ICAC v S. G. BRIAND

2019 INT 129

CN 114/2015

THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

The Independent Commission Against Corruption

V

BRIAND Gerard Stephane

JUDGMENT

The accused stands charged in respect of **Counts 1, 2, 3, 5, 6, 8, 10, 12, 14 and 16** with wilfully, unlawfully and criminally making a payment in cash in excess of 350,000 rupees in breach of **Sections 5(1) and 8 of The Financial Intelligence and Anti-Money Laundering Act 2002.**

He is further charged in respect of **Counts 4, 7, 9, 11, 13 and 15** with willfully, unlawfully and criminally accepting a payment in cash in excess of 350,000 rupees in breach of **Sections 5(1) and 8 of The Financial Intelligence and Anti-Money Laundering Act 2002.**

He was represented by Mr S. Lallah, SC.

Miss Bissoonauthsing appeared for the prosecution.

The case for the prosecution rested mainly upon the sole testimony of Chief Investigator Seeruthun who read and produced the statement which he recorded from the accused. He also produced various saving deposit vouchers, debit vouchers, swift transfer forms and other documents in respect of each count (**Documents B to B15 and Documents C and C1**).

The case concerns various deposits and withdrawals made by the accused from the period 17th of June 2002 to 27th of May 2004 at the Hong Kong and Shanghai Banking Corporation Ltd (The HSBC), The Mauritius Commercial Bank Ltd (The MCB) and The State Bank of Mauritius (The SBM). The various deposit vouchers and withdrawal forms produced by the prosecution proved conclusively that such deposits and withdrawals were made. It is not disputed by the accused that those deposits and withdrawals were made by him and the amount exceeded 350,000 rupees. The particulars are as follows:

- With regard to **Counts 1, 2, 3, 5, 6, 8, 10, 12, 14 and 16**

- On the 17th of June 2002, he made a cash deposit of Rs 380,000 in his Savings Account at the HSBC

- On the 6th of September 2002, he made a cash deposit of Rs 500,000 in the same account at the HSBC.

- On the 14th of February 2003, he made a cash deposit of Rs 400,000 in his Savings Account at the MCB.

- On the 24th of April 2003, he made a cash deposit of Rs 2,919,650 in his Savings Account at the MCB.

- On the 12th of June 2003, he made a cash deposit of Rs 963,825 in his Savings Account at the MCB.

- On the 23rd of October 2003, he made a cash deposit of Rs 983,022.20 in his Savings Account at the MCB.

- On the 3rd of December 2003, he made a cash deposit of Rs 494,919.80 in his Savings Account at the MCB.

- On the 3rd of December 2003, he made a cash deposit of Rs 990,219.80 in another Savings Account at the MCB.

- On the 7th of May 2004, he made a cash deposit of Rs 1,669,616 in his Savings Account at the MCB.

- On the 27th of May 2004, he made a cash deposit of Rs 1,000,200 in his Savings Account at the MCB.

- With regard to **Counts 4, 7, 9, 11, 13 and 15**

- On the 24th of April 2003, he accepted a payment of Rs 2,919,658 in cash from the SBM.

- On the 23rd of October 2003, he accepted a payment of Rs 983,022.20 in cash from the SBM.

- On the 3rd of December 2003, he accepted a payment of Rs 494,919.80 in cash from the SBM.

- On the 3rd of December 2003, he accepted a payment of Rs 990,219.80 in cash from the SBM.

- On the 7th of May 2004, he accepted a payment of Rs 1,669,616 in cash from the SBM.

- On the 27th of May 2004, he accepted a payment of Rs 1,000,200 in cash from the SBM.

