence rendering the election between paragraphs (a) or (b) vital. The prosecution here is against the accused company, invoking section 44(2). The corresponding subparagraph (b) is merely the definition section of the word representative. The qualitative nature of the section 44(2)(b) therefore does not create an element which has to be averred in the Information.

21. However since the representative of the company who pleaded to the Information was neither a director nor the secretary of the company, the latter must have duly authorised Mr Dilraj Ramkooleea to plead to the Information on its behalf. As the prosecution submitted, Doc B, a letter dated 17.03.15 and signed by the Chief Financial Officer of the SBM shows that Mr Ramkooleea has been deputed in his capacity as supervisor of Fond du Sac branch to represent the company. Naturally the letter is dated prior to the Information being lodged which would lead to the understanding that the authorisation was meant for enquiry purposes. The next question is whether such authorisation can be implicitly extended to trial representation. The law does not stipulate the manner in which the authorisation must be granted for representation at trial. It is a matter of evidence as to form which may vary with each case. Undoubtedly, a letter being filed by the representative of the company or by the prosecution in court when the former takes the plea would represent the clearest evidence. However when such evidence is regrettably lacking, the interpretation of the law cannot be overly technical. In the

present matter, the company gave express authorisation through a letter, Doc B for Mr Ramkooleea to act on its behalf at enquiry stage. Such authorisation has to endure until the company decides to cease the representation in question and appoint someone else. The current accused company has been legally represented by counsel at trial throughout the proceedings. At no point in time, the defence moved to change the representation of the accused company during trial. The court would have entertained such motion if it was made clear that the authorisation given to Mr Ramkooleea no longer applies to trial representation. The defence here cannot benefit from its own inaction. I find that in the circumstances of the case, authorisation has been impliedly granted by the accused company for Mr Dilraj Ramkooleea to take the plea on its behalf at trial.

22. The issue of whether the transaction is an exempt one has been argued by both parties with regards to its commensuration with the business activities of Dr Toofany (Wit no.2). The law prior to the 2013 amendment can be read as follows:

Section 2 Financial and Intelligence and Anti-Money Laundering Act 2002 (FIAMLA):

"exempt transaction" means a transaction –
(a) between the Bank of Mauritius and any other person;
(b) between a bank and another bank;
(c) between a bank and a financial institution;
(d) between a bank or a financial institution and a customer where –

> (i) the customer is, at the time the transaction takes place, an established customer of the bank or financial institution; and
> (ii) the transaction consists of a deposit into, or withdrawal from, an account of a customer with the bank or financial institution,

where the transaction does not exceed an amount that is commensurate with the lawful business activities of the customer.

23. The case is concerned with part (d) and the prosecution did not expressly dispute that Dr Toofany was an established customer. Indeed he has been a customer of the bank since 1978 or 1979. The bank was aware that he is a medical practitioner for the state. It was borne out in cross-examination that

he was also involved in the running of his wife's pharmacy. The questioning by the defence was geared to prove that the transaction fell into the exempt category. It may be that Dr Toofany could have been a long standing customer of the bank but the impugned transaction had to be commensurate with his business activities at the material time. When sifting through the evidence of Dr Toofany, the following observations can be made:

a) During cross-examination at page 30 of the transcript dated 17.06.21, the witness stated that he has never in his life done such a big deposit in the bank. It means that, in any capacity, he has never deposited such amount (Rs 1 million) in the bank.

b) He further stated that he was appointed as a specialist medical practitioner in 2007 and has never done private practice throughout his career. There is no evidence of his earning capacity up to 2009. The burden rests on the defence vide **Beezadhur v The Independent Commission Against Corruption and anor (2013) PRV 83.**

c) The witness was involved with the running of his wife's pharmacy. The witness deponed to the fact that that business had its own bank accounts. From the bank's point of view, if the cash flow of Dr Toofany could be enlarged to encompass the business of the pharmacy, it should have been seen as an atypical manoeuvre for him to deposit Rs 1 million into the bank account of his minor son and not into the accounts of the pharmacy business. Again it is unclear as to what capacity was Dr Toofany involved in the running of the said business.

d) Finally the witness himself has made it clear that the money was not from his personal earnings but it represented a gift from his brother to his son.

24. In light of the above observations and in the absence of conclusive evidence, I find that the transaction was not exempt as it was not commensurate with the business activities of Dr Toofany.

25. The teller, witness no.4, was a prosecution witness and employee of the bank. Her evidence was at variance between examination-in-chief and cross-

examination on the point of policy of the bank when it comes to cash payment in excess of Rs500,000. This raises issues of corporate liability. Both counsels, for the prosecution and the defence referred to the case **ICAC v ABC Motors Co. Ltd 2021 INT 104.**

26. The submission of the defence on the issue of mens rea was to the effect that the representative of the accused company, Mr Ramkooleea could not have had the required the mens rea as he was not present when the transaction was effected between Dr Toofany and the teller, witness no.4. Such proposition is misconceived. The accused here is a company which is represented by Mr Ramkooleea. As an artificial legal person, the company cannot form its own intention. Such intention has to be attributed by its agent. The agent in question in the present matter is Miss Chandranee Mutty, the teller, not Mr Ramkooleea. It is noted that the issue of the offence under section 5 FIAMLA being a non-strict liability one, was not disputed at trial. Therefore the same reasoning as in ICAC v ABC Motors (supra) is followed.

