**FCD CN: FR/L13/2022**

**IN THE INTERMEDIATE COURT OF MAURITIUS**
**(FINANCIAL CRIMES DIVISION)**

**In the matter of:**

**ICAC**

**V**

1. **Louis Julio Clayvio de BOUCHERVILLE**
2. **Jean Patrick BOTTEVEAUX**

## RULING

## A. Background

1. Accused no.1 is being prosecuted for Money Laundering offences (Counts 1-5) in breach of Sections 3 (1) (b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 (hereinafter referred to as the 'Act'). Accused no.2 is also being prosecuted for Money Laundering offences in breach of Sections 3 (1) (a), 6 and 8 of the Act. Both accused have pleaded not guilty and are represented by Counsel, Mr. U. Hurnauth and Mr. N. Dulloo respectively.

2. The case for the Prosecution was conducted by Mr. Nulliah, counsel for the ICAC.

3. During the examination in chief of CPL 6364 Budhoo, an officer deputed to represent the Commissioner of Police (Witness no.10), the prosecution sought to adduce a document emanating from the Crime Records Office representing the previous conviction of accused no.1. Mr. U. Hurnauth objected to the production of that document on the grounds that (i) CPL 6364 Budhoo was not posted at the Crime Records Office and (ii) that the production of such a document goes to the character of accused no.1 and is a course of action which is prejudicial to accused no.1. Mr. N. Dulloo joined the motion and further stated that it would be unfair and unconstitutional for the prosecution to adduce evidence of bad character of accused no.1.

4. The prosecution insisted on the production of that document and the matter was fixed for arguments.

5. Mr. Nulliah submitted that though previous convictions of an accused is per se inadmissible, money laundering is a specific offence whereby the prosecution does not have to prove a specific crime. The previous conviction is not being adduced as part of the bad character of accused but for the purpose of showing that in the circumstances such proceeds can only come from a crime.

6. On the other hand, Mr. N.Dulloo submitted that what the prosecution is seeking to do is to adduce bad character evidence of accused no.1 and that such a course of action is so irregular that it will taint the fairness of the trial. Mr. U. Hurnauth joined the submissions of Mr. N. Dulloo.

## B. Bad Character Evidence

7. Bad character evidence refers to past misconduct or misbehavior of an accused. As a rule, such evidence is not admissible since it carries with it the potential risk of tainting the mind of the fact finder when assessing the case against the accused. Indeed, bad character evidence may lead to the conclusion that the accused is a person likely, from his past criminal conduct or character, to have committed the offence for which he is being presently tried.

### I. The legal position in the UK

8. Evidence of bad character, in the UK, was initially governed by common law. As was described at paragraph 2.2 of the Report of the UK's Law Commission on Evidence of Bad Character in Criminal Proceedings of 2001 (hereinafter referred to as the "Report"):

> *"The prosecution may not, in general, adduce evidence of the defendant's bad character (other than that relating to the offence charged) nor of the defendant's propensity to act in a particular way even if relevant. This is a derogation from the general rule that all relevant evidence is admissible, and has been described as "one of the most deeply rooted and jealously guarded principles of our criminal law". There are two bases for this exclusion of evidence of bad character: it is often irrelevant in showing guilt; insofar as it is relevant, its prejudicial effect outweighs its probative value."*

9. The Report also recognized that there existed certain exceptions to that exclusionary rule which were:

(a) Section 1 of the Criminal Evidence Act 1898[1];

[1] Paragraph 2.43 of the Report.

(b) Similar fact evidence[2]; and
(c) Where the previous misconduct is an ingredient of the offence[3].

10. The recommendations of the Law Commission resulted in provisions being enacted in the UK's Criminal Justice Act 2003 in relation to evidence of bad character. Those statutory provisions have abolished the common law principles governing bad character evidence. Consequently, those common law principles are now no longer relevant in assessing the admissibility of bad character evidence under the UK's Criminal Justice Act 2003 – See **R v Platt [2016] EWCA Crim 4.**

## II. The Legal Position in Mauritius

11. In Mauritius, we have a similar prohibition against the admissibility of bad character evidence and the three exceptions that were previously applicable in the UK are still applicable here.

