DIRECTOR PUBLIC PROSECUTIONS v NARRAINEN V.

2024 SCJ 97

Record No. 9531

THE SUPREME COURT OF MAURITIUS

DIRECTOR PUBLIC PROSECUTIONS

Appellant

v

VIJAYA NARRAINEN

Respondent

JUDGMENT

This is an appeal against a judgment of the learned Magistrate of the Intermediate Court dismissing the information lodged against the respondent (then Accused), Vijaya Narrainen, who was prosecuted on three counts of an information on charges of conspiracy to commit the offence of money laundering in breach of sections 4, 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act ("the FIAMLA").

Under count 1, the respondent was prosecuted for having on or about 25 August 2014 at British American Insurance Company Ltd ("the BAI"), Quatre Bornes Branch wilfully, unlawfully and criminally agreed with a person to commit the offence of money laundering.

The particulars of the charge were that on or about the said date and place, the respondent agreed with one Mary Anne Esmelda Rase to cause the sum of Rs 3 million to be invested in the Super Cash Back Gold Insurance Policy of the BAI and where she had reasonable grounds for suspecting that the said sum was derived from a crime.

Under count 2, the respondent was prosecuted for having on 17 November 2014 at BAI, Quatre Bornes Branch wilfully, unlawfully and criminally agreed with a person to commit the offence of money laundering.

The particulars of the charge were that on or about the said date and place, the respondent agreed with one Mary Anne Esmelda Rase to cause the sum of Rs 2 million to be invested in the Super Cash Back Gold Insurance Policy of the BAI and where she had reasonable grounds for suspecting that the said sum was derived from a crime.

Under count 3, the respondent was prosecuted for having on 17 November 2014 at BAI, Quatre Bornes Branch wilfully, unlawfully and criminally agreed with a person to commit the offence of money laundering.

The particulars of the charge were that on or about the said date and place, the respondent agreed with one Mary Anne Esmelda Rase to cause the sum of Rs 3 million to be invested in the Super Cash Back Gold Insurance Policy of the BAI and where she had reasonable grounds for suspecting that the said sum was derived from a crime.

After a contested trial, the learned Magistrate dismissed all three counts against the respondent. The DPP filed an appeal against the judgment on 11 grounds but he is not insisting on ground 4 so that we are left with 10 grounds of appeal which we need not reproduce at this stage.

The unchallenged evidence on record is to the following effect:

1. 14 August 2011, late Richard Albert Rase (Richard Rase) subscribed to an insurance policy, known as the Super Cash Back Gold ("SCBG") insurance policy, in the sum of Rs 8 million with the BAI. The maturity date of the policy was 13 August 2014. The beneficiaries under the policy in case of death of the policyholder were Richard Rase's twin sons (Document A);
2. the insurance policy was for a term of 3 years but it could be renewed for a period of up to 10 years;
3. at the maturity of the insurance policy, the policyholder had two options: he could either encash the sum invested and the benefits ("the money') or reinvest them by filling in a form known as the "Policy Renewal or Encashment Form";
4. the same Policy Renewal or Encashment Form was used for either the encashment or the renewal of the policy: part A concerned renewal while part B concerned encashment of the money;
5. there were two means of encashing the money: by bank transfer or by payment through a cheque in the name of the policyholder. Where the policyholder decided that the encashment was to be by bank transfer, he had to submit a bank account to the BAI;

6. in the case of Richard Rase, at the time he subscribed to the policy, he had already identified the bank account into which the **benefits** were to be paid: it was a joint account which he held with his sister, Mary Anne Esmelda Rase ("Esmelda Rase"), at the HSBC;
7. on 3 August 2014 Richard Rase passed away in Norway (Document AA);
8. on 6 August 2014-
   (a) Esmelda Rase attended the BAI Office in Quatre Bornes with a Policy Renewal Or Encashment Form ("the encashment form" – Document K), allegedly already signed by Richard Rase on 03/08/2014 and met the respondent;
   (b) the respondent signed the encashment form under the part bearing the heading "FOR OFFICE USE ONLY" certifying that the policyholder, Richard Rase had signed the encashment form in her presence at Vacoas and she also certified copies of documents, notably the insurance policy and the National Identity Card of Richard Rase, the originals of which she never verified;
9. on 11 August 2014, the BAI paid the sum of Rs. 1,992,000 (**benefits**) into the HSBC account and, on 22 August, it paid the invested sum or **premium** of Rs 8 million into the same account (Doc R – HSBC Bank statement);
10. on 25 August, Esmelda Rase-
    (a) transferred the sum of Rs. 3 Million from the HSBC account to the BAI for 'investment purposes'; she subscribed to a first BAI SCBG policy in her own name, with the respondent as agent of the BAI, and with her daughter as beneficiary of the policy (Doc R – HSBC Bank statement);
    (b) transferred Rs. 6 Million from the HSBC account to a Mauritius Commercial Bank (MCB) account which she jointly held with her father. The purpose of the transfer was stated to be 'Transfer to own account at MCB – funds to be used for purchase of flat' (Doc R – HSBC Bank statement);
11. on 17 November 2014, Esmelda Rase subscribed to 2 more insurance policies in her own name with the respondent as the BAI agent and with her daughter as the beneficiary of the policies. This transfer was from the MCB account to the BAI (Doc P – MCB bank statement).

