ICAC v Audit

2014 INT 57

Cause Number: 314-2010

In the Intermediate Court of Mauritius
(Criminal Division)

In the matter of:

Independent Commission Against Corruption ('ICAC')

v

Yoshika AUDIT

Judgment

The Accused stands charged with 'Money Laundering' under five counts in breach of sections 3(1)(b), 6(3) and 8 of the Financial Intelligence and Anti Money Laundering Act ('FIAMA').

She pleaded Not Guilty to all five counts and was duly assisted by Counsel.

As stated above, the offence with which she stands charged under all five counts is provided under section 3(1)(b) of FIAMA and reads as follows:

3. Money Laundering
(1) Any person who -
…
(b) …is in possession of,… 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 realized, in whole or in part, directly or indirectly from any crime, shall commit an offence.

The essential elements of the offence therefore are the following;

1. In possession of;
2. Any property;
3. In whole or in part;
4. Directly or indirectly;

5. Proceeds of crime
6. Suspects or has reasonable grounds for suspecting property is derived or realized, in whole or in part, directly or indirectly from any crime…

Now, it is clear that the above section creates several distinct offences since whenever the word 'or' is used, it goes without saying that pursuant to the rules of statutory interpretations as provided under **section 5(5) of the Interpretations and General Clauses Act:**

(5) "Or", "other" and "otherwise" shall be construed disjunctively, and not as implying similarity unless the word "similar" or other word of like meaning is added.

In the present matter, the Prosecution has chosen to aver under all five counts the following elements of one of the possible offences from the above section of law:

"…wilfully, unlawfully and criminally in possession of properties which in part directly represented the proceeds of a crime, where she had reasonable grounds for suspecting that the properties were derived in part directly from a crime…"

Thus, the elements of the distinct offence which the Prosecution has chosen to prosecute the Accused are as follows:

1. Possession
2. Property
3. In part
4. Direct
5. Proceeds of crime
6. Reasonable grounds for suspecting properties were derived in part directly from a crime.

POSSESSION

There cannot be any serious dispute as regards the fact that the Accused was in possession of the property under each count as averred in the light of the evidence on record as well as submission from the Defence as at dates of offence as averred under each of the five counts.

PROPERTY

There cannot be any dispute as well as regards the nature of the property in the light of clear admission from the Accused that she was in possession of the property as averred under each of the five counts as at dates of offence as particularised under each of those counts. This is so clear from her statements to the Commission (Documents K, K1, K2 refers). In any event, the Defence has not made it a disputed fact during the trial.

As regards the property under count V, it is on record from the Defence that it is not disputed[1] that the legal guardian of the minor Tushya Audit is the mother, therefore the Accused in the light of the certified extract of birth of the said child produced in Court (Document H refers), following the death of Accused's husband.

THE PREDICATE OFFENCE

Now before dealing with the other elements of the offence and whether they have been proved to the required standard of proof in criminal matters by the Prosecution, there is a need to look first and foremost as to the predicate offence as averred as well as the evidence on record.

The averments under count 1 of the present information is to the effect that the predicate offence, i.e., the crime is *'larceny by Mr. Chabeelall Audit (late husband of Mrs. Yoshika Audit) whilst he was an employee of the Development Bank of Mauritius'* whereas under the remaining four counts, it has been averred *'larceny by Mr. Chabeelall Audit (late husband of Mrs. Yoshika Audit) whilst he was employee of Ivy Leathers Ltd'*.

Now, the Defence has submitted that the five counts are defective since the Prosecution has not averred that the property belonged to his employer as it should normally be whenever such type of larceny committed by person in receipt of wages is charged. The Defence has however conceded that the Court has wide powers of amendment in the light of **Bungaroo v R 1975 MR 1** as well as specifically in cases of money laundering in the light of **Ahmad Azam Bholah & anor v the State 2009 SCJ 432**, so that this defect could be cured.

1Â Vide transcript of proceedings dated 30-05-2012, page 22.

However, most importantly, the Defence submitted that there is no evidence of larceny under all five counts since the constitutive element of 'soustraction' in such an offence has not been proved. Rather, the evidence shows that there has been forgery and making use of forged documents. Thus, the Defence submitted that since these were two distinct offences altogether, no amendment would be possible.