<u>The version of accused as to background and circumstances of payments</u>

The accused is French and came to Mauritius in the year 1992/1993 in company of his parents to invest in the country. With his father, he created their first company here, Briand Ebony and Rosewood Co Ltee, dealing with importation and exportation of woods. In 2001, the company was dissolved and he invested all the money in Briand Ebony Co Ltee. The company has an account at the Banque des Mascareignes. On the 15th of July 2004, he opened three different accounts at the SBM. Prior to that the company had an account with the MCB to deal with local expenses. In 2007, he received his Mauritian citizenship and created various other companies.

He stated that he gets no salary as director, but only receives dividends as shareholder, all being made by bank transfer.

He is the sole heir to the family wealth, found in Switzerland. His parents were dealing in fur. They brought 100,000 Euros in 1992 for the initial investment.

All payments are made by bank transfer. He also often buys land at the Master's Court and his company holds various land bought therefrom.

At the material times, he or his company did not hold any account with the SBM, nor the HSBC.

He explained that the money which was transferred to the SBM, was either from his own account or from his mother's account, in Switzerland and were in Euros. He then withdrew the money in cash and deposited it in his own account at the MCB. He did so for three reasons: firstly, the SBM gave him a better rate than the MCB and this is why the money was transferred (by swift transfer) to SBM. Secondly, he did not want to pay bank charges for the transfer to MCB. And thirdly, an office cheque would have taken three days to be cleared and he would not have received interests for these three days.

He has revealed the source of funds to the MCB, but none of the bank informed that he could not do any transaction above 350,000 rupees.

Case for the defence

The defence called Mr Ashraf Ramtoolah, accountant at SGG Global Administrators (Mauritius) Ltd and produced a statement of account of Briand Ebony & Co Ltd with regard to the profits for the year 2002 to 2013, totalling some 3 million euros. The purpose being that the defence wants to show that the accused is a man who got money from official work.

Several other bank officers were called to produce vouchers concerning the transactions made by the accused on the relevant days and the procedures to be followed before payment is made in cash. Mr Loganaden, Bank Supervisor of the SBM confirmed that he knew the accused and he was a customer of the Bank. When he had to make an inward remittance, he contacted a superior to get a better rate and then the transfer is being effected. He then goes to the counter to issue a debit advice to encash the amount, which was converted into Mauritian Rupees. The Bank has accepted to perform the transactions since it believed that they were exempt transactions.

The law and the amendment brought

The section of law applicable at the material time is the Financial Intelligence and Anti Money Laundering Act 2002 (The Act). There has been various amendment since. The FIAMLA was preceded by the Economic Crime and Anti Money Laundering ACT (ECAMLA), which was repealed by the FIAMLA in 2002. The 2002 Act took effect on 10th of June 2002. The ECAMLA had similar provision with regard to limitation of payment and definition of exempt transaction.

In view of the fact that the impugned transactions took place during the period 2002 to 2004, the threshold for transactions in cash as well as the definition of exempt transaction prior to the amendments of 2006 and 2013 shall apply.

Section 5 of the Act reads:

"*5. **Limitation of payment in cash***

(1) Notwithstanding section 37 of the Bank of Mauritius Act 2004, but subject to subsection (2), any person who makes or accepts any payment in cash in excess of 350,000 rupees or an equivalent amount in foreign currency, or such amount as may be prescribed, shall commit an offence.

(2) Subsection (1) shall not apply to an exempt transaction."

Section 2 of the Act at the material time gave the definition of exempt transaction as a transaction:

"(a) between the Bank of Mauritius and any other person;

(b) between a bank and another bank;

(c) between a bank and a financial institution;

(d) between a bank or a financial institution and a customer where –

(i) the customer is, at the time the transaction takes place, an established customer of the bank or financial institution; and
(ii) the transaction consists of a deposit into, or withdrawal from, an account maintained by the Customer with the bank or financial institution,
where the transaction does not exceed an amount that is commensurate with the lawful business activities of the customer; or

(e) between such other persons as may be prescribed."

Submissions of respective counsel

Miss Bissoonauthsing gave an outline of the evolution of the law and cited the relevant section applicable at the material time before it was amended in 2013.

