

# IN THE INTERMEDIATE COURT OF MAURITIUS

C N 1620/12

## INDEPENDENT COMMISSION AGAINST CORRUPTION V/S BEEKHY Nasser Osman

### JUDGMENT

The accused stands charged with the offence of Limitation of payment in cash in breach of Section 5(1) & 8 of the Financial Intelligence and Anti Money Laundering Act 2002 as amended by Section 11(a) of Act 15/2006. He pleaded not guilty and he was assisted by Counsel.

As per the particulars of the information, the accused "accepted sum of Rs 1.3 M in cash from one Mrs Marie Gilberte Marjorie Bazerque so as to pay back Biosphere Trading Ltd and which said sum was in excess of Rs 500,000/."

#### The case for the prosecution

The case for the prosecution rested on the evidence of the following witnesses:

-Chief Investigator Moonesawmy (witness no.1) read and produced the two defence statements of the accused in respect of the alleged charge against him (Docs.A & A1). He further produced a copy of the provisional information and proceedings of a bail hearing which the accused remitted to the ICAC in the course of the enquiry (Docs.B & B1) as well as an extract of Le Défi Plus (Doc.C).

The above witness confirmed that there was a case lodged by the ICAC against Mrs Bazerque -witness no.2 in the present case, for making a payment above Rs 500,000 to the accused. On the 28 November 2011 she pleaded guilty to the said charge and on the 8<sup>th</sup> December 2011 she was sentenced accordingly. It came out that during the enquiry, witness no.2 mentioned one Ismael Badat, a national from Reunion Island. No statement was recorded from the latter as at the time he was being looked for a statement, he had already left the country.

Under cross examination, the above witness confirmed that when the accused gave his first statement, he referred to a previous enquiry which he had given to the MCIT which was at the material time enquiring into that matter, following which a provisional information was lodged against him as evidenced by Doc.B. He further confirmed that the ICAC enquiry in relation to the present case was based on an allegation made by the said Mrs Bazerque..

-Mrs.M. Bazerque (witness no.2) deposed as follows:



On the 01 October 2007 she gave a declaration against the accused in respect of a case of embezzlement in the sum of Rs 1.3 M. She explained that she borrowed a sum of one Million rupees from one Mr Doomun and Rs 300,000 from a lady as she had to refund a sum of Rs 1.3 M to a person, namely one Mr Ismael Badat. The latter asked her to meet him in the office of Mr Nasser Bheeky (meaning the accused ). When part of her statement to the ICAC dated the 17 March 2008 was read over to her, she conceded that she mentioned therein that on the 22 September 2007, at about 14h30, together with her husband she went to the office of the accused where she met the latter as well as Ismael Badat and the accused's office attendant, one Zakir. She however added that on the material date she handed over a sum of Rs 1,3 M, which Mr Beekhy has counted and then kept the money in his safe.

She further explained that Mr Badat is an old person and it was the latter who gave him instructions to contact the accused as the latter was his "homme de main". It was Mr Badat who asked the accused to count the money and to keep it in his safe for security reasons to be remitted thereafter to late Mr Radhooa. The above witness maintained that the money was meant to be paid to Mr Badat.

Under further examination in chief, the above witness confirmed that she left the money at the office of the accused and she maintained that the beneficiary of the said sum of money was Mr Badat. She further confirmed that she was prosecuted for having effected a payment in cash in the sum of Rs 1.3M and for which she was sentenced to pay a fine. She however maintained that she gave the said amount of money to the accused to count. When part of her statement dated the 17 March 2008 was read over again to her, she conceded having stated therein that " Après avoir remis l'argent, Mons. Bheekhy m'a rien donné comme preuve, mais j'ai insisté pour savoir comment on va résoudre le problème". But she maintained that it was upon the instructions of Mr Badat and for security reasons that the accused kept this important sum of money in a safe in his office. She explained that the accused was only an intermediary. It was the accused who put her into contact with Mr Badat. The latter is an old man who advised her to effect payment of the amount due to the company (meaning Biosphere Ltd) through late Mr. Radhooa. She was told to leave this amount of money in the office of the accused for same to be remitted thereafter to late Mr. Radhooa. Thereafter when she came to know that the money was not remitted to Mr Radhooa for him to effect payment to Biosphere Co. Ltd that she gave a declaration against the accused on the 1<sup>st</sup> October 2007 as the latter was the person who kept the money under the instructions of Mr Badat.