As regards the element of predicate offence, the law under section 3(1) of FIAMA has only stipulated 'any crime'. Thus, what the Prosecution has to prove in effect is that the property represented proceeds of any crime which has also been defined under **section 2 of the FIAMA as follows**:

"crime" –
***(a)* means an offence punishable by –**
(i) penal servitude;
(ii) imprisonment for a term exceeding 10 days ;
(iii) a fine exceeding 5,000 rupees;

There cannot be any realistic argument as to whether larceny by person in receipt of wages or forgery or making use of forged documents is a crime as per the above definition since these offences are all punishable by penal servitude.

Furthermore, according to **section 6(3) of the FIAMA**, there is no need for the Prosecution to even aver and prove any particular crime. The said section reads as follows:

(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.

Thus, even though the Prosecution was not under any obligation to aver any particular crime, it did so in the present case. Whether at the end of the day, this Court finds that it is not larceny but forgery or any other offence is of no effect whatsoever since the law has explicitly provided that the only requirement is for the Prosecution to aver 'a crime' and for the Court

then to reasonably infer whether the proceeds were proceeds of a crime in the light of evidence on record.

In any event such minor defect can always be cured so as to tally with the evidence on record in the light of the Supreme Court decision in **Bholah v The State (supra)** which reads as follows:

We do appreciate that sometimes it may be difficult for the prosecution to particularise a predicate crime in a certain manner where the evidence may reveal a slightly different crime. This difficulty may however be resolved by an amendment of the information, which is normally granted by our courts with the usual safeguards for the accused, upon a variance arising between the information and the evidence.

In the light of above, I find that the only question which this Court needs to ask itself is whether the property is a proceeds of any crime or of a legitimate activity in the light of the evidence on record. There is no duty on the Prosecution to prove that the proceeds is that of a specific crime and thus failure to aver and prove a particular crime is nowhere near fatality or even an issue. This is also the position in England which was explained by the Criminal Court of Appeal in **R v Anwoir & anor [2008] EWCA Crim 1354**, the relevant extract of which reads as follows:

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. This in our judgment gives proper effect to the decision in Green, and is consistent with the decisions of this court in Gabriel [2007] 2 CAR 11, IK [2007] 2 CAR 10 and, of course, Craig.

It is to be noted from the above that the Prosecution can also aver one or more types of crimes as regards the predicate offence.

Now, when the evidence on record as well as the suggestions that arise from the cross examination adopted by the Defence are considered, it barely leaves any doubt that the only irresistible inference is that the property under all five counts were derived from crime.

Under count 1, the various witnesses from the Development Bank of Mauritius have established that during the period 2003 to 2004, there have been several withdrawal forms forged which were then used in order to direct an obligation to the bank to allow withdrawal of various sums of money from various bank accounts of the said bank without the authorisation of the holders of the said bank accounts and therefore to their prejudice. Mr. Carrim produced a bulk of withdrawal forms confirming same (Document AF refers). Further, Mr Daugnette deponed in Court to the effect that following a complaint from one the customers that money had been withdrawn from his bank account, the bank set up a committee following which it was revealed that the handwriting of late Chabeelall Audit appeared in those withdrawal forms. The latter was then confronted with the said version and admitted it. In the same breath, Mrs. Bhoyjoo produced a resignation letter from the said C. Audit dated 28-10-2004 (Document J refers) wherein he admitted having committed irregularities for a total sum of 612, 350 rupees. Now, the handwriting of the said Audit in the said letter has also been recognised by his wife, the Accused (Document K refers) when the said letter was confronted to her by the ICAC officer, Mr. Koussa whilst recording her statement.

In any event, the fact that there had been a fraud committed at the said bank by the said C. Audit has not been disputed by the Defence. This is reflected by the line of defence adopted in the sense that there was no cross-examination to any of the witnesses of the said bank, so that it has been satisfactorily established as a matter of fact that Mr. C. Audit was responsible for the fraud of some 612, 350 rupees at the bank.

Thus, it is established beyond reasonable doubt that a sum of 612, 350 rupees was derived from a crime, which might be classified as forgery and making use of forged document.

