IN THE INTERMEDIATE COURT OF MAURITIUS

(Financial Crimes Division)

Cause Number: 27/2020

The Independent Commission Against Corruption

v

1. **Bipin Gungaram**
2. **Ahmud Shakeel Khan Jahangeer**
3. **Mubareka Begum Jahangeer, born Khoyratty**

RULING

1. Accused No. 1 is charged with the offence of money laundering under Sections 3(1)(a), 6(3), and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 ("the Act") in Counts 1 to 15 of the Information. Accused No.: 1 pleaded not guilty to Counts 1 to 15.

2. Accused No.: 2 has been charged under Count 16 of the Information with the offence of money laundering, in violation of Sections 3(1)(b), 6, and 8 of the Act, coupled with Section 44(1)(b) of the Interpretation and General Clauses Act ("IGCA"). Accused No.: 2 has

also been charged under Counts 18 to 20 of the Information with the offences of money laundering in violation of Sections 3(1)(a), 6(3), and 8 of the Act. Accused No.: 2 has pleaded not guilty to Count 16 and Counts 18 to 20.

3. Accused No. 3 is charged with the offence of money laundering under Count 17 of the Information, in breach of Sections 3(1)(b), 6 and 8 of the Act coupled with Section 44(1)(b) of the IGCA. Accused No.: 3 pleaded not guilty to Count 17.

4. Counsel represented all three accused parties and the Prosecution was also legally represented during the proceedings.

5. On 19th July 2023, the Acting President of the Intermediate Court (Financial Crimes Division) notified the Counsel for Accused No.: 2, who was present and who was replacing Counsel for Accused No.: 1 and Counsel for Accused No.: 3 that: -

> "*Since Mrs Cunden who started the case is not* [no] *more in the Judiciary, Counsel is informed that the case will have to be started anew.*"

6. The Court record then reads as follows: -

> "*He makes the following motion on behalf of all Counsel:*
>
> *He is objecting that the case be started anew and moves that the proceedings be permanently stayed in as much as started the trial anew in all the circumstances –*
>
> 1) *Runs contrary to the due process of the law*
> 2) *Constitutes an abus de droit*
> 3) *Infringes the Accused's parties constitutional right to a fair hearing within a reasonable time such that rehearing the case would be unfair and it would be unfair to try the Accused parties at all.*"

7. During the court hearing, the learned Counsel for Accused No. 2 informed the Court that he would not not be pursuing the first point of his motion. Instead, he stated that he would be focusing on presenting the second and third points that he had previously raised.

8. The Agreed Statement of Facts between the Prosecution and the Defence (Doc ASF) and the Affidavit of the Chief Investigator ("CI"), which was marked as (Doc A), are part of the record.

9. To support his submission, learned Counsel for Accused No.: 2 relied on the cases of ***Mungroo v The Queen,* Privy Council Appeal No.: 22 of 1990**, ***The Director of Public Prosecutions v De L'Estrac* [2010] SCJ 118**, ***State v Jean Jacques & Anor* [2019] SCJ 312**, ***Sooriamurthy Darmalingum v The State* [1997] SCJ 294**, ***Sooriamurthy Darmalingum v The State* [1997] SCJ 295**, ***The State v Bissessur* [2001] SCJ 50**, ***Tapper v Director of Public Prosecutions* [2012] UKPC 26** and ***Mc Farlane v DPP* [2008] ISEC 7**.

10. To support his submission, learned Counsel for the Prosecution relied on the cases of ***The Director of Public Prosecutions v De L'Estrac* [2010] SCJ 118**, ***Jean Jacques & Anor* [2019] SCJ 312**, ***Sooriamurthy Darmalingum v The State* [1997] SCJ 295** and ***The State v Bissessur***.

11. I have meticulously examined the arguments of both learned Counsel and thoroughly analysed the relevant legal authorities they cited.

12. The case at hand involves a retrial with two documents placed before me namely, Doc ASF and Doc A.

13. The argument put forth by the learned counsel for Accused No. 2 can be outlined as follows: The new trial is based on the assertion that it would infringe upon each accused's right to a timely trial due to the prolonged delay in prosecuting the case. Additionally, it is argued that the defence of each accused was compromised as they were exposed to the prosecution's witnesses during the initial trial. Consequently, it is contended that conducting a fair trial, as stipulated in Section 10 of the Constitution, cannot be guaranteed if all three accused parties are subjected to a new trial.

14. The primary argument put forth by the learned Counsel for the Prosecution is that the investigation was not unduly delayed and that its complexity and time-consuming nature justified the duration. Furthermore, the learned Counsel submitted that the Chief Investigator (CI) comprehensively outlined in Document A the intricate investigative procedures employed to resolve the matter.