She referred to **Meeajun v The State 2011 SCJ 141** with regard to the elements of the offence. She quoted the case of **Beezadhur v The ICAC 2013 PRV 83** on the meaning of business activities and the burden of proof applicable thereof.

She submitted that the evidence on record in respect of the counts pertaining to the State Bank reveal that the accused was not an established client of the bank in as much as he did not have any account there. With regards to the other counts, she submitted that there has been no evidence to the effect that the payment was commensurate with the lawful business activities of the Accused.

Mr Lallah SC referred to the Debate of the National Assembly of the 4th of February 2002 when the relevant bills (The Prevention of Corruption Bill and the Financial Intelligence and Money Laundering Bill) were read for the second time. The whole object of the bills was to fight corruption. He referred to the speech of the Minister of Finance who mentioned that banks, financial institutions, accountants and lawyers should not accept deposits in banks, or bank transfers or payment of fees. What he meant was that if the banks, financial institutions, accountants and lawyers suspected that the money being deposited or fees paid were the proceeds of a fraudulent transaction then they should report same to the Financial Intelligence Unit for further investigation. It imposed a duty to report a fraudulent transaction.

He submitted that the prosecution has admitted the reasoning behind the withdrawal from the SBM and the deposit at the MCB, being to save on chares and costs and these are exempt transactions within the purview of Section 5(1) of the FIAMLA. There is furthermore, he went on to add, no evidence that the money was proceeds of crime or some corrupt transaction or even that they were suspicious transactions.

He added that it was very clear that the ICAC enquiry was not properly conducted. If there was any suspicious transaction the ICAC should have referred the matter to the Financial Intelligence Unit for further investigation.

Learned senior counsel also referred to the definition of payment from the Oxford English Dictionary and found that deposits and withdrawals cannot be regarded as payment. There has therefore been no payment made by the accused.

Exempt transaction

It seems that the submission of the defence is that since the source of the money was not tainted, the transactions were exempt ones.

It is not in issue that the money which have been withdrawn and deposited is not proceeds of suspicious transactions. The issue is whether the transactions fall within the definition of exempt transactions as provided for by Section 2. The defence did not qualify the subsection under which it is relying to say that the transaction is an exempt one.

Several requirements have to be satisfied for a transaction to be an exempt transaction. But of relevance here is subsection (d), where the transaction is between a bank and a customer, where (i) the customer was at the time of the transaction, an established customer of the bank and (ii) the transaction consists of a deposit into, or withdrawal from, an account

maintained by the customer with the bank; in both cases where the transaction does not exceed an amount that is commensurate with the lawful business activities of the customer.

It is not disputed that all cash deposits made by the accused at the several banks in respect of Counts 1, 2, 3, 5, 6, 8, 10, 12, 14 and 16, were made into an account maintained by him with bank so that they fall within subsection (d)(ii). With regards to the other remaining counts, the issue to be determined is whether the accused was an established customer of the SBM, from which he accepted several payments in cash. It can be gathered from the testimony of Mr Loganaden of the SBM, that the accused negotiated a better rate with the Bank despite that he held no account with them. There were several transactions spanning over months. He described the accused as a "customer" of the Bank.

It can be concluded from such circumstances that at the time of the transactions, the accused was an established customer of the SBM, so as to falls within subsection (d)(i).

Lawful business Activities

For a transaction to be an exempt one, it is imperative that the transaction does not exceed an amount which is commensurate with the lawful business activities of the customer.