I have to observe here that Counsel for the Defence laid emphasis on the fact that the provisional charge against Mr. C.Audit following police enquiry and his release on bail was subsequently struck out. This is reflected from his cross-examination of Ms. Kullootee.

However, the law has provided under **section 6(1) of FIAMA** that conviction of the person committing the predicate offence is not required. It reads:

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.

Under counts 2, 3, 4 and 5 respectively, the fact that Ivy Leathers company limited as represented by Mr. T. Malik has suffered a prejudice of a total sum of over 2 million rupees has never been challenged by the Defence. In fact, the line of cross-examination adopted as well as suggestions made to the said witness during his cross examination show clearly that it was admitted by the Defence that the company suffered such prejudice following Mr. C. Audit forging salary sheets and thereby inflating his salary.

This is so evident from the following question and suggestion during the cross-examination of Mr. Malik:

Q: I put it to you that, Mr. Malik, that you are out to settle score with the Accused as the wife of late Mr. Audit, her late husband who had defrauded you, do you agree?[2]

Q: …Mr. Malik, I put it to you that it is a fact that you had been defrauded and you have certain prejudice…[3]

Thus, the fact that there has been a crime committed by the late Chabeelall Audit to the prejudice of Ivy Leather Company limited from which a sum of over 2 million rupees was derived has also been proved beyond reasonable doubt.

2Â Transcript of proceedings 19-02-13, page 10.

3Â Ibid, page 25.

As already stated above, it matters not whether the crime has been specifically particularised. All that matters is that there are abundant evidence from which it may be reasonably inferred that ***'the property is, in whole or in part, directly or indirectly the proceeds of a Crime'*** under each of the five counts. This has been proved beyond reasonable doubt.

IN PART

The Prosecution has averred that the property under all five counts is partly represents the proceeds of crime. I fail to find any dispute as to this particular element of the offence under all five counts so that I find this element as well proved beyond reasonable doubt.

DIRECT

The main issue as regards the proceeds of the crime is whether the property is a direct proceeds of the crime and I will analyse this element of the offence as averred under all five counts, i.e., whether the property are in part direct proceeds of crime.

There cannot be any dispute that the proceeds of the crime under all five counts are sums of money. The Prosecution has chosen to aver that the property were direct proceeds of the crime as one of the elements of the offence under all five counts.

Now, the property as averred under counts 4 and 5 respectively are money found in two different bank accounts belonging to the Accused under count 4 and to her son under count 5 respectively. Therefore as regards, counts 4 and 5 respectively, I find that it has been established beyond reasonable doubt that the property were in part direct proceeds of the crime.

The issue arises as regards counts 1, 2 and 3 respectively. Under count 1, it has been averred that the property, to wit, a portion of land together with a house is in part the direct proceeds of the crime; under count 2, the car bearing no. 379 ZS 03 has been averred as part of direct proceeds of crime and under count 3, private car bearing no. 249 ZT 04 has been averred as being part of direct proceeds of crime.

Clearly, there is no evidence to the effect that the property under counts 1, 2 and 3 respectively directly represent the proceeds of crime. The evidence on record shows that the

property in question in part indirectly represented the proceeds of the crime since it is with part of the money so derived from the crime that the property in question were acquired.

Thus, they cannot be directly representing proceeds of crime under counts 1, 2 and 3.

The above depicts a situation whereby the evidence on record under counts 1, 2 and 3 respectively are in variance with the averment under the said counts in as much as the property do not directly represent the proceeds of crime as averred but in fact are indirect proceeds of crime.

The question that arises at this juncture is whether the Prosecution has failed to prove its case under counts 1, 2 and 3 respectively? Or, is it a situation where the Court can exercise its discretion to amend the said counts so as to meet the circumstances of this case under those counts as per evidence on record?

In **Bungaroo v The Queen 1975 SCJ 7**, the appellant was originally charged with 'having criminally and wilfully induced one Appayah Bungaroo alias Vassoo to falsely represent himself to be Seemadree Bungaroo'. The Prosecution moved to substitute the word 'allow' for that of 'induce'. The said motion was granted by the Court despite the objection from Defence that it would be tantamount to substituting another offence for the one originally charged in the information and this would cause injustice to his client, hence the ground of appeal.

