

ICAC v M. S. Nanuck

2023 INT 167

CN: 695/2016 [FCD CN: 69/2020]

**IN THE INTERMEDIATE COURT OF MAURITIUS [FINANCIAL CRIMES
DIVISION]**

In the matter of: -

Independent Commission against Corruption

v/s

Mohmud Sariff Nanuck

JUDGMENT

Accused stands charged as per the amended information under 3 counts with the offence of , whilst being engaged in the management of a body corporate, wilfully and unlawfully engaging in a transaction that involved property which, in part, directly represented the proceeds of a crime where Accused had reasonable grounds to suspect that the property was derived from a crime in breach of sections 3 (1) (a) ,6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 [FIAMLA] and section 44 (1) (b) of the Interpretation and General Clauses Act. [IGCA] Accused pleaded not guilty to the charges and was represented by counsel at the trial.

The representative of the Registrar of Companies gave evidence that See Ring Investments Limited was created on the 2nd of August 2004. Mr Nanuck Sariff Mohmud was the director of the company at the time. As at 2009, the nature of business was general retailer, computer activities and victualler. He produced a document to that effect. He was not cross-examined.

At that stage there was a motion to amend the information which was objected to. Arguments were heard and the objection was eventually overruled. Accused pleaded not guilty to the amended information.

2 statements of Accused were read and produced in court by Mr Dosiah. Under cross-examination, he stated that the purpose of the transfer of 1 million rupees was to invest in the business of scrap metal as per Mr Kassam's version. The bank did not detect anything irregular with the transfer. He agreed that if the bank found anything irregular it has a duty to report same to the authorities.

The gist of CI Mungur's testimony is that Accused is allegedly operating an illegal investment scheme and that Mr Mukhtar Cassam has been the victim of that scheme. Accused made use of fraudulent pretences to make him believe that he is in the business of selling scrap metal. He promised Mr Cassam that he will give him 10 % return on the investment following which Mr Kassam invested 1 million rupees in the business of the Accused. See Ring Investment Ltd has a permit to sell foodstuff, IT, computer equipment but not scrap metal. . The company is dormant. Accused has no permit to operate any financial activity or accept investments. He produced a number of documents. According to MRA, the Accused has imported only holy quoran books. He added that the investment of 1 million rupees was not included on the financial statement of the company and that the 1 million rupees emanates from an illegal activity since the company was not licensed to accept any investment or to deal in the business of scrap metal. Accused has shown some documents to Mr Cassam who did not receive his money back in the end. Under cross-examination, he agreed that Accused mentioned that he is doing business with Mr Issa. He however denied that Mr Issa Dawagajee is related to Mr Cassam. He agreed that he did not record any statement from Mr Issa Dawagajee since the latter was abroad. He explained that the crime relates to the failure to obtain an appropriate licence from the financial authorities. He added that he did not investigate into the business of scrap metal in Ghana since the company's name is different. He maintained that the 1 million rupees are proceeds of crime. In re-examination, he stated that before the 1 million rupees was credited into the account of See Ring Investments Limited, there was already a balance of Rs 441,000.

The main features of Mr M H Mukhtar Cassam's testimony are that Accused who used to purchase air tickets from him invited him to invest in his business of scrap metal and showed him some photos and documents. He told him that the business is flourishing and invited him to invest in the business and that he would get commission. He showed him an order which he received from a reputed company from India. Mr Kassam agreed to invest 1 million rupees in See Ring Investments Ltd and Accused informed him that he could withdraw the capital on demand and that he would be given a commission of Rs 100,000. He was handed over a letter from the Accused. He added that the document does not refer to any third party. In the end, he only received Rs 100,000. He agreed that Accused's business stalled. He stated that it is Accused who introduced him to one Mr Dawagajee. He denied having imposed any condition that Accused had to deal with Mr Dawagajee for him to invest the money in Sea Ring Investments Limited. He denied that he knew Mr Dawagajee and maintained that he had dealings with Accused. In the end, Accused never reimbursed the sum of 1 million rupees. Under cross-examination, when he was confronted with his statement that he is the one who proposed to Accused to invest in his business, he maintained that it is following Accused's earlier proposition that he decided to invest. He agreed that he did not question the Accused whether he had a permit to do such business since he trusted him. He denied that Mr Dawagajee is his brother in law. He explained that he did not make any complaint initially since Accused informed him that he was having financial constraints and asked him to be patient. When he heard about the Ponzi scheme, he went to make a complaint to the Bank of Mauritius. He agreed that Accused made arrangements for Mr Cassam to proceed to Ghana. He could not confirm whether Accused's business was genuine since he never met anyone in Ghana and only saw a yard containing scrap metal. He agreed that Accused's project was not successful.