15. The case with Cause Number 1390/12 was initially filed at the Intermediate Court (Criminal Division). However, following an amendment to the law, specifically Section 80A (2) of the Courts Act, the case was transferred from the Intermediate Court (Criminal Division) to the Intermediate Court (Financial Crimes Division). Before the transfer, legal proceedings had already commenced at the Intermediate Court (Criminal Division), with approximately 13 witnesses having been examined.

16. When Case Cause Number 1390/12 was transferred from the Intermediate Court (Criminal Division) due to its financial nature, it was assigned a new Cause Number, 27/2020, in the Intermediate Court (Financial Crimes Division).

17. The legal proceedings for Cause Number 27/2020 commenced in the Intermediate Court (Financial Crimes Division). However, during the course of the hearing, the Presiding Magistrate was transferred to the Office of the Director of Public Prosecutions ("ODPP"), leading to an incomplete hearing. Consequently, the case had to be recommenced from the beginning.

18. I must determine whether there was an unnecessary delay and whether holding a new trial would unfairly prejudice the three accused to the point where they would not receive a fair trial.

19. In ***Boolell v The State*** **[2006] UKPC 46** at paragraph 31, it was held that: -

> *"Lord Bingham stated in paragraph 22 that the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. He went on to summarise his conclusions at paragraphs 24 and 25:*
>
> > *"24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will*

depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention

right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.

25. The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which Darmalingum v The State [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (Martin v Tauranga District Court [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right"."

20. In ***Bissessur***, where it was held that: -

"*1) The court should exercise its discretionary power to order a stay of the proceedings only in exceptional cases and a staying order is an exception rather than the rule.*

2) There is no mathematical calculation for how long is too long, it differs from jurisdiction to jurisdiction and each case has to be decided on its own facts.

3) *A stay of criminal proceedings should not be ordered simply as a form of disciplinary disapproval of the DPP's office.*

4) *The Court ought to carry out a balancing exercise which requires an examination of the length of the delay in the light of other factors, namely: (1) the seriousness of the offence; (2) limits on our instutional resources; (3) reasons for the delay and (4) trial-related prejudice, in order to determine where the attainment of justice lies."*

21. Learned Counsel for Accused No. 2 asserted that the accused parties are enduring a challenging ordeal. It is crucial to emphasize that none of the accused have provided testimony about their experience. It is imperative to weigh the impact of their situation when making a fair and just decision. Without a comprehensive understanding of the hardships faced by the accused, it is impossible for me to make an informed judgment.

22. I acknowledge that any criminal trial can be an incredibly difficult and overwhelming experience for an accused party. In ***Reid v The Queen*** **[1980] AC 343**, it was held that: -

> *"The seriousness or otherwise of the offence must always be a relevant factor; ... So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interest of justice require that he should do so."*

23. I firmly believe that it is the responsibility of the Court to alleviate the anxiety and concern of the accused parties while ensuring that their defence is not compromised. In ***Charles, Steve Carter and Leroy Carter v The State of Trinidad and Tobago*** **[1999] UKPC 24**, it was held that: -

> *"(i) ...; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired..."*

24. Learned Counsel for Accused No.: 2 argued that if a trial is not held within a reasonable time, it violates the requirement under Section 10 of the Constitution. He further pointed out that such a delay can impact the fairness of the hearing. To support his submission, he relied on the following passage, which was cited in ***Mungroo***, namely:

> "*When delay is alleged, the courts must have regard to the reasons for the delay and to the consequences of the delay. In Bell's case, at page 953, the Board expressed the view that the delay must also be considered in the context of the prevailing system of legal administration and in the prevailing economic, social and cultural conditions to be found in the country concerned.*"

25. In ***Mungroo***, it was held that: -

> "*Their Lordships consider that, in any future case in which excessive delay is alleged, the prosecution should place before the court an affidavit which sets out the history of the case and the reasons (if any) for the relevant periods of delay.*"

26. I have to evaluate whether the Prosecution in Doc A has provided a reasonable justification for the delay in lodging the Information against the accused parties.

27. According to Doc A, the Commission started an investigation on 27.09.2007. Doc A also indicates that a preliminary investigation took place as of 21.12.2010, and the Commission decided on further investigation on 04.01.2011, as stated in paragraph 4 of Doc AM.

28. Referring to paragraph 6 of Doc A, it becomes evident that a total of 35 witnesses were interviewed on separate occasions and their statements were recorded.

29. In Doc A, it was mentioned that the Commission's investigation into the accused parties was intricate and required a considerable amount of time. It is important to highlight that the Defence did not raise any challenges or disputes regarding the reasons provided by the Commission.