The Supreme Court considered **section 73 of the District and Intermediate Courts (Criminal Jurisdiction) Act** and held the following after reviewing several local and English authorities on this issue:

It results from the above-quoted authorities that the Courts have very wide powers of amendment and that nothing short of prejudice that maybe caused to an accused party can prevent the amendment of a criminal information either by substituting an offence akin to the one originally charged or by adding a new count to an information or by making good any other defect of substance or form. However, the Court must be very careful to see to it that given the nature of the offence originally charged, the gist of the amendment applied for and the time at which such application is made, no prejudice will be likely to ensue to

the accused.

Thus, the power of amendment available to the Court is so wide that it can also substitute an offence akin to the one originally charged, and nothing except a prejudice can prevent such an amendment. It is observed here that under the first three counts, should the Court exercise its power to amend the information pursuant to **section 73 of the District and Intermediate Courts (Criminal Jurisdiction) Act**, it would do so as regards an offence which is akin to the one originally charged since the discrepancy lies only as regards whether the property represents directly or indirectly the proceeds of the crime.

In **Venkiah v The Queen 1984 SCJ 154**, the Supreme Court summarised the principles governing the issue of amendment as follows:

The basic principles involved, which may bear repetition, are that (a) an information may be defective, as distinct from being thoroughly bad (e.g. because it discloses no offence at all or is tainted with duplicity); (b) if the defect is of no consequence and the accused cannot have been misled in any way, there may not even be cause for amendment at all; (c) if the defect is material and there is any likelihood of prejudice, because the accused may have been misled into preparing and presenting a defence to a different set of circumstances or not presenting one at all, the information should be amended at the earliest opportunity and the accused must be given every opportunity, either by himself or through his Counsel, to object to the proposed amendment and, if it is made, to present his defence to the new charge, if necessary by the biais of an adjournment and to cross-examine the prosecution witness again or call other witnesses in his defence; (d) if there is or can be no likelihood of prejudice, more particularly if it is patent that the accused was all along fully aware of the real charge against him and has had every opportunity of saying what he had to say, there is no need or duty to amend the information for the purpose of enabling the accused to put forward a new defence, but there is simply a need and a duty to cure the defect in the information so that it discloses the proper offence and it can tally with the conviction.

Thus, there is only a duty to cure the defect so that the offence tallies with the evidence on record and therefore no likelihood of any prejudice to the Accused and the present case is

similar to the situation described under paragraph (d) of the above extract from Venkiah (supra).

The above authorities were again confirmed by the Supreme Court in **Rahiman v The State 2009 SCJ 340** where it held after affirming **Bungaroo (Supra)**:

We agree with the submissions made on behalf of the learned Director of Public Prosecutions that had the learned Magistrate properly considered the nature of the offence and the gist of the amendment applied for, she would have had no difficulty in finding that no prejudice could have possibly been caused to the appellant, although the motion for amendment was made after the defence had closed its case. Firstly, the amendment applied for did not seek to change the nature of the offence originally charged under section 333 of the Criminal Code; it sought to change the qualification in law of how the offence was committed. Secondly, the amendment applied for still relied on the same particulars of the offence viz. the remittance of funds by the fraudulent use of an automatic teller machine.

In the light of above, I therefore amend the information under counts 1, 2 and 3 respectively so as to delete the word 'directly' and substitute therefor by the word 'indirectly' to then read '…possession of a property which in part indirectly represented the proceeds of a crime' as well as delete the word 'directly' wherever it appears under those counts and substitute therefor by the word 'indirectly'. This amendment is made pursuant to powers under **section 73 of the District and Intermediate Courts (Criminal Jurisdiction) Act** and without any prejudice whatsoever to the Accused since the latter knew since day one the case she had to meet under all five counts.

REASONABLE GROUNDS TO SUSPECT

This Court will now consider whether the Prosecution has been able to prove whether the Accused had reasonable grounds for suspecting that the properties were derived in part indirectly from a crime under counts 1, 2 and 3 respectively and directly under counts 4 and 5 respectively.