The case for the prosecution was that the money which was initially clean money became illicit once it was transferred to the HSBC account as the respondent committed a forgery when she falsely certified that the encashment form was signed in her presence by the policyholder and that the respondent conspired with Esmelda Rase to commit money laundering when she caused the money to be invested in the SCBG insurance policies.

The case for the respondent was that the procedure regarding encashment was not always followed at the BAI and it is only "in theory" that the policyholder had to be present for the encashment. It was already agreed by Richard Rase that, in case of encashment, the insurance proceeds were to be paid to the HSBC account and it is only in 2016 that the BAI knew that Richard Rase had passed away in 2014. The respondent was only a negligent employee who had not followed the procedure and there was no mental element to commit the offence of money laundering.

The learned Magistrate found that it was very difficult to believe the prosecution's case, it was surprising how the prosecution was able to conduct the enquiry regarding the conspiracy and agreement between the parties in the absence of the version of Esmelda Rase, she was somehow lawfully in possession of the money and it could not be conclusively established that the handwriting on the encashment form was not that of Richard Rase.

The relevant provisions of the FIAMLA are reproduced below -
Section 3(1) of the FIAMLA provides as follows –

"***3. Money Laundering***

(1) Any person who—

(a) ***engages in a transaction that involves property which is****, or in whole or in part directly or indirectly represents,* ***the proceeds of any crime****; or*

(b) receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which is, or in whole or in part directly or indirectly represents, the proceeds of any 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.***" [emphasis added]

Section 4 stipulates-

"***4. Conspiracy to commit the offence of money laundering***

Without prejudice to section 109 of the Criminal Code (Supplementary) Act, any person who agrees with one or more other persons to commit an offence specified in section 3(1) and (2) shall commit an offence."

Pursuant to section 6(3) of the FIAMLA, where a person is prosecuted for the offence of conspiracy to commit the offence of money laundering, it is sufficient to aver in the

information that the property is, in whole or in part, directly or indirectly the proceeds of a crime, without specifying any particular crime. The relevant extracts of section 6 are reproduced below –

"***6. Procedure***

(1) A person may be convicted of a money laundering offence notwithstanding the absence of a conviction in respect of a crime which generated the proceeds alleged to have been laundered.

(2) ...

(3) ***In any proceedings against a person for an offence under this Part, it shall be sufficient to aver in the information that the property is, in whole or in part, directly or indirectly the proceeds of a crime, without specifying any particular crime****, and the Court, having regard to all the evidence, may reasonably infer that the proceeds were, in whole or in part, directly or indirectly, the proceeds of a crime.*" [emphasis added]

The word "property" is widely defined under the FIAMLA and it makes no doubt that it includes money.

Before proceeding further, we must point out that the DPP stated that in the case at hand the crime committed was a "faux intéllectuel". However, since the particulars of the information averred that the respondent agreed with Esmelda Rase to cause the sums of money under the different counts to be invested in the SCBG policy of the BAI when she had reasonable grounds for suspecting that the said sum was derived from **a crime**, the prosecution simply needed to prove that the money was the proceeds of a crime, i.e., it was illicit and there was no need to establish the commission of the offence of forgery.

Knowledge of the illicit origin of the money

We shall first deal with the grounds 1, 8 and 9 of the grounds of appeal, which are set out below, under which, in essence, the appellant is challenging the finding of the learned Magistrate regarding the respondent's lack of knowledge of the illicit origin of the money -

"*1. The learned Magistrate was wrong to conclude that the evidence on record does not establish actual knowledge on the part of the accused.*"

"*8. The learned Magistrate erroneously concluded that the accused could not have knowledge about the source of the money because "Mrs Rase was somehow lawfully in possession of that money".*

"9. The learned Magistrate failed to appreciate that the evidence on record established beyond reasonable doubt that the monies subject matter of the three counts, were initially clean but were subsequently defrauded and became tainted at the time the agreement took place."

The learned Magistrate rightly stated that the central issue which the court had to consider was whether, at the material time, by initiating the SCBG insurance policies in favour of Esmelda Rase, the respondent knew that the money was the proceeds of crime. He also correctly observed that the case for the prosecution was that the money sought to be laundered was the proceeds of an insurance policy which had been subscribed by Richard Rase.

It was of course an innocuous act for an insurance agent of the BAI to agree with a potential policyholder to cause money to be invested in the SCBG insurance policy. The question of money laundering would however, arise if the money so invested is the proceeds of a crime and the *mens rea* for committing the offence of conspiracy to commit money laundering would only be present where the insurance agent knows that the money is of illicit origin but nonetheless agrees to cause the proceeds of crime to be invested in the SCBG insurance policy. In the present case, the prosecution had to prove that (1) there was an agreement between the respondent and Esmelda Rase (2) to commit the offence of money laundering and that she had the necessary mens rea to commit the offence.