The Law Lords in **Beezadhur v The ICAC 2013 PRV** construed the words "business activities" as follows:

"*22. The wording of the exemption must be looked at as a whole. It is concerned with "business activities" not just business in a loose general sense. Furthermore the emphasis is, not so much on the business activities as such, as on the nature and amount of the cash transactions, which must be "commensurate" with the activities of that business. This tends to support the Supreme Court's view that the exemption is directed at businesses, typically in the retail trade, in which substantial cash transactions are a routine activity and provide an appropriate comparison for the transactions in issue.*

23. Nothing in the background or purposes of the statute calls for a wider interpretation. Strict
control of cash transactions was clearly seen as an important part of the strategy for countering financial abuse. The exemptions were narrowly defined, being directed principally at transactions under the control of the central bank, or between recognised banks and financial institutions. The last category extends the exemption more widely, while still subject to some control by the banks, but it is not surprising to find it limited to businesses with a pattern of cash transactions, as opposed to the public at large."

The burden of proof

The Privy Council in **Beezadhur** went on to conclude that the burden was on the accused to show that the transaction was within one of the exempt transaction:

"*36. In agreement with the Supreme Court in the cases to which reference has been made, the Board reads section 10(11) (a) as intended to give constitutional effect to the common law principle enunciated in cases such as R v Edwards. It applies whenever the relevant law ("the law in question"), interpreted in the light of that principle, has the effect of placing the burden of proof on the defendant. If that effect is clear from the form of the provision in issue, it does not need to be spelt out in express terms. In the present case, the structure and*

content of the statutory offence and of the specific exemptions are in the Board's view clearly designed to bring into play the Edwards principle. The Supreme Court was right to hold that, in accordance with section 10(11) (a), it was for the defendant to show that the transaction was within one of the exempt categories."

The Board went on to add that *"…Exclusivity of knowledge, as such, is not an essential requirement for the application of the exception. The important issue is –*

"the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access." (R v Johnstone [2003] 1 WLR 1736 para 50 per Lord Nicholls).

This clearly applies to the customers' knowledge of his status as an established customer of a bank, of the nature and purpose of his own cash transactions, and of whether they were commensurate with his lawful activities in general. It is not affected by the possibility that the prosecuting authority may be able to obtain some of the information indirectly by a court order for disclosure of bank records."

Similarly, in the present case, the burden was on the accused to show that the amount withdrawn and deposited did not exceed an amount which is commensurate with his lawful business activities.

An attempt was made to show that the transactions were part of the business transaction of the accused when Mr Ramtoola from SGG Global Administrators produced the statement of accounts of Briand Ebony & Co Ltd for the financial years ended 2002 to 2013. That was only it. The accused gave no evidence as to whether the money withdrawn and deposited under each count related to his business. In his statement to the police, he explained that the money came from his own account and that of his mother, in Switzerland and were in Euros.

When he deposed in court, the accused agreed that he made two deposits at the HSBC (Counts 1 and 2), and all other deposits were made at the MCB. He is someone well know and the banks practically did not question the provenance of funds, since he had followed all the procedures. He revealed that the payments were personal to him. With regard to the two deposits made at the HSBC, he stated that the money came from his savings, money which was meant to be spent, but was ultimately not spent: "*Bon, vous savez quand on a un certain train de vie, on a forcément des sous qui, de temps en temps, en économie, qu'on a retiré encore. Une fois qu'on a économisé un p'tit peu, tout d'un coup on s'imagine qu'il en a un peu trop dans la maison, on vient le déposer à la banque…"*

When a further question was put to him as to whether the money transferred from abroad was meant for his business, he stated that at some point in time, he has to bring money as investor to start his business, but gave no detail as to the nature and purpose of each of his own cash transactions. The sparse reference made to his business is far from the requirement of the burden of proof placed upon him to show that the transactions were commensurate with his lawful business activities. The court also takes note of the frequency with which the transactions were made, the amount of money involved and the fact that money was transferred into his personal account. No explanation was forthcoming as to how it was commensurate with his business activity.

Furthermore, the accused has been in Mauritius since 1992/1993, doing business in various areas. The previous legislation (ECAMLA) had similar provision as the FIAMLA before the amendment in 2002. He cannot plead ignorance of law.