12. Indeed, Section 184 (2) (f) of the Courts Act bears striking similarity with the UK's section 1 of the Criminal Evidence Act 1898 and questions as to previous misconduct can be asked in certain circumstances whereby an accused has chosen to depose under oath.

13. As to the issue of similar fact evidence as an exception to the rule against the admissibility of bad character evidence, this was canvassed in **Ritta v The State [2015] SCJ 238** where it was held that:

> *"The established general rule in criminal cases is that it is not open to the prosecution to adduce evidence of bad character of the accused in any manner. Therefore, evidence may not be adduced that he has a bad reputation in the community in which he lives or of his previous misconduct or of conduct which shows or tend to show a disposition on his part to commit crime. If the evidence is inadvertently given, the least that can be done is for the Judge or Jury to disregard that evidence -vide Phipson on Evidence 1970 Edition page228, para. 525. Now, an exception to this general rule is in respect of similar fact evidence where evidence showing the bad character of the accused may be admissible. The test for such evidence to be admissible is based on the degree of relevance of that evidence to the case. The evidence is not admissible if it only suggests that the accused might have committed the offence -vide Blackstone's Criminal Practice 2001 Edition pages 2143-2144, para. F12.4."*

[2] Paragraph 2.4 of the Report.
[3] Paragraph 2.3 of the Report.

14. With respect to the third exception, in **Madelon and Anor v The State [2009] SCJ 208**, the Court of Criminal Appeal took the view that:

> *"However, the Judicial Committee of the Privy Council has, in the case of* ***Sabapathee*** *referred to above, made a distinction between two types of aggravating circumstances – those which are intrinsic to the offence charged and accordingly must be averred and proved and those which are external to the offence charged ...*
>
> *It is clear from the above underlined passage of the judgment that an aggravation which is constituted only by the existence of a previous conviction is an aggravation of a kind which does not form part of the facts which need to be proved to establish the guilt of the offence charged but is rather one which is independent of those facts and is to be established only after conviction and at the stage when the court is considering the sentence to be passed ...*
>
> *This is not to say that the previous conviction of an accused party should indiscriminately not be averred in all cases. Thus an information may contain a reference to a previous conviction if the fact of such conviction is an associated element of the offence charged. An instance of such an information would be one charging an accused party with an offence under section 34(1) of the Firearms Act 2006 which reads as follows –*
>
> > *34. Prohibition on person convicted of crime (1) A person who has been sentenced to penal servitude or to imprisonment for a term of 3 months or more for any crime shall not at any time during a period not exceeding 5 years from the date of his release, have a firearm or ammunition in his possession.*
>
> *The previous conviction contemplated here forms part of the facts which constitute the offence. Likewise with the offence of driving whilst under disqualification: the fact that the accused has already been convicted of a driving offence and has been disqualified is an associated element of the offence."* (Underlining is mine)

15. However, their Lordships in **Madelon (supra)** also made certain observations in relation to the unnecessary averment of previous convictions during the trial:

> *"As indicated above, in the present case not only has there been the wrongful admission of the evidence of the previous conviction against the first and third*

*appellants but more importantly there has been the irregular averment of the previous conviction in the information itself. Had this Court been dealing with a case of wrongful admission of undoubtedly prejudicial evidence only, the Court could have, pursuant to the powers laid down in section 6(1)(b) of the Criminal Appeal Act, dismissed the appeal if it considered that no miscarriage of justice had occurred, especially in view of the overwhelming nature of the evidence against both the first and third appellants and the manner in which the learned trial Judge elaborately analysed the evidence without any sign of any prejudice in favour of or against any of the appellants and made her determination in the typical manner in which a professional Judge is adept, by training and experience, at reaching decisions by an objective appraisal of facts.*

*However, the unnecessary averment of the previous conviction itself in the information is a gross irregularity which flies in the face of section 10 of the Constitution and renders the conviction of the first and third appellants unsafe. In the circumstances we are unable to say that the first and third appellants have had a fair trial. Having come to that conclusion, we need not be concerned with the strength or otherwise of the evidence against them."*

16. It follows from the reasoning in **Madelon (Supra)** that where the previous conviction is not an associated element of the offence, same should not be averred in the information and same should not be adduced by the prosecution as part of their case. In the event that such previous conviction is before the Court, this would potentially lead to a serious irregularity rendering the trial unfair under section 10 of the Constitution.