It was never disputed that the respondent was the insurance agent of the BAI who dealt with Esmelda Rase when she subscribed to the 3 insurance policies subject matter of the 3 counts before the trial court. It was also undisputed that the money which was used to subscribe to the insurance policies came from the insurance proceeds which were paid into the joint account which Esmelda Rase held with Richard Rase. It stands to reason that the respondent and Esmelda Rase must have agreed with each other for Esmelda Rase to subscribe to the insurance policies. However, the central issue in the case was whether the respondent knew that the money which was being invested was the proceeds of a crime. The above question is intricately linked with whether Esmelda Rase was lawfully in possession of the insurance proceeds and, if not, whether the respondent knew that she was unlawfully in possession thereof.

It is apposite to refer to the following extracts regarding the elements of the offence of conspiracy.

The case of **Deedaran vs The Queen** [1981 MR 169] explains what needs to be proved by the prosecution to establish that the offence of conspiracy has been committed–

> *"The offence of conspiracy ... consists in an agreement to do, among other things, an unlawful act. Under this definition three matters have to be considered ... First, the agreement. That is the gist of the offence. It is not necessary that the conspirators should have accomplished what they agreed to do; the agreement to do it is sufficient to constitute the offence, but it is necessary to prove more than a mere intention on the part of each conspirator to carry out the design. It must be proved that there has been a communication of that intention by one accused to another and that that other one has approved of it.*
>
> *That communication, the approval of that intention which constitutes the offence is normally made apparent by some overt act (overt act is the technical word used in legal jargon, it is an act that can be seen by some other people), an act done by the accused. It can be proved by word or deed or it may be inferred from the conduct of the accused. Once the agreement to carry out the object of a conspiracy is proved, it is immaterial whether the object is in fact carried out or not.*
>
> *The second matter to be considered is the object of the agreement; it must be one specified by law. ....*
>
> *The third matter to be considered under this charge is: the parties to the agreement. The collaboration of at least two persons is essential to the existence of a conspiracy. A person cannot conspire with himself...."*

In **R. v. Anderson [1986] A.C. 27, HL**, it was explained that -

> *"Mens rea is also an essential element in conspiracy only in that there must be an intention to be a party to an agreement to do the wrongful act. "But, beyond the mere fact of agreement, the necessary mens rea of the crime is [ ] established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required."*

The **Journal of Criminal Law JCL 82 (338), 1 AUGUST 2018: Prosecuting Complicity: The CPS Legal Guidance on Secondary Liability**, lays down the following on the '**knowledge**' issue:

"...A jury could infer that the accessory intended to assist a rape where the evidence is that the accessory held a gun on the victim while she was raped by several other men. Here, the accessory has full knowledge of all the relevant facts and acts in a voluntary manner to assist the rape. Similarly, a jury could infer that a mother intended to assist or encourage the sexual violation of her 12-year-old son when she fails to prevent him from having sexual intercourse with a 30-year-old woman, because the mother has present or advance knowledge of the fact that her son is underage and is thus unable to give legal consent because the mother herself gave birth to him 12 years before. The mother cannot make a mistake as to the child's present age, because she has present knowledge of his age. ***Following the reasoning in R v Jogee and R v Saik, in the case of complicity and conspiracy, intention can be inferred where D has (genuine) present/advance knowledge of the relevant circumstances or alternatively if there is evidence showing that she intended the perpetrator to perpetrate the anticipated target act (e.g. sexual intercourse) in circumstances that make it criminal (e.g. where the sexual intercourse is non-consensual).*" [Emphasis added]

In the case of **R v Saik [2006] UKHL 18**, where the appellant was charged with conspiracy to launder money which was the proceeds of drug trafficking or other criminal activity, the Court had the following to say in relation to the issue of *mens rea* to commit the offence of money laundering:

"7. Under this subsection conspiracy involves a third mental element: ***intention or knowledge that a fact or circumstances necessary for the commission of the substantive offence will exist.*** *Take the offence of handling stolen goods. One of its ingredients is that the goods must have been stolen. That is a fact necessary for the commission of the offence.* ***Section 1(2) requires that the conspirator must intend or know that this fact will exist when the conduct constituting the offence takes place.***

8. It follows from this requirement of intention or knowledge that proof of the mental element needed for the commission of a substantive offence will not always suffice on a charge of conspiracy to commit that offence. In respect of a material fact or circumstance, conspiracy has its own mental element. ***In conspiracy, this mental element is set as high as 'intend or know'. This subsumes any lesser mental element, such as suspicion, required by the substantive offence in respect of a material fact or circumstances.*** *In this respect, the mental element of conspiracy*

> *is distinct from and supersedes the mental element in the substantive offence. When this is so, the lesser mental element in the substantive offence becomes otiose on a charge of conspiracy. It is an immaterial averment. To include it in the particulars of the offence of conspiracy is potentially confusing and should be avoided."* [Emphasis added]

As rightly pointed out by the appellant, on the basis of the above, in a case of conspiracy *"actual knowledge"* on the part of the accused is the **deliberate and wilful intention** of entering into an agreement with one or more persons to do something unlawful. In the present case, the learned Magistrate had to determine whether the money used by Esmelda Rase to subscribe to the insurance policies constituted proceeds and, if so, whether the respondent had the deliberate and wilful intention of entering into an agreement with Esmelda Rase to launder the proceeds.