Accused in his first unsworn statement stated that he has stopped working since the end of the year 2007 and gets about Rs 20,000 as pension every month. He was the director of See Rings Investments Co Ltd in 2004 and was in charge of the operation of the company. He added that the company was dormant and that he has been unable to operate any business. He stated that from October 2004 until June 2005, the return was nil. As regards the sum of Rs 495,000, it comes from his personal savings. As regards the turnover of Rs 55, 000 for the period 1/07/2005 to 30/06/2006, he explained that it represents the sale of computer which the company purchased. As regards the declaration of a profit of Rs 2000 in 2007, he stated that it is a mistake and that in fact, the company

incurred loss. For the year ending 30. /06/2008, the turnover of the company was nil. As for the Rs 15,000 costs incurred, it represents administrative costs. There was in fact a loss of Rs 15000 and the entry of profit of Rs 15000 is in fact a mistake. As regards the entry of Rs 1,000,000 on the balance sheet, it represents a loan which one Mr Cassam advanced. There was a contract for sale of scrap metal to an Indian company. He did not divulge the name of the company. He negotiated the contract and added that he was going to purchase scrap metal from Africa. In November 2008, he opened an account in the name of See Ring Investments Ltd. He was at the time negotiating the contract with the Indian company and was confident that he would conclude the contract. Mr Cassam proposed to invest in his business. He agreed that Mr Mukhtar transferred the sum of 1 million rupees in the company on the 9/06/09 and he treated it as a loan. Mr Cassam agreed to invest provided Accused works with his brother in law one Issa Dawagajee whom Accused met on several occasions in 2009. As regards the entry of Rs 893,550 as account receivable on the balance sheet of 30/06/2009, he admitted that it is a mistake of the accountant since there has been no sale which can account for such figure. The figure Rs 1,7666,399 is also a mistake by the accountant. The sum of Rs 574,640 which was declared by him represents his lump sum. He added that Rs 493,000 represents the sum which Mr Issa Dawagajee paid for scrap metal bought by See Ring Investments Limited. The latter told him that he has a stock of scrap metal which he can sell and and it was agreed that they would share the profits. Accused thus agreed that he transferred money to Mr Dawagajee in respect of the purchase of scrap metal. He conceded that in June 2009, he effected a transfer of money on 2 occasions to the said Mr Dawagajee to carry out the transaction in respect of the sale of scrap metal. The first transfer was for 13,000 US dollars and second one was 8000 US dollars but added that the 8000 US dollars are from his savings. The said Mr Dawagajee never sent any scrap metal to India.

He stated that he did not mention business of scrap metal as one of the company's activity since he was doing business outside Mauritius. He conceded that See Ring Investments Limited had no permit to deal with scrap metal or to purchase scrap metal outside Mauritius. He conceded that he has not filed any MRA return in respect of See Ring Investments Limited.

In a further statement, he denied having told Mukhtar that his company deals with the purchase and sale of scrap metal. He denied that he told Mukhtar that he has ordered

scrap metal from Africa to be sold to a company in India and proposed him to invest in his company See Ring Investments. He agreed having remitted to Mr Mukhtar a letter dated the 6/06/2009. He conceded that See Ring Investment Ltd does not any written contract to purchase scrap metal. He also agreed that See Ring Investments Ltd does not have any permit from any authority to accept investments. He agreed that the said Mr Cassam transferred 1 million rupees in the account of See Ring Investments Limited. He denied having given Rs 100,000 as profit to Mr Cassam. He agreed that there is no written contract made with Mr Dawagajee for purchase of scrap metal and no evidence that any scrap metal was sent to India by the said Mr Dawagajee. He stated that he was aware that Mr Dawagajee was involved in a drug dealing case in 2007. He stated that Rs 80,000, Rs 60,000 and Rs 30,000 come from his savings. As regards the withdrawal of 100,000 on the 13/07/2009 he could not recall why he withdrew such sum of money.