## C. <u>Analysis</u>

17. The contention of the prosecution is that the previous conviction sought to be adduced does not amount to bad character evidence and should accordingly be admissible to prove the tainted origin of the proceeds. On the other hand, the contention of the defence is that such previous conviction amounts to bad character evidence and its admission would invariably lead to an unfair trial.

18. In the present case, there has also been an averment, in relation to the previous conviction of accused no.1, in the list of witnesses as follows:

*"10. Commissioner of Police, Line Barracks, Port Louis to an Officer to produce: (1). Document dated 23.04.2015, Re: Previous Conviction of Louis Julio Clayvio DE BOUCHERVILLE, &...."*

19. It is also undisputed that the issue of producing the previous conviction of accused no.1 does neither fall under the exception provided for by section 184 (2) (f) of the Courts Act nor under similar fact evidence.

20. Section 3 (1) of the Act provides:

> *"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 realized, in whole or in part, directly or indirectly from any crime, shall commit an offence."* (Underlining is mine)

21. Section 6 (1) of the Act provides:

> *"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."* (Underlining is mine)

22. A reading of section 3 (1) of the Act shows that one of the elements of the offence which the prosecution has to prove is that the proceeds must necessarily be as a result of any crime. But this has to be read together with section 6 (1) of the Act which, in effect, provides that 'any crime' specified in section 3 (1) of the Act need not necessarily be a crime for which accused has already been convicted of. In other words, whether or not accused has been convicted for the predicate offence which the prosecution believes has generated the proceeds is not a pre-condition for someone to be prosecuted for money laundering under section 3 (1) of the Act.

23. As the Judicial Committee of the Privy Council held in the landmark case of **DPP v Bholah [2011] UKPC 44**:

> *"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."* (Underlining is mine)

24. Indeed, what the prosecution has to prove, amongst others, is that the property possessed, concealed, disguised or transferred were proceeds of a criminal activity without having to specify and prove any particular crime since the proof of a particular crime is not an essential element of the offence.

25. In supporting their contention that the previous conviction of an accused may be produced, the prosecution has relied on the case of **Ferrell v The Queen [2010] UKPC 20**. The prosecution submitted since previous conviction was admitted in that case to prove money laundering, the same approach should be adopted by this Court in the present case. Unfortunately, the reasoning in that case cannot be relied upon by the Court for the following reasons:

    i. in that case, appellant was prosecuted and convicted, amongst others, of nine counts of concealing or transferring the proceeds of drug trafficking in breach of the then section 54 (1)(a) of the Drug Trafficking Offences Act 1995 of Gibraltar;

    ii. their Lordships, only for ease of reference, referred to those counts as the 'money laundering counts[4];

    iii. the then section 54 (1) of the Drug Trafficking Offences Act 1995 of Gibraltar was worded as follows:

[4] **Ferrell v The Queen [2010] UKPC 20** at paragraph 5.

*"**Concealing or transferring proceeds of drug trafficking.***

*54. (1) A person is guilty of an offence if he -*

*(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of drug trafficking, or*

*(b) converts or transfers that property or removes it from the jurisdiction, for the purpose of avoiding prosecution for a drug trafficking offence or the making or enforcement in his case of a confiscation order."* (Underlining is mine)

iv. clearly under that section, the prosecution had to prove that the proceeds were the personal proceeds of accused derived from the specific offence of drug trafficking. In that respect, using the conviction for drug trafficking was essential since same was clearly and directly an associated element of the offence; and

v. this section bears absolutely no similarity with our section 3 (1) of the Act.

