ICAC v Jean Serge ALLEEMUDDER - Ruling

2024 INT 236

CN: 14/21

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

Jean Serge ALLEEMUDDER

RULING

1. The accused is prosecuted for the offence of Money Laundering in breach of sections 3(1)(a), 6 & 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 (FIAMLA). He pleaded not guilty to the Information and was legally represented by Mr J. Panglose. The prosecution was represented by Mr Ponen, of counsel.

2. During the course of trial, the defence objected to the admissibility of a previous conviction (dated 2006) of the accused as evidence, and the evidence of an arrest dated 16.11.21. Furthermore, the defence moved for further particulars for the word 'crime' at the last line of the 'particulars' section of the Information. The particulars sought were in relation to the date of the said crime. The further contention was that, in the absence of such particulars, the proceedings against the accused would amount to an abuse of process. The prosecution had objected to the motion to provide for further particulars.

CASE FOR THE PROSECUTION

3. Witness no.1, CI Jokhoo, stated that the accused has been prosecuted and convicted in 2006 for a drug related offence, for which he was sentenced for 18 months imprisonment, together with the imposition of fines.

4. Under cross-examination, it was put to the witness that there was no nexus between the 2006 conviction and the current charge which is dated between December 2011 and December 2012. The witness stated that accused's lifestyle could only be explained by income generated from drug activities. It was borne out that the accused was given the presidential pardon for the said previous conviction. The witness replied that the pardon abolished the sentence and the not the offence.

5. Witness no.8, Insp Moheswar, stated that the accused was arrested for a drug related offence on 16.11.21. Under cross-examination, he stated that he was not the enquiring officer. He could not say whether the arrest was connected to the charge laid in the current Information and dated 2011 to 2012. He was not aware of the current charge.

CASE FOR THE DEFENCE

6. No evidence was adduced on behalf of the defence.

ASSESSMENT OF THE COURT

<u>Motion for further particulars and abuse of process</u>

7. The defence moved for the date of the 'crime' as averred in the Information, wherever reference to the source of the alleged proceeds of crime is made. The motion has been broadly founded in the proposition that the accused will otherwise be unfairly prejudiced in the preparation of his defence. The prosecution objected to the said particulars on the ground that the identification of the predicate offence is a not legal requirement in such case, and the fact that the source of the alleged proceeds is from activities stretching over a period of time.

8. The legal basis for such issue has been enunciated in the case of **DPP v Bholah 2010 PRV 59**, where the following extract is of relevance:

33. The Board has therefore concluded that proof of a specific offence was not required in order to establish guilt under section 17(1) of ECAMLA. It is sufficient for the purposes of that subsection that it be shown that the property possessed concealed, disguised, or transferred etc represented the proceeds of any crime – in other words any criminal activity – and that it is not required of the prosecution to establish that it was the result of a particular crime or crimes. In light of this conclusion it follows that a failure to identify and prove a specific offence as the means by which the unlawful proceeds were produced is not a breach of section 10(2)(b) of the Constitution. In the Board's view, that section requires that the nature of the offence of which the accused person must be informed is that with which he is charged, in this case the offence of money laundering. Proof of a particular predicate crime is not an essential "element" of the offence of money laundering.

34. The decisions in the English cases are informative beyond their firm conclusion that proof of a specific predicate offence is not required, however. They are unanimous, in the Board's view, in suggesting that where it is possible to give particulars of the nature of the criminal activity that has generated the illicit proceeds, this should be done. Some of the cases appear to suggest that this is an indispensable requirement; others that it is merely required where it is feasible. All are agreed, however, that where it is possible to give the accused notice of the type of criminal activity that produced the illegal proceeds, fairness demands that this information should be supplied.

