**1FCD CN: FR/L83/2020**

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

**In the matter of:**

**ICAC**

**V**

**Sunil Dutt KISSOONAH**

**RULING**

## A. BACKGROUND

1. Accused is being prosecuted for Money Laundering offences (27 Counts) in breach of Sections 3(1)(a), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002. He has pleaded not guilty and is represented by Counsel, Mr. G. Glover, SC, appearing together with Mr. L. Balancy. Mr. L. Balancy conducted the case for the Accused.

2. Miss Ramsooroop conducted the case for the Prosecution on behalf of the ICAC.

3. During the testimony of Mr. Danirow Bhiwajee (witness No.6), now Acting Manager at the DBM, Mr. L. Balancy objected to the production of 178 query payments which the prosecution sought to produce but which have not been confronted to accused at enquiry stage. For ease of reference, a list of those 178 query payments was produced – Doc AUU refers.

4. For the purposes of the arguments, CI Aleear (witness no.1) was called by the prosecution. He explained that as per Doc HH and JJ, accused was informed of the allegations and charges against him, i.e., money laundering offences. He also informed accused that he had made several cash and cheque transactions and showed him 25 documents in that respect. As per Doc AA, accused stated that he will neither give any statement nor answer any question in connection with the present case. CI Aleear (witness no.1) was also referred to Doc ATT which had been produced by Mr. Danirow Bhiwajee (witness No.6). He explained that this document was obtained from the DBM by way of disclosure order and shows the loan account of one Jeeawan Mahendranath. The document, amongst others, contains the username used by officers of the DBM to make transactions on this loan account together with its different dates. According to ICAC investigation, it was accused who used the usernames KSunil, FLBACKUP and FLCASH01 to access several loan accounts at the DBM to back date

transactions. The 178 query payments mentioned in Doc AUU would be of a similar nature as the one in Doc ATT. CI Aleear (witness no.1) however conceded that none of those 178 query payments have been confronted to accused during the enquiry.

## B. THE SUBMISSIONS

5. Mr. L. Balancy submitted that those 178 query payments, as listed in Doc AUU, amount to incriminating evidence. As such, they should have been confronted to accused during the enquiry to give him an opportunity to provide any explanation, if he so wished, as regards those 178 query payments. He also submitted that, in the present case, the prejudicial effect of those 178 query payments outweighs its probative value and should therefore not be admitted.

6. Miss Ramsooroop, on the other hand, submitted that Mr. Danirow Bhiwajee (witness No.6) has already deposed as to the investigation at the level of the DBM into a fraud case whereby transactions were backdated. She submitted that it is on record that the usernames Ksunil, FLBACKUP and FLCASH01 were used to access the computer system of the DBM to backdate transactions. She also submitted that it is on record that the username Ksunil was attributed to accused whilst the other two usernames were attributed to other officers at the DBM. According to her submissions, the prosecution is seeking to produce these query payments to confirm what is already on record from Mr. Danirow Bhiwajee (witness No.6) and to enlighten the Court as to the nature of the predicate offence. She also submitted that these query payments carry with them substantial probative value to the prosecution's case and should therefore be admitted.

## C. THE LAW

7. The Court, in a previous ruling in the present case **(see: ICAC v Kissoonah [2023] INT 148)**, stated that:

> *"8. In **The State v Marie Francois Bernard Maigrot [2020] CS 6/12**, it was held that:*
>
> *"The principles may be summarized as under:*
>
> *(i) at common law, a Court has, in the exercise of its inherent and overriding duty to ensure that the accused has a fair trial, the discretion to exclude evidence of facts even if such evidence is otherwise admissible,*

*to which the accused was never confronted with at enquiry stage in order to give him an opportunity to say whatever he has to say; and*

*(ii) the failure to confront the accused with the evidence or case against him at enquiry stage constitutes a breach of his constitutional rights to be informed of the case against him and to be given an opportunity to respond to what lies against him."*

9. *On the effect of the failure to confront accused with the evidence against him, the Supreme Court in* ***Maigrot (supra)*** *further held that:*