26. Now, the proposition by the defence that since proof of a particular crime is not an essential element of the offence of money laundering in Mauritius, this debars the prosecution from adducing, as evidence, the previous conviction of an accused as an exception to bad character evidence, appears at first sight appealing but nevertheless cannot stand for the reasons to follow.

27. Though it is undisputed that proof of a particular crime is not an essential element of the offence of money laundering, the interpretation adopted by the Judicial Committee of the Privy Council in **Bholah (supra)** shows that the prosecution, nevertheless, has the legal burden of proving that the proceeds come from any crime, whereby any crime has been given a wide interpretation, equating it to any criminal activity.

28. What amounts to a criminal activity has been described in the case of **R v Anwoir [2009] 1 WLR 980**:

*"We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown may prove that 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."*

29. Indeed, 'any criminal activity' is interpreted very broadly and this understandably because the intention of the legislator here is to facilitate, as much as possible, the prosecution of money laundering offences and placing a lesser onus, in terms of evidential burden, on the prosecution by not limiting 'any crime' as an offence for which the accused has already been convicted for. It suffices for the prosecution to show that the proceeds are from a criminal activity, which itself does not require a conviction for the predicate offence.

30. If section 6 (1) of the Act allows the prosecution of money laundering offences despite the non-existence of a previous conviction for the predicate offence whereby the prosecution has only to prove that the proceeds come from any criminal activity, it would be preposterous for the Court to automatically debar the prosecution from adducing the previous conviction for the predicate crime which the prosecution believes has generated the proceeds. Here, the previous conviction would potentially be one of the relevant circumstances showing the existence of such criminal activity from which the proceeds are derived from.

31. As such, the previous conviction is not sought to be adduced for the purpose of attacking the character of the accused or his credibility but instead to prove one of the essential elements of the offence which is that the proceeds are derived from any criminal activity.

32. However, the Court being wary of the possible dangers attached to the presence of previous conviction(s) before it, will not de facto allow its production unless:

    a. the prosecution has laid the proper evidential foundation as to why such previous conviction is sought to be adduced. In other words, the relevance of that previous conviction, a priori, must be established so that the Court can properly assess whether such previous conviction would be admissible in those circumstances. As Lord Simon of Glaisdale stated in **DPP v Kilbourne [1973] 1 All ER 440**:

> *'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof...relevant...evidence is evidence which makes the matter which requires proof more or less probable.'*

Furthermore, as was held in **R v Randall [2004] 1 ALL ER 467**:

> *A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue. The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience (see Keane The Modern Law of Evidence, (5th edn, 2000) p 20).*

b. the prosecution has ensured that not all the previous convictions of the accused are sought to be produced. Only the previous conviction(s) which is relevant to the fact in issue, i.e., whether the proceeds come from any criminal activity, must be sought to be produced; and

c. more importantly, the Court will ultimately need to assess whether the probative value of the previous conviction(s) sought to be adduced outweighs its prejudicial effect. The Court will only be in position to make such an assessment if the prosecution has adduced sufficient evidence to show the relationship, in terms of relevance, between the proposed evidence of previous conviction(s) and the proceeds forming part of the current charges before the Court.

33. Indeed, the prosecution satisfying the above conditions would render the potential risks associated with the production of such previous conviction(s) non-existent and will ensure that the sanctity of a fair trial is all throughout maintained.

## D. Conclusion

34. In view of the above, the prosecution seeking to adduce the previous conviction of an accused to prove a charge of money laundering under section 3 (1) of the Act is not per se inadmissible provided the conditions specified above are satisfied.

35. However, given the evidence that is before the Court in the present case, in terms of the witnesses who have already deposed, the prosecution has not laid the proper evidential foundation for the production of such previous conviction relating to accused no.1.

36. Indeed, there is no sufficient evidence showing the relevance between the production of such previous conviction and the proceeds forming part of the different charges before the Court.

37. Accordingly, the motion of the prosecution seeking to produce the previous conviction of accused no.1, at this stage, is not acceded to and is accordingly set aside.

**A.R.TAJOODEEN**
**Ag Magistrate of the Intermediate Court (Financial Crimes Division)**
**06.03.2023**