We are of the considered view that there was ample evidence on record which established beyond reasonable doubt that the appellant knew what she was up to from the outset, by falsifying the encashment form on 6 August 2014 and that *'en toute connaissance de cause'* and acting *'de concert'* with Esmelda Rase she committed the offence of conspiracy to commit money laundering. As explained below, the evidence adduced by the prosecution at trial stage was conclusive on the issue of 'actual knowledge' on the part of the appellant in line with the authority of **Saik** (supra).

It can be gleaned from the testimony of Richard Tong Sam, who was working as Head of Risk Management at the BAI, that there were established procedures in place at the BAI for payment of the insurance proceeds where the policyholder had passed away prior to the date of maturity, for the encashment of the proceeds and for the renewal of insurance policies.

In her statement to the police, the respondent herself stated the following: there was a procedure which had to be followed when an insurance policy was about to reach its maturity. The office (BAI) sent the encashment form one month in advance to the policyholder's address. Once the policyholder obtained the encashment form, **he had to come in person to the office of the BAI with the encashment form as well as the original insurance policy, his identity card and proof of address**. Where the policyholder was unable to come to the office of the BAI personally, an agent of the BAI had to meet the client for **the encashment form to be signed in the agent's presence**.

The learned Magistrate rightly stated that Richard Tong Sam explained that the encashment form contains a part which bears the heading "FOR OFFICE USE ONLY" and that this section has several purposes: firstly, it is a means of control to show that the BAI agent has met the client; secondly, the BAI agent certifies that the pay out instructions have been given by the policyholder and thirdly, that he has seen the original of the documents.

In the present case, it is undisputed that the payment of the insurance proceeds was triggered by the encashment form (Document K). It is obvious from the extract of the respondent's statement referred to above that she was fully aware that the policyholder had to sign the encashment form in her presence before she could trigger the procedure for the encashment of the insurance proceeds. Further, it is amply clear from Mr Tong Sam's testimony that the procedure was in place with a view to ensure that it was the policyholder who gave instructions as to whether the premium money which he had invested and his insurance benefits (collectively referred to as "the insurance proceeds") were to be encashed or resubscribed.

Learned Counsel for the respondent argued that the respondent was simply a negligent employee who had not followed the procedures and that one cannot make criminals of employees simply because they are negligent.

We do not agree. Even if we were to assume that the respondent did not know on the day when Esmelda Rase came to the BAI office that Richard Rase had passed away, the uncontroverted evidence on record is that she knew that Esmelda Rase was not the policyholder and that the encashment form already bore a signature when it was brought to the BAI office and was thus not signed in her presence. Nonetheless, the respondent signed the part of the encashment form under the heading "FOR OFFICE USE ONLY" where she stated the following –

"*VIJAYA NARRAINEN certify that* ***the present payout instruction was signed*** *by both policyholders and* ***in my presence*** *in Vacoas.*" [emphasis added]

If the evidence only established that she certified that the form was signed in her presence when this was not the case, one could possibly argue that, as contended by Counsel for the respondent, the respondent had no criminal intention and that she was simply a negligent employee. However, it is significant that, in her statement to the police, the respondent also admitted that the content of the part of the encashment form bearing the heading "FOR OFFICE USE ONLY" was false as it purported to establish that she **met Richard Rase on 3 August** (the date on which he passed away in Norway) **at Vacoas** and

that he signed on the encashment form in her presence when, in fact, she met Esmelda Rase in Quatre Bornes and the latter had brought a pre-signed encashment form. Further, as rightly pointed out by the learned DPP, the respondent never stated that what she did was the result of an omission or mistake on her part.

We note that the respondent was not bound to give an explanation for her acts but she chose to do so and, in her statement, she stated that she could not say why she certified that Richard Rase was present before her. She further declared that she could not explain why she inserted the wrong place or why, despite that the wrong date was indicated on the encashment form, she processed same. Moreover, she asserted that she had no explanation to offer as to why she certified documents brought by Esmelda Rase as being copies of originals when the originals were not produced before her.

Concerning the bank account into which the payment of the insurance proceeds was effected, we note that the learned Magistrate wrongly stated that Mr Tong Sam had explained that whenever a policyholder would pass away, **the BAI would make the payment into a designated bank account** which the policyholder would have notified the BAI in which to make the payment.

It is patent from the above that the learned Magistrate was clearly confused and that he misapprehended the evidence of Mr Tong Sam. The evidence on record shows that Mr Tong Sam, in fact stated that, in the case of the demise of the policyholder, **the whole insurance proceeds was paid to the beneficiaries** referred to in the insurance policy and not that it would be paid to a bank account designated by the policyholder in such a case.

Learned Counsel for the respondent argued that the there was no proof of actual knowledge on the part of the respondent as, firstly, the payment of the insurance proceeds was effected into the bank account already identified by Richard Rase and, secondly, the evidence on record established that the procedure for encashment was not being followed.

We must straight away state that there was no evidence on record that it was Richard Rase who identified the bank account into which the **insurance proceeds** were paid but only that he identified the account into which the **benefits** were to be paid. In this respect, it is relevant to note that witness Tong Sam explained that **the insurance proceeds is made up of two parts: the premium** (here, the sum of Rs 8 million) which is paid back to the policyholder by the insurance company at the maturity **and the bonus or benefits** which he derives from the premium invested (here, the sum of Rs1,992,000). Generally, the policyholder

designates the account for the payment of the **benefits** at the time of subscription itself. Mr Tong Sam made it clear that Richard Rase had given instructions for the **benefits** to be paid to his account Number 010013480091 at the HSBC in Vacoas, as can be gleaned from the subscription form (Document A). However, as regards the **premium**, i.e., the sum of Rs 8 million, instructions had to be given at the time of encashment as to how that payment was to be effected.