When the charge was put the Accused, he stated that it was in fact Mr Cassam and Mr Dawagajee who carried out the contract.

Submissions

The gist of Mr Bisham Ramdenee's submissions are as follows:

The transfer of the sum of money which forms the subject matter of counts 1 and 2 and the withdrawal of the sum of 100000 under count 3 do not amount to a "transaction" within the meaning of provisions of the FIAMLA. There was no criminal activity involved. The transfer of money from one bank account to another does not constitute a crime. The defence has been unable to cross-examine any witness from the Bank of Mauritius who would have enlightened the court on the need for a licence.

Mr Jeeha on the other hand submitted that to engage in a transaction cannot be limited to the words "opening an account 'as provided in section 2 in view of the fact that the word "includes" has been sued. He referred to the dictionary meaning of the word "includes". Accused did not hold a licence from the Bank of Mauritius to accept deposits in the form of investments or loans and that the sums of money which were transferred and withdrawn have been received in breach of the provisions of the Banking Act. As regards the issue of mens rea, he submitted that the unsworn statement of Accused reveals that See Ring

Investments Limited has always been a dormant company, that the main objective of the company was to deal as General Retailer foodstuff and that it was not its objective to deal in scrap metal. Accused admitted that he approached Mr Cassam to invest in his business and he contradicted himself in his own statement when he stated that had secured a contract abroad to purchase scrap metal. The above circumstances lead to the irresistible inference that he had reasonable grounds to suspect that the sums of money emanate from criminal activity.

Analysis and findings

Section 3 (1) (a) of the FIAMLA 2002 provides that any person who engages in a transaction involving any property which is, or in whole or in part directly or indirectly represents the proceeds of a crime where he suspects or has reasonable grounds for suspecting that the property is derived or realised, in whole or in part, directly or indirectly from any crime, shall commit an offence.

It can be gleaned from the documentary evidence and Accused's unsworn version that the sums of Rs 497,627.50 and Rs 395,922.50 have been transferred by the Accused from the account of See Ring Investments Limited into the account of Mr Issa Dawagajee and that the sum of Rs 100000 has been withdrawn by Accused.

The elements which the prosecution must establish are, firstly, that Accused did engage in a transaction when he caused to be transferred the sums of money as averred under counts 1 and 2 and withdrew the sum of Rs 100000 under count 3, secondly that the sums of money represent the proceeds of any crime and lastly, that Accused had reasonable grounds for suspecting that the said sums of money are derived from criminal activity.

The first question which arises is whether Accused did engage in a transaction when he transferred and withdrew certain sums of money.

I have duly considered the submissions of Mr Ramdenee that the transfer of funds and the withdrawal do not fall within the definition of engaging in a "transaction" within the meaning of section 2 of the FIAMLA. The word "transaction" is defined in section 2(a) of the FIAMLA as including "*opening of account, issuing a passbook, entering into a fiduciary*

relationship or establishing any other business relationship". It is noted that the word "includes" has been used after the word "transaction". The Oxford dictionary meaning of the word 'includes' is "comprise or contain as part of a whole". As rightly submitted by Mr Jeeha, the use of the word "includes" connotes that the word "transaction" cannot be restricted to the words "opening of an account or establishing any business relationship" but may include any other transaction. It is apt to refer to section 5 (8) of the IGCA which provides that *effect shall be given to each enactment according to its true intent, meaning and spirit*. For the above reasons, to all intents and purposes, the act of transferring funds to Mr Issa Dawagajee in the course of business constitutes a transaction within the meaning of section 2 of the FIAMLA. As for the act of withdrawing the sum of money, I find that it does amount to engaging in a transaction since the ordinary meaning of a bank transaction entails money going in and out of a bank account. For the above reasons, I find that the Accused did engage in a transaction under counts 1, 2 and 3.