It is here highly relevant to quote from **Antoine v The State 2009 SCJ 328** the following extract:

Since suspicion has to be based on facts, it is the duty of the Court to analyse the whole of the evidence on record in order to determine whether or not it can be inferred, from the facts and circumstances of the case, that the accused reasonably suspected that the proceeds were proceeds of crime.

As regards the element of suspicion, it is again useful to refer to **Antoine v The State (supra)** which gives a summary of what should really be understood from such an expression and which is as follows:

The mental element 'reasonable grounds to suspect' has been elaborated and explained in the Chambers case of Manraj and Others v ICAC 2003 SCJ 75. We find it apt to quote an extract of the Learned Judge's judgment, which we find appropriate and relevant. It reads as follows;-
……..First, the suspicion should be reasonable: King v Gardner (1979) 71 Cr. App. R. 13; Prince [1981] Crim. L. R. 638. Second reasonability should be gauged not from the personal point of view…….. It should be appreciated from the objective standard, the point of view of a dispassionate bystander: Inland Revenue Commissioners v Rossminster Ltd [1980] A.C. 952. Finally, and importantly, the suspicion should be based on facts: King v Gardner (supra); Prince (supra); Ware v Matthew February 11, 1981, 1978 W. No. 1780 (Lexis). The facts relied on should be such as are consistent with the implication of the suspect in the crime: Pedro v Diss [1981] 2 All ER 59, D.C.; [1981] Crim. L.R. 236."

The Supreme Court also explains the term 'reasonable grounds to suspect' in **Manraj and others v ICAC 2003 SCJ 75** and the relevant extract reads as follows:

The meaning of the term "reasonable suspicion" has been distilled from case-law and now reproduced as section 1.6. of Annex B of the Code of Practice for the Exercise of Police Officers: see Castorina v Chief Constable of Surrey 1988 NLJR 180, Court of Appeal;

Dallison v Caffery (1965) 1 QB 348, 371 and Wiltshire v Barrett (1966) 1 QB 312, 322; Murphy v Oxford (15 February 1988, unreported).

"Reasonable suspicion" must necessarily be grounded on facts:"Reasonable suspicion, in contrast to mere suspicion, must be founded on fact. There must be some concrete basis for the officer's belief, related to the individual person concerned, which can be considered and evaluated by an objective third person."

"Reasonable suspicion" must necessarily be distinguished from mere suspicion.

"Mere suspicion, in contrast, is a hunch or instinct which cannot be explained or justified to an objective observer."

"Reasonable suspicion" is no instinct, allows no guess, no sixth sense. It is scientific. It has to find support on facts, not equivocal facts but facts consistent with guilt. All that an investigatory authority may do with its hunches is keep the person under observation but it cannot act on it.

"An officer who had a hunch or instinct might well be justified in keeping the person under observation but additional grounds would be needed to bring suspicion to the level of reasonable suspicion."

…

Facts may point unequivocally to the view taken by the police or equivocally to that view. Where they point unequivocally, the suspicion is reasonable. Where they are equivocal, no coercive action may be taken by the Police until the facts become unequivocal.

I will now consider the facts under each count in order to decide whether the Accused had reasonable grounds to suspect that the property was derived in part indirectly from proceeds of crime under counts 1, 2 and 3 respectively as amended by Court and directly from proceeds of crime under counts 4 and 5 respectively.

Count 1

It is essential to bear in mind that the Prosecution has averred a date so that this Court has to decide whether on or about November 2003, there were such reasonable grounds to suspect.

I find the following facts relevant from her own statement (Document K refers). She stated therein that she did not believe that her husband was beneficiary of the fraud at the bank as she did not see anything in her possession which was worth that sum.

However, her belief cannot be taken to be a serious and genuine one in the light of the other facts. Her husband joined the bank in June 1995 as clerk with a salary of 4, 175 rupees and was promoted to Development officer with a salary of 12, 760. He resigned in October 2004 and at that time, he was earning a salary of 17, 470.

This is the only income he had. The Accused stated in her statement that she did not know how much her husband earned but still contributed to the family expenses which again she would not reveal the extent. I find that she cannot be believed since she knew with minute details the family expenses.

Now, her own income during the relevant period was never in excess of 10,000 rupees.