Under cross examination, the above prosecution witness maintained that the sum of Rs 1.3 M was to be remitted to Mr Radhooa, and that Mr Badat was a "négociateur". But as he did not have any office, she went to remit the money to Mr Badat in the office of the accused. She further maintained that the payment was made to Mr Badat for him to remit same to Mr Radhooa, who in turn has to remit the money to Biosphere Company Ltd as there was a declaration from the said company to the effect that she owed it money. She explained that the accused only put at her disposal his office but was not the beneficiary of the Rs 1.3M nor did he receive any payment from her. The accused only verified that the amount of money was correct as Mr Badat is an old man and suffered from some eye problems ("mal voyant").



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-Mr M J Bazerque i.e witness no.3 confirmed that on the 28<sup>th</sup> October 2009 he gave a statement to the ICAC. He however stated that he did not recall that his wife did a transaction of Rs 1.3 million. When his memory was refreshed from the statement which he gave to the ICAC to the effect that he stated therein that he accompanied his wife to the office of the accused where he helped the latter in presence of Mr Badat to count the money and following which his wife has remitted to the accused the sum of Rs 1.3 M which the latter has immediately kept in his safe, the witness stated that he could not recall anything at all. He further added that it was only when he met the accused in Court that he recalled his name. He further maintained that he did not recall anything in his statement and neither did he recall whether his wife was prosecuted and pleaded guilty and nor whether he accompanied his wife in respect of a money transaction in the sum of Rs 1.3 M.

Under cross examination the above witness stated that he could not give any testimony in relation to the present case as he could not recall anything at all.

Before the prosecution closed its case, a declaration given by witness no.2 was produced (Doc.D).

#### The case for the Defence

The defence did not adduce any evidence. In his unsworn statement dated the 20<sup>th</sup> May 2010 (Doc.A), it came out that in the year 2007, there was an enquiry conducted by the MCIT in respect of an allegation made by Mrs Bazerque concerning an alleged case of embezzlement of a sum of Rs 1.3 M against the accused, following which a provisional information was lodged against the accused who has denied the said allegation. Thereafter in 2009 the said provisional information was struck out. In his second unsworn statement dated the 10<sup>th</sup> October 2012 the accused stated that though he requested for a copy of the statement he gave to the MCIT, neither his Counsel nor him has been communicated with same. He knows Mrs Marjorie Bazerque who used to come to his office for business advice. He knows that the latter has a company known as "Je T'aime Marketing Ltd" but he did not know any company in the name of Biosphere Ltd. He knows one Ismael Badat whom he introduced to Mrs Bazerque but he did not know whether there were any transactions between them. He knows one Zakir who was at the material time his employee but the latter did not come regularly to work. He also knows the husband of Mrs Bazerque, Mr Joe Michel Bazerque but he never did any transaction with the latter. He further stated that Mrs Bazerque is only fabricating a story and made a false allegation against him.

#### Submissions of Counsel

It was submitted by Counsel appearing for the prosecution that it was clear that the main witness for the prosecution namely witness no.2, Mrs Bazerque was reluctant to incriminate the accused and was inconsistent in her version given to the ICAC and that given in Court. Likewise for the witness no.3, husband of witness no.2 whom Counsel submitted was unwilling and reluctant to depose. Reference was made to an article entitled "What a payment is (and how it continues to confuse lawyers) -Rhys Bollen 2005, copy of which was enclosed and the Supreme Court case of Meeajun M J v State 2011 SCJ 141.



Counsel for the defence submitted that the Court cannot rely on the out of Court statements of witnesses nos.2 and 3 to find the case for the prosecution proved beyond reasonable doubt. Further the evidence of the main witness for the prosecution i.e witness no.3, Mrs Bazerque has proved herself to be of no credibility. Her testimony did not in any manner implicate the accused and hence did not substantiate the averments made in the information. Both witnesses nos.2 and 3 are not witnesses of truth. Counsel further submitted that at some point in time Mrs Bazerque stated that the accused counted the money which was then remitted to one Mr Badat. Therefore it cannot be said that the payment was made to the accused.

#### The Court's Analysis

I have carefully analysed all the evidence on record as well as the submissions of both Counsel.

The relevant section of the law applicable to the present case is **Section 5 (1) of the Financial Intelligence and Anti-Money Laundering Act (FIAMLA)** which reads as follows:

*"Notwithstanding section 37 of the Bank of Mauritius Act, but subject to subsection (2), any person who makes or accepts any payment in cash in excess of 500,000 rupees or an equivalent amount in foreign currency, or such amount as may be prescribed, shall commit an offence."*

As rightly submitted by Counsel appearing for the ICAC, in the case in hand it is incumbent on the prosecution to prove that there was a transaction above the prescribed limit between the accused and Mrs Bazerque i.e witness no.2 in the present case. And as per the particulars of the information, the said transaction was that of the accused allegedly accepting a payment in cash in the sum of Rs 1.3 M from the said Mrs Bazerque so as to pay back Biosphere Trading Ltd. Hence, the burden is on the prosecution to prove beyond reasonable doubt that Mrs Bazerque made a payment of Rs 1.3 M to the accused.