30. In ***Boolell***, the case of ***Martin v Tauranga District Court*** **[1995] 2 NZLR 419, 432** was quoted, wherein it was stated that: -

> *"The right is to trial without undue delay; it is not a right not to be tried after undue delay."*

31. The retrial in this case has been deemed necessary due to the unexpected transfer of the learned Magistrate to the ODPP. This transfer was unrelated to the actions of the accused or the prosecution. It is imperative to conduct a new trial in order to uphold public confidence in the administration of justice.

32. In ***Taito v The Queen*** **[2002] UKPC 15**, it was held that: -

> *"Delay for which the state is not responsible, present in varying degrees in all the relevant cases, cannot be prayed in aid by the appellants."*

33. In the case of ***Attorney-General's Reference (No 1 of 1990)*** **[1992] 3 W.L.R. 9**, the Court of Appeal held:

> *"(1) a stay for delay or any other reason was to be imposed only in exceptional circumstances; that, even where delay could be said to be unjustifiable, the imposition of a permanent stay was to be the exception rather than the rule; and that even more rarely could a stay properly be imposed in the absence of fault on the part of the complainant or the prosecution, and never where the delay was due merely to the complexity of the case or contributed to by the defendant's action (post, pp. 643G-644A).*
>
> *Connelly v Director of Public Prosecutions [1964] A.C. 1254, H.L.(E): Reg v Derby Crown Court, Ex parte Brooks (1984) 80 Cr. App. R. 164, D.C. and Reg v Telford Justices, Ex parte Badham [1991] 2 Q.B. 78, D.C applied.*

(2) That no stay was to be imposed unless a defendant established on the balance of probabilities that, owing to the delay, he would suffer serious prejudice to the extent that no fair trial could be held, in that the continuation of the prosecution amounted to a misuse of the process of the court; ..."

34. Considering the context of the existing legal administration system is essential when analysing delay in legal proceedings. In this specific case, the Magistrate who was presiding over the case was transferred to the ODPP due to a decision made by the administrators responsible for our legal system. As a result, the State cannot be held responsible for the delay.

35. The learned Counsel for the prosecution submitted that, as per Doc ASF, accused No.: 1 or his Counsel have requested postponements at least 20 times due to ill health between 22.10.2012 and 29.09.2023. Counsel for accused No.: 3 requested postponements at least four times. He argued that the case had been postponed mainly due to accused No.: 1 or his Counsel. Doc ASF shows that accused No. 1 was absent 18 times, and his Counsel was absent 3 times between 01.09.15 and 09.08.2023, which led to the postponement of the case. On three occasions, accused No.: 3 was present, but his Counsel was absent, leading to postponements. The learned Counsel for the prosecution believes that the delay in the case was mainly due to accused No.: 1 or his Counsel. In response, the learned Counsel for accused No.: 2 stated that no postponements were requested on behalf of accused No.: 2. This is true indeed. Accused No. 2 and his Counsel did not object when postponements were asked by either accused No. 1, accused No. 1's Counsel, or accused No. 3's Counsel. In my humble opinion, this passive role played by accused No. 2 gave rise to the delay, for which he and his Counsel are responsible.

36. In ***Director of Public Prosecutions v. Jaikaran Tokai and Others (Trinidad and Tobago)*** **[1996] UKPC 2**, at paragraph 16, Their Lordships held:

"*In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due*

merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay."

37. In the years 2020 and 2021, the country experienced the impact of the COVID-19 pandemic, resulting in two periods of lockdown. These lockdowns had the significant consequence of halting the trial of the accused parties. It is crucial to emphasize that neither the Prosecution nor the Defence can be attributed responsibility for the occurrence of these lockdowns.

38. Learned Counsel for accused No. 2 argued that it has been 16 years since the alleged offences were committed. Due to this lengthy delay, the accused parties may not receive a fair trial. In support of this argument, learned Counsel for accused No. 2 cited the case of ***Tapper***. In ***Tapper***, the case of ***Darmalingum v The State*** **[2000] 1 WLR 2303** was referred. Learned Counsel for Accused No.: 2 placed reliance on "*In the result the defendant has had the shadow of the proceedings hanging over him for about 15 years. There has manifestly been a flagrant breach of section 10(1)" (p 2310)*" as quoted in ***Tapper*** from the case of ***Darmalingum***.