As stated above is it undisputed that there were indeed two payments made to the HSBC bank account as follows : on 11 August 2014, the BAI paid the sum of Rs. 1,992,000 (**benefits**) into the HSBC account and, on 22 August, it paid the invested sum or **premium** of Rs 8 million into the same account. However, it can, in fact, be gleaned from paragraph 9.3 of the subscription form (Document A), under the heading "Instruction to pay **benefits**", that Richard Rase had indeed identified savings account No. 010013480091 at the HSBC Bank, Vacoas Branch as the bank where all future **benefits** under the policy were to be paid. As regards the payment of the **premium**, a perusal of the encashment form (Document K) shows that a bank account number into which it is to be paid is designated therein. Although it was again bank account number MU HSBC 010-013480 which was designated in the encashment form, there was no evidence that it was Richard Rase who gave the instructions to do so.

It is important to reiterate that the encashment form was already signed when Esmelda Rase brought it to the BAI and that the respondent certified that it was signed before her thus falsely certifying that the pay out instructions for the premium were given to her by Richard Rase.

In the light of the above, there is clearly no merit in the submissions of learned Counsel for the respondent that since the payment was effected into the bank account which was designated by the policyholder when he signed the subscription form (Document A) there could be no intent on the part of respondent and that it is only if there was evidence from the prosecution to show that the respondent knew that the policyholder had passed away that it could be argued that there was an agreement.

The judgment of the learned Magistrate was also glaringly flawed when he stated that the accused "*could not have knowledge about the source of the money because Mrs Rase was somehow lawfully in possession of that money*". Firstly, the assertion that Esmelda Rase was lawfully in possession of the money is incorrect. As explained above, the money should never have been paid into the HSBC account but should have been paid to the beneficiaries of Richard Rase as he passed away before the maturity date. In any event, even if the

respondent was not aware of this fact, the money could not have been paid into the HSBC account as the conditions which needed to be fulfilled before the payment could be effected to the said account were clearly not met.

Esmelda Rase was in possession of the money because the respondent falsely certified facts which were untrue as being true: Esmelda Rase was in possession of the money as a result of the fraud committed by the respondent. In the circumstances, it is preposterous to state that the respondent had no knowledge about the source of the money.

We note that the learned Magistrate stated the following in the judgment -

"In the present case, this bank account into which the money was paid was a joint account which Mrs Rase held with the policy holder Mr Richard Albert Rase. On this aspect, this Court again finds it implausible that the accused could even have doubts about the origins of that money. Because that money was an insurance money which the BAI itself had paid in that joint account which Mrs Rase was entitled to manage. Mrs Rase was somehow lawfully in possession of that money."

We have already explained that the encashment would never have been possible without the respondent's participation. As rightly pointed out by the DPP, the learned Magistrate failed to take into account the manner in which the money reached the joint account in the first place: the encashment was possible only because the respondent forged the encashment form which triggered the payment of the money by the BAI into the joint account. The money, having been paid into the joint bank account through fraud, was of illicit origin and it is preposterous to suggest that the respondent who was the one who committed the fraud did not know that the money was of illicit origin.

We find it of interest to refer to the following extract from the case of **R v GH [2015] UKSC 24** by the Judicial Committee of the Privy Council-

"47.... The character of the money did change on being paid into the respondent's accounts. It was lawful property in the hands of the victims at the moment when they paid it into the respondent's accounts. It became criminal property in the hands of B, not by reason of the arrangement made between B and the respondent but by reason of the fact that it was obtained through fraud perpetrated on the victims..."

In the present case, the money which was lawful property when it was with the BAI prior to the encashment became criminal property when it was paid into the HSBC account by reason of the fact that it was paid therein through fraud.

In the light of the above, we find that the learned Magistrate failed to appreciate that the evidence on record established beyond reasonable doubt that the monies subject matter of the three counts were initially clean but were subsequently tainted by the fact that they were paid into the joint bank account through fraud. Furthermore, the learned Magistrate also overlooked that if the respondent had complied with the established procedure, given that Richard Rase had passed away on 3 August 2014 and the date of maturity of the insurance policy was 13 August 2014, the whole of the insurance proceeds should have been paid to the beneficiaries, his two sons, but that, as a result of the acts of the respondent, the insurance proceeds were paid into the bank account jointly held by Esmelda Rase and Richard Rase and that Esmelda Rase thus fraudulently encashed the money.

In so far as the encashment procedure is concerned, it was the contention of learned Counsel for the respondent that it was not being adhered to in practice and therefore one could not infer any criminal intent on the part of the respondent when she did not comply with the said procedure. In his judgment, the learned Magistrate stated that in answer to a question put to Mr Tong Sam during re-examination as to whether there was an obligation for the policyholder to be present to sign his form he stated that in theory it should be the case. Learned Counsel for the respondent relied on the above reply to argue that it was only "in theory" that the policyholder had to sign the encashment form in the presence of the BAI agent and that, in practice, the said procedure was not being adhered to.