*"As a direct consequence of the application of the principle stated above, it is incumbent on an investigative authority to formally put to a suspect any evidence gathered and intended to be used against him in order to allow him to respond to the case against him and to prepare his defence at the trial eventually. Failure to do so, would render the admissibility of the evidence in question objectionable and likely to be excluded at the trial. Therefore, there can be no dispute about the meaning of the principle on which the present motion is based, its effect and the ultimate sanction if it is not adhered to." (Underlining is mine)*

10. *The evidence which has to be confronted to an accused during the enquiry should be of an incriminating nature. As such, not each and every piece of evidence gathered by an investigative authority during the enquiry would have to be confronted to the accused. To that effect, the Court of Appeal in* ***The DPP v Lagesse & Ors [2018] SCJ 257*** *held that:*

*"Where there is a complaint, it would de facto imply that the suspect has to be confronted with that complaint; and if there were additional incriminating evidence gathered during the course of the enquiry those should be put to the suspect. Obviously, if the police as part of their enquiry do have incriminating evidence, the suspect has to be cautioned and informed of his right to be legally represented..." (Underlining is mine)*

11. *In* ***DPP v Ducasse [2023] SCJ 20****, the respondent's contention was that he could not have a fair trial since he was not confronted with an alleged injection of diclofenac which had led to the involuntary homicide of the victim. The Appellate Court, after reviewing several authorities, held that:*

*"This is, in our view, incorrect because we do not believe that this omission by the police could really have had an incidence on the defence of the*

*respondent. This contention appears to us to be clearly over simplistic. The respondent has denied having administered any injection at all to the deceased. Although the police are expected to put the correct version to a suspect at the investigative stage, in the present case, it cannot be said that this omission has prejudiced the respondent in his defence because the respondent has stated in his statement "... mo pas fine faire aucaine injection avec quiqaine d'ailleur mo pas gagne droit faire sa".*

*Moreover, in the case of Lagesse (supra), the court made it clear that "the baseline is therefore that the accused must be made aware of the case against him. What effectively does that imply? Quite clearly this will depend on the particular circumstances of each case...".*

*It is, therefore, clear that all imperfections during the enquiry by the police will not necessarily be fatal to the prosecution's case unless it is of such a nature as to result in irreparable prejudice being caused to an accused." (Underlining is mine)*

12. *The case of **Ducasse (supra)** was in relation to a stay of proceedings acceded to by the trial Court as a remedy to incriminating evidence not having been confronted to accused during the enquiry. According to the Appellate Court, the test of irreparable prejudice would apply when a stay of proceedings is being sought when incriminating evidence was not confronted to an accused during the enquiry. By its very nature, a stay of proceedings is a more drastic remedy compared to the exclusion of the incriminating evidence simpliciter although in both situations, the element of prejudice will be of utmost importance, be it to varying degrees."*

8. In the present case, the remedy sought by Counsel for accused is to prevent the prosecution from producing those 178 query payments as listed in Doc AUU. In that respect, the Court must first decide whether those 178 query payments do amount to incriminating evidence. And secondly, whether those 178 query payments would be admissible given that the failure to confront accused with incriminating evidence at enquiry stage, though constituting a breach of his constitutional right, would not necessarily lead to its automatic exclusion. The ultimate test for the admission or exclusion of an otherwise admissible piece of evidence remains that of its probative value and prejudicial effect – **see (i) The State v Bacha (1996) SCJ 218, (ii) The State v Nunkoo (2001) SCJ 77, (iii) The State v Islam (2007) SCJ 43, (iv) The State v Koonjul and anor (2007) SCJ 179 and (v) Veerapen v The State (2015) SCJ 439**.

9. Here, each case will have to decided according to its own facts and circumstances. The nature of the evidence sought to be admitted, the defence, if any, of accused and the importance of

such evidence both to the prosecution and to the accused in the preparation of his defence would, amongst others, be relevant factors to be borne in mind in reaching such a decision.