27. The evidence of Miss Mutty, the teller, represents the basis of the determination of corporate liability in the present matter. During examination-in-chief (Pages 41 to 42 of transcript dated 17.06.21), she had stated clearly that for transactions in excess of Rs500,000, it is not for every customer that she had to seek authorisation from a supervisor. She retained a degree of appreciation to decide whether to process the transaction or not. If the customer was a regular one with a known background, as it was for Dr Toofany, there was no need for approval from the supervisor. However during cross-examination (Pages 47 to 48), when the first question on the issue was put, i.e. whether it was necessary to consult the supervisor for every transaction above Rs500,000, she remained silent. The follow-up questions were as follows:

Q. You have explained to us in case of doubt, you have to go to your supervisor?
A. Supervisor, yes.

Q. You agree with that?
A. Yes

Q. That was part of the policy?

A. Yes

Q. I am telling you now, that according to the policy, at that time, in fact any transaction above Rs500,000 you needed the approval of the your supervisor who is the authority of the bank to sanction such transaction?
A. Yes

Q. You agree with me?
A. Yes

28. The last two answers are a clear deviation from her first version in examination-in-chief. Now it can be hypothetically argued that the witness did not understand the nature of the questioning during cross-examination. That was the reason for a rather extensive re-examination on the issue. The witness stated that both versions were correct, showing that she did understand the questions but chose to remain uncertain in her answers. This very factual basis of bank practice represents the central component to corporate liability in the present matter. When such vital issue is founded on weak grounds, the whole case for the prosecution is shaken.

29. The law with regards to the identification principles have been reviewed in **CEB v State 2010 SCJ 75** and **Director of Public Prosecutions v La Clinique Mauricienne 2014 SCJ 070**. The application of those principles to all cases has proved difficult. The reasoning from English law is that the principles of when to engage corporate liability cannot be squeezed into one general formula where the primary rule of attribution seems inconsistent with the intention of parliament. Here the teller can be easily identified as the agent to have effected the impugned transaction but that does not automatically engage the liability of the company. When the substantive law regulating the offence or the board resolutions of the company are silent and the general rules of agency are not applicable, each case will have to fashion its own special rule of attribution, vide **R v Andrews Weatherfoil Ltd (1972) 56 Cr.App.R. 31**, **Tesco Supermarkets Ltd. v. Nattrass [1971] 2 W.L.R. 1166**, **In re Supply of Ready Mixed Concrete (No.2) [1995] 1 A.C. 456** and **Meridian Global Funds Management Asia Ltd v Securities Commission (1995) 2 A.C. 500 PC.**

30. That is not to say that the identification principle has fallen out of favour under English law, as it remains the hallmark of corporate liability as expounded in the Tesco case (supra). The relationship among the above authorities has been summarised by the case **R v A Ltd (2016) EWCA Crim 1469** where the following was stated:

"This principle [the identification principle] was analysed and restated in its application to offences requiring proof of mens rea by the Court in R v St Regis Paper Co Ltd [2011] EWCA Crim 2527; [2012] 1 Cr App R 14 (p.177). Save in those cases where consideration of the legislation creating the offences in question leads to a different and perhaps broader approach, as discussed in Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500, the test for determining those individuals whose actions and state of mind are to be attributed to a corporate body remains that established in Tesco Supermarkets Ltd v Nattrass , to which we have already referred."

31. The principle works almost perfectly for small companies where the chain of command is clearly defined or easily determinable. For bigger companies, as a national bank, the operation of the business has to be conducted through devolution and delegation of responsibilities to agents or postulated officers. That does not mean that the diffuse responsibility is made with the intention to escape criminal liability but sometimes that is inevitably the case. The law therefore has to be applied with either, a narrow (Tesco case) or broad (Meridian Global) approach depending on the facts of each case or the size of the company in question.

32. Thus, to engage corporate liability, the agent or officer has to be the directing mind and will of the company for all purposes. Officers in high management would normally fit into that category. If that is not the case, the agent of a lower status in the company must be the directing mind and will of the company for the purpose of performing the particular function in question, vide **Serious Fraud Office v Barclays Plc and Another [2020] 1 Cr. App. R. 28**.

33. Miss Mutty, as a teller at the material time, did not represent the directing mind and will of the company for all purposes. The question that had to be answered by the prosecution was whether she had the required directing mind and will for the purpose of accepting cash payment in excess of Rs500,000. Did the management of the accused company delegate their

authority and discretion in that function to the teller? Were there preventive measures in place to monitor such transactions? The only evidence which pertains to the above is from the witness herself (Miss Mutty) and there is significant doubt as to which procedure was in place at the bank. Had she retained discretion as to when to seek approval from her supervisor, the bank would have been culpable, having delegated its authority to an agent to act on its behalf. However, the fact that she has backtracked so blatantly from her first version, there is a clear possibility that the bank did put in place a preventive mechanism of 'de facto approval' needed from a supervisor whenever a transaction in excess of Rs500,000 presents itself. It would be unsafe to rely on the evidence of the said witness on the issue of bank policy. As a result the actions of the teller, Miss Mutty, cannot be attributed to the accused company.

34. For these reasons, I give the benefit of the doubt to the accused company and dismiss the case.

P. Rangasamy
Magistrate of the Intermediate Court
18.11.21