However, a perusal of the court record shows that when the testimony of Mr Tong Sam is read as a whole, it is patent that the above reply pertained to the signature of the policyholder on the subscription form and not on the encashment form. A reading of the testimony of Mr Tong Sam shows that he asserted that for a person to be able to subscribe to the insurance policy he had to sign on the insurance policy and, therefore, a person who was abroad would not be able to subscribe to a new policy. He stated that the policyholder had to come to the BAI in person or an agent was sent by the BAI to meet the policyholder for the policyholder **to subscribe to the policy**. Although he agreed that Richard Rase was a policyholder since 2008, he stated that he was not aware if Richard Rase was not in Mauritius when he subscribed to the insurance policy. It was suggested to him that it was not necessary for policyholders to be physically present **to subscribe to an insurance policy** and that such a procedure was not being adhered to by the BAI. However, he maintained that, to his

knowledge, all clients had to be present to subscribe to the policy but that he could not pronounce himself for the person who had filled in the subscription form regarding the policy subscribed by Richard Rase in 2008.

It can be gleaned from the evidence on record that learned Counsel for the prosecution specifically re examined Mr Tong Sam regarding the last question put by Counsel for the respondent and that it is in answer to this question that Mr Tong Sam stated "*pour le principe, oui*".

It is amply clear from the court record that the reply given by witness Tong Sam concerned the subscription to an insurance policy, i.e., it was for a subscription to the insurance policy that, in theory, the policyholder had to be present. Further, it is evident when one reads the whole of testimony of witness Tong Sam that he maintained throughout that the policyholder had to be the one who gave the instructions and that the encashment form had to be signed in the presence of the BAI agent.

In support of his contention that the encashment procedure was not being followed, learned Counsel for the respondent also relied on the testimony of witness Stephanie Lim, an ex Sales Agent at the BAI who was the BAI agent who had dealt with Richard Rase when he had initially subscribed to the SCBG policy at the BAI. He argued that she had admitted that the encashment procedure was not being strictly followed.

However, when one reads the court record carefully, it can be seen that her testimony is to the following effect: she met Richard Rase when he subscribed to the insurance policy initially and also met him concerning the policy when he came to Mauritius on holidays. Under cross examination, she was referred to her statement regarding the renewal of the policy where she stated that she had remitted the form to Esmelda Rase for Richard Rase to sign at specific places in 2011 when he was abroad. She explained that when there was a renewal of the policy, i.e., a resubscription, generally, policyholders did not come personally and, at times, their family members came to collect the form for them to sign. In those cases, the insurance agent would insert a remark on the encashment form to indicate where the policyholder had to sign. Although Richard Rase did not come in person, she was satisfied and processed the encashment form because it was a **renewal and if it was a new policy the policyholder would have to come personally**.

Although we agree that the same form was being used both for encashment and renewal, it is evident that witness Lim never stated that the procedure for encashment was not being adhered to.

In any event, we are of the view that, even if the procedure for encashment was not being adhered to (which we do not agree was the case), there was ample evidence as summarised below from which the learned Magistrate should have concluded that the respondent had the necessary mens rea -

1. the respondent was fully aware of the fact that the original of the policy contract as well as original of the policyholder's National Identity Card were needed for processing the encashment form. However, she admitted that when Esmelda Rase came to the BAI office she only brought a **photocopy** of the SCBG insurance policy and **photocopies** of the passport and the National identity card of the policyholder, Richard Rase. Nonetheless, she attached the documents to the policy encashment form and affixed a stamp reading "certified true copy of original" thereon and she inserted her name and signed on the photocopies of the documents which Esmelda Rase had brought, knowing fully well that she should have checked the originals but had not done so;
2. the encashment form bore the date **3 August 2014** whereas it is undisputed that it was on **6 August 2014** that Esmelda Rase met the respondent for the encashment procedure at the BAI office;
3. the respondent admitted that she met Esmelda Rase at the **BAI office in Quatre Bornes** however on the encashment form she certified having met **Richard Rase in Vacoas**;
4. the respondent herself never stated that the procedure for encashment was not being complied with at the BAI but stated that she could not say why she certified that Richard Rase was present before her. She also declared that she could not explain why she inserted the wrong place or why despite that the wrong date was indicated on the encashment form she processed same. She stated that she had no explanation to offer as to why she certified documents brought by Esmelda Rase as being copies of originals when the originals were not produced before her;
5. the respondent stated that Esmelda Rase told her that her brother did not want to reinvest the money and wanted to buy an apartment for his sons who were the beneficiaries under the policy yet she called Esmelda Rase after a week and asked her to reinvest the money while she would look for an apartment. She also stated that she knew that Richard Rase had passed away and that Esmelda Rase had informed her of same. Nonetheless, she went to meet Esmelda Rase on 25 August

2014 and on the subscription form she declared the source of funds being invested as being savings, knowing fully well that it was the money which was obtained from Richard Rase's insurance policy. Furthermore, she declared that she had no response to provide regarding why when Esmelda Rase had already informed her that her brother has passed away, she did not inform her superiors of same and asked her to invest the money with the BAI.