## D. ANALYSIS

10. It is undisputed that those 178 query payments, as listed in Doc AUU, would not only reflect transactions made on the loan accounts of different persons but would also reflect the different usernames which have been used to make those transactions together with their respective dates. Ex facie Doc AUU, we can see that usernames Ksunil, FLBACKUP and FLCASH01 were used for that purpose. It is on record that the username Ksunil was attributed to accused whilst the usernames FLBACKUP and FLCASH01 were attributed to other officers at the DBM. For the purposes of the arguments, CI Aleear (witness no.1) also stated that the ICAC's investigation revealed that accused used those passwords to make transactions with respect to those 178 query payments.

11. Taken in isolation, those 178 query payments showing that usernames Ksunil, FLBACKUP and FLCASH01 have been used to make transactions would be an innocuous piece of evidence. Likewise, taken in isolation, the username Ksunil being attributed to accused and the usernames FLBACKUP and FLCASH01 being attributed to other officers at the DBM would equally be innocuous pieces of evidence. However, when taken in conjunction with each other and in conjunction with the testimony of CI Aleear (witness no.1) to the effect that the investigation revealed that it was accused who used those usernames to make transactions, those query payments undoubtedly amount to incriminating evidence against the accused, the more so when one of those usernames was personally attributed to him. Clearly, the purpose of adducing those 178 query payments is not merely to confirm what is already on record from Mr. Danirow Bhiwajee (witness No.6) but goes beyond to show how accused committed the misappropriation of funds at the DBM. Mr. Danirow Bhiwajee's (witness No.6) testimony was more of a general nature as to what led to an internal investigation at the DBM in the present case, albeit him stating to whom were certain usernames attributed to. On the other hand, those 178 query payments are more of a specific nature and go directly towards showing how accused allegedly committed misappropriation of funds at the DBM. As such, the Court does not accept the proposition that those 178 query payments are merely being produced to confirm what is already on record.

12. Those 178 query payments, as listed in Doc AUU, do amount to incriminating evidence against the accused. As such, they should have been confronted to accused during the enquiry. However, as has been conceded by the prosecution, none of those 178 query payments have been confronted to accused during the enquiry.

13. Undoubtedly, those 178 query payments are highly probative to the prosecution's case since they will show the modus operandi of accused in respect of the misappropriation of funds from the DBM. On the other hand, those 178 query payments also carry with them a substantial degree of prejudicial effect to the accused. Those 178 query payments would eventually be used to show how accused made transactions using the usernames Ksunil, FLBACKUP and FLCASH01 to misappropriate funds at the DBM. As such, the Court cannot preempt what possible explanation accused could have had if those 178 query payments were confronted to him, especially when he exercised his right to silence. As explained by the Court in a previous ruling in the present case (**see ICAC v Kissoonah [2023] INT 148**):

> *"16. ...As stated above, the exercise of one's right to silence would be meaningless unless exercised in relation to questions asked or incriminating evidence confronted. It cannot be excluded that a suspect who has initially decided to remain silent may well eventually choose to answer some questions or give an explanation to incriminating evidence confronted to him. That is his choice and the Court cannot preempt his action especially when incriminating evidence has been confronted to him."*

14. Since those 178 query payments would reveal the stratagem allegedly employed by accused to misappropriate funds at the DBM, it is most likely that they would have been important to him in the preparation of his defence since the time of enquiry. The Court is alive to the fact that accused has been communicated with a copy of the brief. He would also have ample opportunity to cross examine all witnesses called by the prosecution during the trial. However, in the present case, these would be insufficient safeguards to counterbalance the prejudice which has been caused to accused by not confronting him with those 178 query payments in as much as he has been deprived of an opportunity, at enquiry stage, to provide an explanation, if he so wished, on such important pieces of incriminating evidence against him. Admitting such kind of incriminating evidence may very well lead to a situation whereby accused finds himself compelled, during the trial, to provide an explanation thereto thereby depriving him of a meaningful exercise of his right to silence during the trial.

## E. CONCLUSION

15. For the reasons stated above, the prejudicial effect of those 178 query payments, in the present case, outweighs its probative value and are therefore not admissible.

**A.R.TAJOODEEN**
**Ag Magistrate of the Intermediate Court (Financial Crimes Division)**
**22.09.2023**