Yet it is during this relevant period that the husband acquired a land of 432 sq. metres at St. Antoine and immediately constructed a house.

The Accused knew that her husband bought the land for 450,000 rupees and the construction was subject of an agreement with one Mr. Provence for the price of 700,000 rupees. It is also highly relevant here to note that during the same period in April 2003, the couple formed a company called Mystic Solace which they later sold for 210,000 rupees from which one may reasonably deduce that at the time they acquired the company they should have surely made some expenses as well. Now, the land was bought late December 2002/ early January 2003 (Document B refers); the construction agreement on 27-05-2003 (Document M refers). Thus, during that short period of time and bearing the figures given by the Accused herself, their expenses were well above one million rupees.

Now could she have expected such types of acquisition at that time? Could she believe that whatever she has in her possession was commensurate with what the couple earned? The answer to a reasonable bystander is clearly in the negative.

This inference is further re-enforced when her explanations as to the source of income from which her husband made those expenses are carefully considered. She stated in her statement (Document K4 refers) that they bought the land together after selling their company, Mystic Solace, for 210,000 rupees and her husband had 200,000 rupees savings which they added with 40,000 rupees obtained from her husband's brother. However, when she was later confronted with the fact that the company was sold in 23-01-04, therefore after the purchase of the land (Document K1 refers), she agreed she lied and maintained that her husband had a savings of 200,000 rupees which they added to the 40,000 rupees obtained from her brother in law. It is also relevant to note that the brothers in laws deponed in Court and denied having given 40,000 rupees to Accused's husband to buy land. Moreover, she could not explain as to the source of the remaining sum of money which made up the purchase price of the land. So many inconsistencies in her explanations as to how they bought the land can only raise reasonable suspicion which the more so are based on facts as can be evidenced from the above.

As regards the construction of the house, there is the construction agreement (Document M refers) which shows that it was agreed that they would pay 700,000 rupees. She explained that her husband took a loan from DBM for the sum of 600,000 rupees, a fact which is confirmed from the bank. She then stated that the remaining sum of 100,000 rupees was given by her father (Document K4 refers). However, there is evidence from Mr. Provence that the construction finally cost 800,000 rupees. He also added that his contract did not include the interior fittings such as tiles, window openings and doors etc., which he believed was contracted by other persons. Accordingly, the cost of construction is much more than 800,000 rupees at any rate.

Thus, at the end of the day, it is clear from the facts on record and which was also available as at on or about November 2003, that the couple was in possession of a land and house which surely they could not account in the light of their legal financial means. This should have triggered the Accused to have reasonable grounds to suspect that how can a newlywed couple with no substantial financial means buy a land, build a house, form a company from such limited financial means. Judicial notice can be taken that purchase of a land and building of a house is a lifetime achievement which middle income earners take some years to realise. Here, we have such a couple which do not earn substantial salaries as at the relevant period and yet have already achieved such a project in a short period of time.

It is in the light of above that I find that no reasonable and objective bystander would believe the Accused when she stated she had nothing in her possession which would show her husband benefitted from a fraud. She was in possession of a well constructed modern house in a good area and this in itself is sufficient to have reasonable grounds to suspect that the said property was in part indirectly proceeds of a crime. This is the only reasonable inference.

I therefore find that the Prosecution has proved its case beyond reasonable doubt against the Accused under count 1 as amended by the Court so that I find Accused guilty as charged as amended under count 1.

Count 2

The property under count 2, i.e., the private car make Nissan March 379 ZS 03 was acquired on 30-01-2007 (Document D refers) hence the charge under count 2 that the Accused as at the said date.

The question arising here is whether she had reasonable grounds to suspect as at that date that the property was in part indirectly proceeds of crime.

She explained in her statement that her late husband gave her the said car as a gift (Document K4 refers). She also stated that the car was bought for 309,000 rupees whereas the car dealer, Mr. Emamboccus, stated in court that the car was sold for 345,000 rupees. She further stated that she did not know how her husband bought the car.

Now, are there any facts known to the Accused from which she could have reasonable grounds to suspect that the car was bought with tainted money?