The next issue to be thrashed out is whether sums of money as averred under counts 1, 2 and 3 had a tainted origin at the time of the transfers and withdrawal.

In determining whether the sums of money which are the subject matter of counts 1,2 and 3 represent the proceeds of a crime, I find it relevant to refer to the principles enunciated in the case of **R v/s Anwoir [2008] 2 Cr App R 36** which was referred to in the case of **DPP v/s Bholah [2010] PRV 59**. Latham LJ observed at paragraph 21 that there are 2 ways in which the Crown can prove that the property derives from crime :

- a. *"by showing that it derives from conduct of a specific kind and that conduct of that kind is unlawful", or*
- b. *"by evidence of the circumstances in which property is handled which are such as to give rise to an irresistible inference that it can only be derived from crime"*

The **Anwoir** principle was quoted with approval in the case of **R v/s MK & AS [2009] EWCA 952** where Hellet LJ at paragraph 12 said *'It is open to the prosecution to try to prove guilt from the evidence of the circumstances in which the property was handled' which it is said "give rise to the irresistible inference that it can only be derived from crime. They do not have to prove specific crime"*.

The bank statement of See Ring Investments Limited reveals that there is clear nexus between the sums of money which were transferred under counts 1 and 2 and withdrawn

under count 3 and the sum of Rs 1,441,0000 which was in the bank account of See Ring Investments Limited as at 9/06/2009. There is unshaken evidence that Mr Mukhtar Cassam deposited the sum of 1 million rupees into the account of Sea Ring Investments Limited on the 9/06/2009. As for the sum of Rs 441,000 which was already in the account at the time of the transfers and withdrawal, Accused alleges that it is from his personal savings.

The contention of the prosecution is that the criminal activity in question is that the company See Ring investments Limited did not have a licence to accept any investment and that the sum of 1 million rupees was received in breach of section 5 (1) of the Banking Act 2004.

Section 5 (1) of the Banking Act provides that *no person can do banking business without a banking licence issued by the central bank.*

“Banking business” is defined by section 2 of the Banking Act as *“the business of accepting sums of money in the form of deposits or other funds, whether or not such deposits or funds involve the issue of securities or other obligations howsoever described, withdrawable or repayable on demand or after a fixed period or after notice and the use of such deposits in whole or in part for –*

Loans, advances or investments on the own account and at the risk of the person carrying out such business.”

It is questionable that the company which was being managed by Accused was doing banking business within the meaning of section 2 the Banking Act 2004. The evidence reveals that only one deposit emanates from Mr Cassam and the other deposits are allegedly from his savings. It follows that there is no evidence that the company regularly engaged in the activity of accepting investments from third parties. Nevertheless, I find that the company acted in breach of section 5 (2) of the Banking Act when it received a deposit from a member of the public without having a licence from the central bank. It is apposite to refer to section 5 (2) of the Banking Act which provides that *no person other than a bank licensed by the Central Bank shall engage in receiving deposits from the public.* “Deposit” is defined in section 2 of the Act as a sum of money paid on terms –

- a. *That it is to be repaid in full, with or without interest or premium of any kind and to be returned at a time agreed by the person making the payment or on demand and the person receiving it*
- b. *That are not referable to the provision of property or services or giving of security, whether or not evidenced by any entry and record of the person receiving the sum.*

The testimony of Mr Cassam who came across as a credible witness amply establishes that he did make a deposit into the bank account of See Ring Investments Limited. It follows that the Accused who was concerned with the management of the company did act in breach of section 5 (2) of the Banking Act when the sum of 1 million rupees was received in the account of See Ring Investments Limited with his knowledge and consent. I find that the character of the sum of 1 million rupees changed upon being injected in the company which did not have any licence to accept any deposit and that it was criminal at the time of the transfer and withdrawal in question by reason of previous criminal conduct.