With regard to mens rea, it is more than self- evident. The accused knew that he was carrying money (rather large amounts and even accompanied by bodyguards) and not on one but on various occasions. The money was transferred from abroad, sometimes into his account at Banque Des Mascareignes, through the SBM, to his account at the MCB, to enable him to save on charges. Even if he was depositing the money to another bank as soon the money was withdrawn from one bank, he knew the risks of carrying so much cash with him.

The same issue was addressed in the case of **Meeajun v The state**, where the Supreme Court laid down certain questions, all relevant to the present case:

"*But the facts show his mens rea as indicated above. One also wonders whether a person who says he has raised his business from rags to riches in a jurisdiction like United Kingdom where paper money is an exception rather than the rule especially in carrying out monetary transactions and transfers between jurisdictions the conduct of his affairs should not know of the sheer number of risks, including legal, involved in carrying so much of cash on his person from one jurisdiction to another and from place to place in each jurisdiction. Why would he want to do that when there are so many other safer and more secure ways of making transfers between the two jurisdictions which adopt open monetary policies*."

Payment

The issue is whether there has been "*payments*" in cash by the accused, which would constitute an offence in breach of Section 5(1) of the Act. In the submission of the defence, deposits and withdrawals cannot amount to payment.

The Supreme Court in **ICAC v Saumtally A.S. 2016 SCJ 47**, stated that although there are many instances where the Courts have referred to dictionaries for guidance in order to ascertain the meaning of words used in their ordinary or grammatical sense, the paramount object in statutory interpretation is to arrive at the legislative intention. An enactment has the legal meaning taken to be intended by the legislator. In other words, the legal meaning corresponds to the legislator's intention.

The Supreme Court went on:

"*The legal meaning of the word "payment" must be determined in the context in which the word is used in section 5(1) of the Act, which would include the policy and object of the legislation, and more particularly the mischief which Parliament intended to repress, as has been authoritatively laid down in* ***Beezadhur v the Independent Commission Against Corruption*** *[2014] UKPC 27. In interpreting the Act, the Judicial Committee of the Privy Council laid stress on the need for "cash transactions" to be closely monitored and controlled in order to combat economic crime and money laundering. It endorsed the following statement made by the Supreme Court in* ***Abongo v The State*** [2009 SCJ 81] *and cited in part in* ***Meeajun v State*** [2011 SCJ 141]*:*

"[The 2002 Act was meant] essentially for the purpose of combating money laundering offences which had the potential of adversely affecting the social and economic set up, both at national and international level to such an extent that they may constitute serious threats not only to the financial system but also to national security, the rule of law and the democratic roots of society. By enacting sections 5, 6 and 8 of the Act, the policy of the legislator was clearly designed to achieve the compelling objective of safeguarding the national and international financial system against any disruptive intrusion which may be caused by the perpetrators of certain criminal activities …" ***[para. 8].***

"Strict control of cash transactions was clearly seen as an important part of the strategy for countering financial abuse. The exemptions were narrowly defined, being directed principally at transactions under the control of the control bank, or between recognised banks and financial institutions."

Referring to the Debate of National Assembly on the one hand, which was mentioned by the defence in its submission, more precisely the speech of the Minister of Finance who stated that banks, financial institutions, accountants and lawyers should not accept deposits in banks, or bank transfers or payment of fees and on the other hand to definition of exempt transaction provided for in Section 2, it is clear that payment includes any transaction in cash with the Bank.

There is finally no need to prove that the money which is the subject matter of the cash transaction comes from a suspicious source although this is a factor which may have a strong bearing on sentence.

For all above reasons, the court holds that the prosecution has proved its case beyond reasonable doubt. The accused has failed to discharge the burden laid on him to show that the transactions fell within the definition of exempt transactions.

The court consequently finds the accused guilty as charged in respect of all counts.

B.R.Jannoo- Jaunbocus (Mrs.)
Magistrate
Intermediate Court (Criminal Division)
This 27th June 2019.