Taking all the above into consideration, we are of the considered view that, there was compelling evidence before the learned Magistrate from which the irresistible inference to be drawn is that the respondent had the necessary criminal intent when she processed the SCBG insurance policies in favour of Esmelda Rase.

For the reasons given above, grounds 1, 8 and 9 must succeed.

The agreement to launder money

Grounds 2, 3, 5, 6, 7 and 11, which are set out below, may conveniently be dealt with together as they in effect challenge the findings of the learned Magistrate that there was no evidence that the respondent had committed the offence of conspiracy to commit the offence of money laundering -

"2. *The learned Magistrate erred in finding that there was no evidence of agreement on the part of the accused and which could not be inferred from conduct.*
3. *The learned Magistrate failed to appreciate that there were circumstantial evidence that there was a conspiracy between the accused and one Mrs Esmelda Rase.*
5. *The learned Magistrate erred when he found that the evidence on record does not show that there were two parties to the agreement.*
6. *The learned Magistrate was wrong to find that there could be no conspiracy merely because of the absence of the version of the other conspirator (Mrs Esmelda Rase) or because the latter chose to keep her right to silence.*
7. *The learned Magistrate failed to appreciate that a charge of conspiracy can be proved even in absence of the version of the other conspirator.*
11. *The learned Magistrate failed to appreciate that the evidence on record revealed that both the accused and Mrs Esmelda Rase were involved in a money laundering scheme.*"

It is pertinent to note that money laundering usually takes place in three stages. Firstly, illegally derived funds are placed usually in the form of cash into the financial system (placement). Secondly, layers of transactions are performed such as transferring funds between several accounts to conceal the origin and movement of funds (layering). Thirdly, the funds are used to make investments in different assets (integration).

It is relevant to refer to the following extracts from **Butterworths Money Laundering Law (Updated to Issue 36 May 2012 Book Block 1 of 2)** which were referred to by the DPP and which depict the different stages usually involved in money laundering schemes -

> *"[1]-[2] Money laundering schemes can vary in their structure and scope and it is therefore difficult to reduce the process to key stages or acts. Money laundering is not a single act but a highly complex process, utilising an infinite range of techniques. From this perspective, every attempt and device designed to hide and conceal the source and ownership of money illegally derived is an act of money laundering.*
>
> ...
>
> ...
>
> ***2 Placement***
>
> *[34] The first stage in a money laundering operation is very often the physical disposal of bulk cash proceeds derived from criminal activity. Typically, launderers seek to place cash into the convention of financial system. Due to the increased awareness by financial institutions and increased reporting obligations launderers will, however, often choose methods which are less likely to raise suspicion. This is known as the placement stage.*
>
> ...
>
> ***3 Layering***
>
> *[49] Upon being placed into the conventional financial system, the true source of the illicit money must be concealed as quickly as possible. The intention will be to quickly disguise the audit trail so as to put as much distance as possible between the money and its original source.*
>
> ...
>
> ***4 Integration***
>
> *[62] Once the true source of the proceeds of the crime has been obscured by the layering process the money can be integrated into the mainstream economy in such a way that it appears as normal business funds generated by a conventional commercial enterprise. Integration provides a final coat of legitimacy for criminally derived wealth. By incorporating the money back into the economy be in this way, a legitimate*

appearance is created and it will be very difficult to distinguish between the launderer's legitimate and illegitimate wealth. Such a distinction can only really be achieved through undercover infiltration, informants and, typically, a stroke of luck."

We have already explained that the money in the present case was tainted money as it was illicitly obtained by Esmelda Rase.

It was submitted by the DPP that, if there is a scheme, it is easier to argue that there is money laundering. In so far as the first count is concerned, there was a straight transfer into the BAI account and there was therefore no scheme as such. He argued that, under our law which is very simple, the offence of money laundering is committed, once a person engages in a transaction that involves property which represents proceeds of any crime, even in the absence of a scheme. He therefore submitted that the prosecution had established the offence under count 1.

In so far as counts 2 and 3 are concerned, he submitted that what is explained in **Butterworths** is the basic money laundering process where there are three stages: placement, layering and integration. However, many textbook writers state that there is no need for the three different stages to take place. What is more important is that one is transacting with proceeds.

He argued that regarding counts 2 and 3, there were the three different stages: on 22 August, Rs 8 million was paid into the HSBC account. Within 3 days, on 25 August, Esmelda Rase transferred Rs 6 Million from the HSBC account to the MCB account which she jointly held with her father. The purpose of the transfer was stated to be 'Transfer to own account at MCB – funds to be used for purchase of flat' (Doc R – HSBC Bank statement). On 17 November 2014, Esmelda Rase subscribed to 2 more insurance policies in her personal name with the respondent as the BAI agent and her daughter as the beneficiary of the policies, one in the sum of Rs 3 million, the other in the sum of Rs 2 million. This transfer was from the MCB account to the BAI account (Doc P – MCB bank statement).

He explained that when one looks at the final transaction, what he sees is that Esmelda Rase has subscribed to two insurance policies and that the money came from the MCB account where she was the joint account holder together with her father. One forgets about what had happened in the first place on 6 August 2014 and that the money initially belonged to the deceased, Richard Rase. In effect, when one looks at the final transaction, Richard Rase has completely disappeared although the money belonged to him and no trace is left.