Indeed the case for the prosecution rested essentially on the evidence of Mrs Bazerque. The latter was subject to a lengthy examination in chief during which she turned out to be a very difficult witness for the prosecution. As pointed out by Counsel for the prosecution, the said witness at one point in time could not see, on another occasion she could not hear and then thereafter when she started deposing departed from the statement which she gave to the ICAC.

It came out that in her statement which she gave to the ICAC dated 17 March 2008, she mentioned therein that she entrusted a sum of Rs 1.3 M to the accused. In her testimony under oath she explained that in fact she went to the office of the accused under the instructions of one Mr Badat to whom the said sum of Rs 1.3M was meant for and that the accused only counted the money to keep it in his office's safe for Mr Badat. Several times during examination in chief this main witness for the prosecution insisted that the beneficiary of the sum of Rs 1.3 M was Mr Badat. The role of the accused was only to count the money and then to keep it in his safe for security reasons as Mr Badat is an old person and a national from Reunion Island.





Under cross examination the witness for the prosecution went as far as saying that the role of the accused was only to put his office at her disposal for her to meet the said Badat and that the accused counted and secured the money which was meant for the said Badat.

Therefore based on the testimony under oath of the above main witness for the prosecution, it is clear that the sum of Rs 1.3 M was meant to be paid to one Mr Badat but the transaction took place in the office of the accused, whose role was to count and kept the money in his office's safe. It is also on record that it was the said Mr Badat who was supposed to remit the money to late Mr Radhooa who in turn would pay back Biosphere Ltd.

However, it was submitted by Counsel for the prosecution that the explanation under oath of witness Mrs Bazerque "cannot be believed" (sic) and that she may have committed perjury. If such is the view of the prosecution in respect of its main witness and on whose evidence the case for the prosecution rested to prove the alleged charge against the accused, then it is obvious that the prosecution's case against the accused before this Court cannot stand.

True it is that there is evidence on record that this witness gave a declaration against the accused for a case of alleged embezzlement and that she has pleaded guilty to a charge of making a payment above Rs 500,000 to the accused. However this is not evidence on which this Court can rely upon to find the present charge against the accused proved beyond reasonable doubt as submitted by Counsel for the prosecution? Indeed how can a Court of Law act on the out of court statement given by a prosecution's witness and discard the latter's testimony under oath as submitted by Counsel for the prosecution.

It is a basic principle that in any criminal proceedings, where the prosecution's case depends on the evidence of some witnesses, then the prosecution can discharge its burden of proof beyond reasonable doubt only if those witnesses whom it chose to call come up to proof and proved themselves to be truthful and credible witnesses. But if those witnesses turned out to be inconsistent in their testimonies under oath or departed, for whatever reasons, from their out of Court statements as was the case for witness no.2 or pretended not to recall anything, as was the case for witness no.3, husband of witness no.2, then no credibility at all can be given to the testimonies of those witnesses. I wish to point out here that if the prosecution feels that in view of the testimony of the witness Bazerque (witness no.2) in Court the latter may have committed an offence (as per the submission of Counsel for the prosecution), it is for the relevant authority to take any action it deems fit against the said witness.

Finally, it was submitted by Counsel for the prosecution that though the main witness for the prosecution i.e witness no.2 stated under oath that the beneficiary of the Rs 1.3 M was Mr Badat, it is irrelevant as to who was the ultimate recipient because as soon as a transaction is made above the prescribed limit, it is an offence. However the Court considers that the issue of "payment" did not really arise in the present case as Counsel for the prosecution herself has submitted that the above version of witness no.2 to the effect that the beneficiary was Mr Badat cannot be believed.

It is to be noted that the accused in his unsworn statement had denied the charge as per the information and contended that it was a false allegation made against him by witness Mrs. Bazerque. And in view of the manner in which this witness has deposed in Court, the Court



is left in the doubt as to whether there was indeed any transaction above the prescribed limit, as averred in the information, involving the accused.

Based on all the above considerations, the Court is not satisfied that the prosecution has proved its case beyond reasonable doubt against the accused. I consequently grant the benefit of the doubt to the accused. Hence the present information is dismissed.

This 18<sup>th</sup> June 2014



K. Bissoonauth (Mrs)  
Magistrate, Intermediate Court.