35. Section 17(7) of ECAMLA did not preclude a request for particulars of the type of criminal activity which was said to have produced the illegal property. The Supreme Court's conclusion that a request for particulars could not be made was founded on its opinion that a specific predicate crime had to be identified and proved in order to meet the requirements of section 10(2)(b) of the Constitution. There is nothing in section 17(7) or its successor which contraindicates a request for particulars of the type of criminal activity that is alleged to have been the source of the criminal property nor is there anything in that provision which would relieve the prosecution of its obligation, in the interests of fairness, of supplying it, if it was able to do so.

9. It is clear from the above extracts that the prosecution is not required to prove or identify the predicate offence giving rise to the impugned proceeds. However, where it is possible to give the accused notice of the type of criminal activity that produced the said proceeds, the prosecution should do so.

Emphasis is laid on the type of criminal activity and not any offence in particular. **Bholah (supra)** dealt with the repealed ECAMLA, but the same principles would apply to the similarly worded section 3 of FIAMLA, vide **Audit v State 2016 SCJ 282**.

10. The defence moved for the date of the alleged crime, not the identification of the said crime. The contention is that the date of the alleged crime would situate the timeframe in which the criminal activity had allegedly been committed and hence enable the accused to prepare his defence accordingly. The case for the defence can only be prepared as a rebuttal to the charge and circumstances laid against the accused by the prosecution. The current circumstances are that the accused acquired a lorry by using money which are allegedly in whole or in part, directly or indirectly proceeds of a crime. The words 'a crime' have been interpreted by **Bholah (supra)** and **Audit (supra)** as meaning any crime, or criminal activity which may include a series of crimes over a period of time. The case for the prosecution is that between the months of December 2011 and December 2012, the accused engaged in a transaction that involved the impugned property, to wit; a sum of Rs625,000. The Information disclosing an offence may only need to contain the, *words of the enactment creating such offence, with the material circumstances of the offence charged*, vide **section 125** of the **District and Intermediate Courts (Criminal Jurisdiction) Act**. Furthermore, *particulars of the offence need also be averred where the offence is not sufficiently clear, in order to give reasonable information as to the nature of the charge*, vide **Sookur v The State 2022 SCJ 4**.

11. It has been the case for the prosecution that the crime from which the money is allegedly derived, cannot be reduced to one specific event. As propounded in **R v Anwoir [2008] EWCA Crim 1354**, *We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, (a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or (b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.*

12. Through the wording of the particulars averred in the Information, the prosecution has elected to adopt the second approach as listed above. It is imperative therefore that the prosecution proves, to the required standard, the

irresistible inference created by the circumstantial evidence, that the money is in whole or in part, proceeds of crime. Whilst, in a classic situation, it would have been pertinent for the defence to request further particulars on the date of an alleged crime, that is not the case laid against the accused by the prosecution. The accused is being prosecuted for his involvement in a transaction, by using tainted money. The question of, how was the money tainted, has been answered by the prosecution, to be through a series of acts over a period of time, and thus is a matter of evidence to be assessed at trial.

13. For these reasons, I hold that the prosecution is not required to provide further particulars as to the date of the alleged crime as sought by the defence. Since that was the ground for the motion of abuse of process, the said motion is equally set aside.

Admissibility of previous conviction and arrest

14. The defence moved that the evidence of any previous conviction and any previous arrest of the accused be rendered inadmissible on the ground that such evidence tantamount to bad character evidence. By its very nature, such category of evidence is, as a general rule, inadmissible, due to their inherent risks of polluting the mind of the arbiter of fact. The negative connotation attached to similar fact evidence is known, that is, the accused would have a propensity to embark on the same behavioural pattern in the light of his previous misconduct. Therefore, the risk that the court is swayed by the propensity argument is high. That would have been pertinent if the evidence of previous misconduct is adduced for the purpose for showing the bad character of the accused, and hence be used as similar fact evidence. However, the proposal of the prosecution is that such evidence will be used to show the criminal activity from which the proceeds are derived.