39. Learned Counsel relied on the case of ***De L'Estrac***, where it was held that: -

"*There is yet another compelling reason that the case cannot proceed, as by now it is almost 11 years since the event has taken place, and in all the circumstances, it would not, in our view, be fair to impose a trial on the respondent as it will be in breach of his rights to a fair trial within a reasonable time under section 10 (1) of the Constitution.*"

40. However, in ***Boolell*** at paragraph 32, Their Lordships held that: -

"*(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.*

(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

41. In ***Darmalingum v The State*** **[1997] SCJ 294**, it was held: -

> *"On what constitutes reasonable time, the Court writes: "It is apparent that a reasonable time is necessary for the State to be in a position to get the case to trial. A varying extent of time will be needed to prepare the docket, depending on the complexity or otherwise of the proposed charge or charges, to record the statements of witnesses and to arrange for their attendance. In addition, there are the usual systemic delays, such as a congested court calendar, the availability of court facilities, judicial officers and prosecutors, and the considerate accommodation of the schedules of witnesses. The list is not exhaustive. The system is not perfect and resources are limited, and one has to accept as normal and inevitable a period of delay in respect of these matters. But this is not to accept that the State can justify abnormal periods of systemic delay on such grounds."*

42. I find it apt to cite the following passage from ***Kaudeer v The State*** **[2018] SCJ 414**, where it was stated that: -

> *"The House of Lords in the* ***Attorney General's Reference No 2 of 2001 [2003] UKHL 68*** *held that failure to determine a criminal charge within a reasonable time constitutes a breach of Article 6 of the European Convention but the remedy will not necessarily be a stay if any lesser remedy will be just and proportionate in the light of all the circumstances of the case."*

43. In the case of ***R v Stephen Paul S*** **[2006] EWCA 756**, it was established that when an application for a stay is made on the ground of delay amounting to an abuse of process, the Court must consider certain principles. These principles include the following:

"(i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;

(ii) Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;

(iii) No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;

(iv) When assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;

(v) If, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

44. Nowadays, if an accused wishes to seek a stay of proceedings due to delay, he must demonstrate to the court that the delay has resulted in substantial harm or prejudice to his case. This means that the accused party must provide compelling evidence that the delay has caused significant damage to his ability to defend himself against the charges brought against him. In this instance, the accused parties have failed to provide sufficient evidence to prove, on a balance of probability, that the delay has caused significant harm to them.

45. The transfer of a magistrate to a different office, such as the Office of the Director of Public Prosecutions or the Attorney General's Office, is a customary and acceptable procedure in our Republic. Likewise, the establishment of new court divisions should not raise alarm in a democratic society like ours. This is crucial to maintaining a judicial system that is both fair and efficient, and at times, such actions are necessary to achieve this objective.

46. Learned Counsel for Accused No. 2 argued that their line of defence has been disclosed because the prosecution witnesses have already been cross-examined. However,

according to Doc ASF, there are 35 witnesses for the prosecution, and only eight have testified in the first trial before this Division. Based on this information, it is difficult to conclude that the Defence has disclosed its line of defence to such an extent that the accused parties will not benefit from a fair hearing.

47. In ***Mungroo***, where it was stated: -

> "*In dealing with the question of delay the court said this: -*
>
> > *"The Police no doubt took time to investigate. They cannot be expected to investigate the most difficult cases within a fixed period of time. If it were so, police work would suffer, law and order would go out of hand and crimes would increase to an alarming degree. It is indeed not the aim of section 10(1) of the Constitution to clog police machinery."*

48. The aforementioned observation applies to all types of investigative bodies that investigate criminal offences in Mauritius, including those conducted by the Commission. Moreover, due to the complexity nature of money laundering, it is not a type of offence that can be investigated and completed hastily.

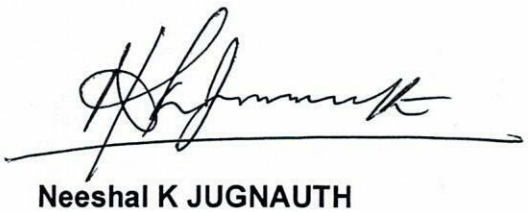
49. On the balance of probabilities, the Defence has been unable to demonstrate that the Commission and the ODPP were responsible for the delay in prosecuting the accused parties.

50. The gravity of the alleged offences requires a new trial in the interest of justice. In ***R v Maxwell*** **[2010] UKSC 48**, in Paragraph 22, it was held that:

> "*The gravity of the alleged offence is plainly a factor of considerable weight for the court to weigh in the balance when deciding whether to stay proceedings on the grounds of abuse of process. At page 534D in Mullen, giving the judgment of the court Rose LJ said: "As a primary consideration, it is necessary for the court to take into account the gravity of the offence in question". It is unnecessary to engage with the academic*

criticism of this approach: see, for example, Professor Ashworth's article already cited at page 120. That is because, whatever the position may be in relation to an application to stay proceedings for abuse of process, it seems to me beyond argument that, when the court is deciding whether the interests of justice require a retrial, the gravity of the alleged offence must be a relevant factor. Society has a greater interest in having an accused retried for a grave offence than for a relatively minor one."

51. After carefully analysing the arguments put forth by the accused parties, I have concluded that their assertions lack merit. Upon thorough consideration, I find no compelling rationale to accede to their plea for a permanent stay of the proceedings. Therefore, I am rejecting their motion.



Neeshal K JUGNAUTH

Magistrate

03.06.2024