We agree that it can be argued that the above steps show that there was a placement, a layering and an integration. At any rate, even if those steps were missing, it is amply clear from the facts on record that the respondent was engaged in transactions which involved property that represents proceeds under all three counts.

In so far as the agreement between the respondent and Esmelda Rase is concerned, it is significant that the respondent knew that the policyholder was Richard Rase, however, in her statement to the police she stated that about a week after 6 August 2014, she called Esmelda Rase to confirm whether the latter had duly received the money.

Furthermore, she stated that Esmelda Rase had told her that her brother had requested that an apartment be purchased in Flic en Flac for her 2 nephews and that her brother was not willing to reinvest the money. Yet, she asked Esmelda Rase to reinvest the money while looking for an apartment. She, in fact, stated that she contacted Esmelda Rase several times asking her to reinvest the money.

Moreover, as explained above, the respondent stated that for the policies subscribed by Esmelda Rase in her own name, Esmelda Rase informed the respondent that the money came from her brother's insurance policy. To the question as to why, after having been informed by Esmelda Rase that Richard Rase had passed away, she still asked Esmelda Rase to reinvest the money which Richard Rase had obtained from the insurance policy with the BAI and she did not inform her superiors of same, the answer given by the respondent was that she does not remember why she told her to invest the money and she has no answer for same.

In the light of the above and taking into consideration the essential role played by the respondent in triggering the payment of the money into the HSBC account, the fact that the date on the encashment form and the place where she allegedly met Richard Rase were false and that the respondent could not explain why she processed the encashment without following the procedure for encashment of which she was fully aware, the irresistible inference is that the respondent and Esmelda Rase agreed with each other to commit the offence of money laundering.

There were clearly two parties to the agreement: the respondent and Esmelda Rase. The learned Magistrate found it surprising how in the absence of the version of Esmelda Rase, the prosecution was able to enquire from the respondent regarding the conspiracy and that there was any alleged agreement between them. It is obvious that the learned Magistrate

disregarded that the agreement between the parties can be inferred from the surrounding circumstances and it is not necessary that a co-conspirator testifies against the other for the offence of conspiracy to be proved.

There was no plausible reason as to why the respondent who must have known of the importance of having the encashment form signed by the policyholder in her presence accepted to process the encashment form which had already been signed beforehand, she had no explanation to provide as to why the form indicated that it was signed in Vacoas when it was signed in Quatre Bornes and could not offer any explanation regarding the date on the encashment form (3 August 2014) which was the very date on which the policyholder passed away in Norway, although she admitted that Esmelda Rase in fact met her on 6 August 2014. It is also significant that it was never the respondent's defence that she had made a mistake when she processed the encashment form. Moreover, the respondent knew that the policyholder was Richard Rase and that the beneficiaries under the policy were his sons but she contacted Esmelda Rase several times to ask her to subscribe to SCBG policies and agreed to act as the insurance agent when Esmelda Rase used the money to subscribe to three insurance policies in her own name, with her daughter as the beneficiary.

In this regard it is relevant to refer to the extracts from the cases of **DPP v Kilbourne [1973] AC 729 at p. 758** and **Teper v Queen [1952] AC 480 at p. 489** which make it clear that in contrast to direct evidence, circumstantial evidence is evidence of "relevant facts" from which the existence or non-existence of facts in issue may be inferred. Circumstantial evidence "*works by cumulatively, in geometrical progression, eliminating other possibilities*" (**DPP v Kilbourne [1973] AC 729 at p. 758**). However, although the weight to be attached to circumstantial evidence is not in any way less than that attached to direct evidence, "*It must always be narrowly examined ..... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference*" (**Teper v Queen [1952] AC 480 at p. 489**).

In the present case, although when considered individually the above facts may each on its own not be sufficient to show that the respondent conspired with Esmelda Rase to launder the money, however, we are of the considered view that, taken as a whole, the sum total of the evidence is such that the irresistible inference is that the respondent and Esmelda Rase conspired to commit the offence of money laundering. It is significant to note that the evidence on record in the present case could potentially establish that there was money laundering itself and not only that there was a conspiracy to commit money laundering.

For all the reasons given above, we agree that the learned Magistrate erred in finding that there was no evidence of agreement on the part of the accused and that he failed to appreciate that there was ample circumstantial evidence from which it could be irrestibly inferred that there was a conspiracy between the respondent and Esmelda Rase.

Taking all the above into consideration, we are of the view that grounds 2, 3, 5, 6, 7 and 11 were well taken. We accordingly uphold the said grounds. In the circumstances, we do not consider it necessary to consider ground 10 under which it was argued that the learned Magistrate failed to give precisions and reasons about his findings of alleged inconsistencies and lack of credibility.

In the light of our findings, we allow the appeal and quash the judgment of the learned Magistrate. The case is remitted back to the learned Magistrate with a direction to make a finding of guilt against the respondent under all three counts of the information and to hold a hearing for the purposes of sentencing.

K. D. Gunesh-Balaghee
Judge

M. E. S. J. Moutou-Leckning
Judge

01 March 2024