15. For the purposes of the argument, evidence was adduced by witness no.1 for the prosecution that the accused was convicted in 2006 for a drug related offence for which he was sentenced to 8 months imprisonment. The contention from the prosecution is that the said conviction is circumstantial evidence to establish the criminal activity from which the sum of money averred in the Information was derived. Section 3(1)(a) of FIAMLA creates the element of proceeds of crime that needs to be proved by the prosecution. As seen in **Anwoir (supra)**, the prosecution may use all relevant circumstances to

establish the irresistible inference that said sum of money was proceeds of crime, including a previous conviction.

16. The admissibility of past convictions of an accused party for a money laundering offence has now been enacted by Parliament through the **section 38(4)** of the **Financial Crimes Commission Act 2023 (FCCA)**, as reproduced below:
Notwithstanding section 184(f) of the Courts Act, the Court may consider the past conviction of any person prosecuted for a money laundering offence, to find or to reasonably infer that the proceeds subject matter of the money laundering offence emanates from a crime which that person has already been convicted of.

17. If the above section clears any doubt as to the direction in which the law is to evolve regarding the admissibility of past convictions in money laundering cases, the issue which remains to be addressed is the retrospective effect of the above legislation. The FCCA post-dates the alleged date of offence as couched in the Information. It is a known rule that criminal legislations cannot have retrospective effect in terms of the creation of new offences or imposition of severer sentences, vide **section 10(4)** of the **Constitution**, **D'Unienville & Anor v Mauritius Commercial Bank (2013) SCJ 404**.

18. On the other hand, section 38(4) FCCA does not fall into the above two categories but is a provision which clarifies the question of admissibility of a particular type of evidence. In **R v Muktar Ali (1987) SCJ 413**, a post-dating change in procedural law was considered by the Supreme Court as follows:

The Criminal Procedure Amendment Act 1986, is a law regulating procedure and conferring jurisdiction (competence) and does therefore give to this Court, sitting without a jury, jurisdiction to try offences committed under the Dangerous Drugs Act even before the coming into force of the Criminal Procedure Amendment Act without, in any way, offending the sacrosanct principle of the non-retroactivity of laws.

It is therefore settled that the general rule against the retrospective operation of legislations does not apply to procedural provisions. Since a law which regulates evidential matters equally does not fall under the purview of **section 10(4)** of the **Constitution**, it can be construed that provisions concerning procedure would include those related to evidential matters, vide **Bennion,**

Bailey and Norbury on Statutory Interpretation, 8thEdition, December 2020, "Section7.15:Retrospectivity:proceduralprovisions".

19. English case law has expressly dealt with the matter and the following cases are of relevance:

Kensington International Limited v The Republic of Congo (2007) EWHC 1632 (Comm): *First, so far as such classification remains appropriate, s.13 is an evidential provision. Procedural changes in the law are expected to improve matters for all concerned; it is therefore presumed that they apply to pending as well as future proceedings. So too with enactments relating to evidence; they are equated to procedural enactments and are presumed to apply as from the moment of enactment to proceedings currently before the courts: Bennion, Statutory Interpretation(4thed., 2002), at pp. 269.*

Bairstow and others v Queen Moat Houses plc (1998) 1 ALL ER 343: *'I am sorry that the respect that we have for the rule against retrospection led us to say that the new law will only apply to proceedings begun after its enactment. Purely procedural and evidential changes in the law should apply as from the moment when the law is enacted to proceedings which are currently before the courts.*'

20. The same principles would apply for previous arrest of the accused dated on 16.11.21. It is noted that there was no dispute from the defence as to the validity of the said arrest. The question therefore is one of evidence for the prosecution to prove the nexus between the previous conviction and arrest, and the proceeds of crime as averred in the Information. Such can only be canvassed at trial.

21. For these reasons, I find that the probative value of the previous conviction dated in 2006 and the previous arrest dated 16.11.21 outweigh their prejudicial effect, and are thus admissible evidence for the prosecution.

P K Rangasamy
Magistrate of the Intermediate Court