As for the submissions of Mr Ramdenee that a witness from the Bank of Mauritius ought to have been called by the prosecution to enlighten the court on the issue of licence, it must be pointed out that it was agreed by the Accused that he did not have a licence from the Bank of Mauritius and that the need for a licence is a matter of law.

In addition to the issue of licence, I find that another criminal activity may also be inferred from the testimony of Mr Cassam which depicts that he was induced by the Accused to join a fictitious investment scheme. The criminal activity can be inferred from the letter [DOC N] from Accused requesting Mr Cassam to advance 1 million rupees in respect of the business of scrap metal when in truth he had no licence to deal in the business of scrap metal, Mr Cassam's testimony that Accused showed him some photographs with regard to the business of scrap metal and made him believe that he had a flourishing business when in truth the company was a dormant company, and the fact that his trip to Ghana which was organized by Accused did not shed any light on his alleged business of scrap metal. It is noteworthy that Mr Cassam mentioned that he made a complaint at the BOM when he heard about Ponzi schemes. I conclude that the inference from the above circumstances is that Mr Cassam was induced to join a fictitious investment scheme may be sufficiently irresistible to amount to proof of criminal activity to the criminal standard.

As for the sum of Rs 441000 which was in the company's account when the Accused engaged in the transactions which form the subject matter of the charges, Accused's version is that it is from his personal savings and that he had been keeping such money at home. In view of the fact that he had retired since 2007 and is earning pension of Rs 20000 on a monthly basis, his unsworn version "mo pane ressi faire aucaine business lors sa compagnie la", the fact that his wife was not working and that he had no visible means of earning since his retirement and the discrepancies in the return of the company as regards the alleged profits, I have no hesitation in rejecting his explanation as untenable. The irresistible inference from the above circumstances is that he set up a company at his residence with a view to obscuring the source of the money which was being credited into the bank account of the company. It is significant that in his unsworn statement he stated that Mr Issa Dawagajee to whom he had transferred substantial sums of money on 2 occasions was involved in a drug dealing offence in 2007. All the above circumstances lead to the irresistible inference that the sum of Rs 441,000 also has an illicit origin.

For the above reasons, I am unable to agree with the submissions of Mr Ramdenee that there is no evidence that the sums of money as averred in counts 1-3 do not emanate from crime.

The final question to be determined is whether there is sufficient evidence of mens rea, that is, suspicion or reasonable suspicion on the part of the Accused that the sums of money as averred under counts 1,2 and 3 derive from criminal activity.

As highlighted in the case of **Antoine v/s State [2009] SCJ 328**, "*Since suspicion is based on facts, it is the duty of this court to analyse the whole of the evidence on record in order to determine whether or not it can be inferred from the facts that Accused reasonably suspected that the proceeds were proceeds of a crime. The central question therefore revolves around the existence of facts which were known to the Accused from which he could have reasonable grounds to suspect that the money which was transferred and withdrawn emanates from criminal activity.*

I find that the following circumstances lead to an irresistible inference that Accused had the necessary mens rea;

1. The investment of 1 million rupees was not included in the financial return of the company and Accused's unsworn version to the effect that; "jamais mo finne ressi faire business lors sa compagnie la"
2. The fact that the company did not have any licence to accept deposits or deal in the business of scrap metal
3. The fact that the figures in respect of the profits which appear on the financial statement of See Ring Investments Limited do not reflect the true posture of the company
4. Accused's unsworn version that Mr Dawagajee, to whom the money had been transferred, was involved in drug business
5. Accused's inability to divulge the name of the company he was allegedly dealing with in India
6. The absence of any written contract between Mr Dawagajee and himself.

The irresistible inference from the above circumstances is that Accused had reasonable grounds to suspect that the sums of money which had been transferred to Mr Issa and withdrawn by himself derived from criminal activity.

For the above reasons, I conclude that the prosecution has proved its case beyond reasonable doubt and I find Accused guilty as charged.

N Senevrayar-Cunden (Mrs)

[Delivered by N Senevrayar-Cunden, Magistrate of Intermediate Court]

[Delivered this 27th of June 2023]