She knew that following a problem at DBM, the said C.Audit resigned and subsequently got a job as secretary with a salary of 7, 500 rupees (Document K1 refers). She also stated that her husband subsequently earned 60,000 rupees monthly as salary. But, as per her own words, she made this inference after she saw a cheque of 60,000 rupees in March 2008, so that as at 31-01-2007, she did not know how much her husband was earning as at that

relevant date. But what she knew for real is that her late husband resigned in October 2004 and got another job in January 2005 and this is supported by other evidence on record namely from Mrs. Jokhoo of the bank as well as Mr. Malik, of Ivy Leathers co. ltd. The latter also confirmed that the highest salary ever earned by Mr. C.Audit was 20,000 rupees.

Furthermore, in her own words, she admitted that the total household expenses increased after the birth of their son to about 10,000 to 12,000 rupees (Document K refers). She did not take into account the monthly loan repayment whilst estimating the above.

Thus, in the light of the above, could a reasonable bystander reasonably accept that it is possible for a person earning between 7,500 rupees to 20,000 rupees with household expenses and a loan to pay every month to express his love to his wife by giving her a car valued at 345,000 rupees as gift?

Clearly, the answer would be in the negative and eye brows raised as to the source of such financial possibilities. Alarm bells should have been ringing loud in the ears of the Accused that surely her husband who had just faced problems at the bank and had just started another job with all the other expenses could not afford such generosity as at 31-01-07. She must surely have known that the car was bought by money derived from sources other than honest hard earned way.

In the light of above, I find that the facts of this case directs this Court to the only reasonable inference that the Accused had reasonable grounds to suspect that the car she got as gift on 31-01-2007 was derived from proceeds of crime.

I therefore find that the Prosecution has proved its case against the Accused under count 2 as amended by Court beyond reasonable doubt so that I find her guilty as charged under count 2 as amended by Court.

<u>Counts 3, 4 and 5 respectively</u>

The rest of the counts will depend largely on whether Mr. Malik is a credible witness as well as other facts as stated by the Accused in her statements. Thus, this Court will first assess the credibility of the main witness for the Prosecution under those counts in the light of what he

stated as well as his statements produced in Court, upon motion made by the Defence with a view to highlight his inconsistencies.

The Defence submitted that Mr. Malik cannot be believed since he proved to be inconsistent in Court as well as had an axe to grind. I will now refer to the main inconsistencies relied upon by the Defence.

First, there was the issue of the Judgment before the Supreme Court as regards the inscription of mortgage and the fact that the Court did not allow the said application due to lack of evidence implicating the Accused. In fact, the Supreme Court stated that there was no evidence adduced.

Be that as it may, Mr. Malik being a lay person cannot be asked as to why a Court has decided one way or the other. This clearly cannot prove inconsistency of a witness.

Next, he was cross-examined as to the salary of Accused's husband and confronted by a certificate under his own signature to the effect that the Accused's husband earned 65,000 rupees (Document AC refers) which is in contrast with what he stated earlier as regards the real salary of the said employee being 20,000 rupees. He explained himself that the Accused's husband came to see him and asked for a favour since he was having problem with ICAC and that his bank account has been subject of a freezing order. The Defence also relied on the cheque (Document AE refers) to buttress its submission that the witness could not be believed. The said cheque in effect showed a sum of 65,000 rupees.

However, when the numerous salary sheets are considered, particularly those in small character (Document V refers), I find that in fact at no time the Accused's husband perceived any such salary of 65,000 rupees so that I find the explanation given by the witness as being a genuine one that he was only helping Accused's husband who however again abused of his kindness.

Further, there is only one cheque showing such a sum so that logically one cannot have a certain salary for only one month. If he earned 65,000 rupees as salary, it would have been reflected as being his salary for the other months as well but it is not the case here.

Mr. Malik explained that the cheque represented the Accused's husband salary as well as an advance to the latter for the sum of 45,000 rupees. This is further confirmed by the memo produced (Document Z refers) which clearly states that the sum of 65,000 rupees represented wages for the month of March 2008 as well as an advance of 45,000 rupees. Furthermore, the Accused herself signed a memo acknowledging that the sum of 45,000 rupees had been returned to Mr. Malik (Document AA refers). Thus, if it was really the salary perceived by Accused's husband, there would have been no need to return 45,000 rupees.

The credibility of the witness was next attacked on the ground that he could not explain how he got the exact figure of the fraud in such a short period of time since his first statement to ICAC was on 08-04-08 and the second one dates 10-04-08. He himself admitted that the audit exercise took some time. Again, there is no inconsistency since it is confirmed by Ms. Kullootee that she contacted Mr. Malik prior to the statements being recorded and informed him the gist of the matter. Thus, it sheds light on the fact that the audit was made since then and not within two days.

Another attempted dent on his credibility was as regards the fact that he gave details in Court as to how the Accused removed cash from a bag whereas whilst giving his statement he did not state so. He explained that he was not asked about details; hence he did not give same. This definitely does not prevent him from revealing same in Court and in no way this can be viewed as coming with an improved version in Court.

Finally he was confronted with the fact that the Police was looking for him to give his version as regards a declaration reported by the Accused against him concerning alleged threats. He confirmed in Court that this was not the case.

Now, whilst it is true that such a declaration was reported and recorded by WPC Subron on 16-10-08, PS Jeetoo clarified that he met with Mr. Malik only once but the latter refused to give any statement. But, what is most crucial here is that PS Jeetoo confirmed that he met Mr. Malik in relation to the case of hanging of C. Audit and not for any alleged threats against the person of the Accused. He also confirmed Mr. Malik was only required to give a statement which would not be under warning. Thus, again, I do not find Mr. Malik to be inconsistent to the extent the Defence wanted to depict him. On the contrary, the Defence called witnesses to add credit to Mr. Malik.

The following extract from **Emambux v The State 2010 SCJ 304** summarises succinctly when inconsistencies affect fatally the version of a witness and it reads as follows:

As regards the inconsistencies, we bear in mind that "inconsistencies must … be measured by the yardstick of seriousness and materiality which must be linked with the overall issue of truthfulness. Not every inconsistency is serious and material and inconsistencies need not affect per se the appreciation by a trial Court that a particular witness's testimony is true" -Saman v State [2004 SCJ 3].

In the present case, it is admitted that the witness was inconsistent on some occasions but none of his inconsistencies were so serious and so material as to affect his overall truthfulness. He was in fact very candid and honest during his deposition and his only aim was to give his version of the facts without any distortion or bad faith. I therefore find that I can safely rely on his sworn version. I have even considered his unsworn statements which were produced upon motion by the Defence but again I did not find any matter which could affect his overall credibility and truthfulness.

Mr. Malik stated very clearly that the Accused was aware of all the fraud and even knew that money was being deposited on her account as well as in their son's from his company. She even told him not to report the matter to Police since needful would be done to return the money. I have no reason to doubt his words, the more so when I take into consideration other facts.

For instance, Mr. Malik also had the photocopy of Accused's National identity card (Documents Y1, Y2 refers). She even signed on the receipt showing that the sum of 45,000 rupees has been paid back to Mr. Malik (Document AA refers). She herself stated that Mr. Malik contacted her on her phone (Document K2 refers) so that the question arises how and why would Mr. Malik contact the Accused and not her husband and worst still why would she then come and meet him? If she really had nothing to do with the said problem or was not aware, she would not have responded and rather informed her husband that his employer was looking or even harassing her. She also wanted this Court to believe her that she did not ask Mr. Malik as to the nature of the problem since she was not concerned with it. Yet, she

readily mortgaged all her jewellery to get the sum of 45,000 rupees so as to return it to Mr. Malik.

All these facts only strengthen the words uttered by Mr. Malik as being a witness of truth and confirming that the Accused was aware throughout that her husband was involved in fraudulent actions at the company where he was working.

At the very least, as at 09-04-08, i.e., the date averred under counts 3, 4 and 5 respectively, she was aware and therefore had reasonable grounds to suspect that the property under counts 3, 4 and 5 respectively were in part derived from proceeds of crime.

In the light of above, I find that the Prosecution has proved its case against the Accused under count 3 as amended by Court as well as under counts 4 and 5 respectively. I therefore find Accused guilty as charged under count 3 as amended by Court as well as under counts 4 and 5 respectively.

Neerooa M.I.A (Mr.)
Magistrate, Intermediate Court.
This 25th February 2014.