FCD CN: 6/2020
CN: 113/2015

IN THE INTERMEDIATE COURT OF MAURITIUS
(FINANCIAL CRIMES DIVISION)

In the matter of:

Independent Commission Against Corruption

v/s

1. **THE HONG KONG AND SHANGHAI BANKING CORPORATION**
2. **THE MAURITIUS COMMERCIAL BANK LTD**
3. **STATE BANK OF MAURITIUS LTD**

RULING

All three accused parties have been charged with the offence of Limitation of payment in cash in breach of sections 5(1) & 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 (FIAMLA) coupled with section 44(2) of the Interpretation and General Clauses Act (IGCA). As per the Information, Counts 1 and 2 have been laid against accused no.1, Counts 4, 7, 9, 11, 13, 15 against accused no.3, and the rest up to Count 16 are against accused no.2. All accused parties were represented by their respective counsels in court and all pleaded not guilty to the Information.

The motion made on behalf of the accused no.1 and joined in by the other two accused parties is read as follows:

'The original Information dated 2014 relates to offence allegedly committed in 2002. Accused no.1 no longer has the necessary documents to defend itself in view of the substantive delay. This substantive delay is unfair and will cause irreparable prejudice to accused no.1 if the case is allowed to proceed.'

CASE FOR THE PROSECUTION

Witness no.20, Mr Seeruttun, Chief Investigative Officer the at the ICAC gave evidence on behalf of the prosecution and produced the affidavit marked as **Doc AFF3**. He was referred to paragraph 38 of the said affidavit and explained that the investigation involved analysis of documents which were provided by the bank institutions, namely the accused parties. Explanations were offered for delays at various stages of the enquiry.

Under cross-examination from accused no.1, the witness stated that the enquiry looked into the anti-money laundering policy of the Hong Kong and Shanghai Banking Corporation (HSBC). But it did not extend into any board minutes of the board of HSBC regarding compliance procedures with FIAMLA, not whether instructions were relayed to all branches of HSBC. The witness was aware of the instructions on limitation of payments in cash posted at all counters at the bank. With regards to the current charge, the enquiry revealed that a supervisor authorised the impugned transaction. There was no enquiry into whether that person acted as per the internal policy of the bank.

When cross-examined on behalf of accused no.2, the Mauritius Commercial Bank (MCB), the witness confirmed that the accused no.2, as then represented by Mrs Rivet, put up a defence statement in 2013. It has been more than 10 years. The witnesses involved with the accused no.2, gave their statements in 2012. The witness was aware of the Anti-Money Laundering handbook of the accused no.2, but did not procure same for the enquiry.

On behalf of the accused no.3, the State Bank of Mauritius Ltd (SBM), the witness confirmed that he recorded a statement from Mr Bostom in 2011. The latter no longer works at the SBM. One Mr Chockalingum also gave a statement in connection with accused no.3 in 2012. He has now retired. The offence dates back to 2003. Most questions on the delay were answered by reference to the affidavit filed as Doc AFF3.

CASE FOR THE DEFENCE

The representative of accused no.1, Mr Rajeev Boyjoonauth gave evidence under oath and he identified the affidavit filed as **Doc AFF1**. Cross-examination dealt with the issue raised at paragraph 6 of the said affidavit, to wit, that the HSBC had carried out internal investigations at the material time, but due to the passage of time and loss of records, such can no longer be proved. The accused no.1 denied the proposition from the prosecution, that had those alleged records or information been produced to the ICAC, they would have still been available today. The accused no.1 further stated

that in 2011 at the time of the enquiry, the said information should still have been available at the bank. Even if the matter was under enquiry, the representative stated that the HSBC had no alternative than to destroy those records and/or information in adherence with the Banking Act and guidelines. However the accused agreed that it held the said information for more than 7 years since the alleged date of offence was in 2002. Under re-examination, it was clarified that the records or information referred to at paragraphs 6 and 7 of Doc AFF3 were connected to transactions dated 17.06.02 and 06.09.02.

The accused no.2, as represented by Miss Firdaus Bundun, confirmed the **Doc AFF2**, the affidavit sworn on behalf of the accused no.2. The main focus of cross-examination was with regards to paragraph 7 of Doc AFF2, which lists the employees who allegedly had knowledge of the impugned transactions and compliance measures in place at the time. They are now retired, but the representative could not say if they are available or not. Apart from Mrs Lebrasse, the former equally could not say if they were called by the ICAC for enquiry purposes.

No evidence was adduced under oath on behalf of the accused no.3.

ASSESSMENT OF THE COURT

The motion for abuse of process was two-fold, the first proposition was that the accused parties would be unable to prepare their defence since the relevant material, i.e., records, witnesses and information, are no longer available, due to the passage of time. The second was that inordinate delay in itself may be a bar for the accused parties to benefit from a fair trial. The latter proposition was mainly argued by the accused no.3.

The law

The natural starting point is **section 10** of the Constitution.

Provisions to secure protection of law

(1) *Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.*

Whilst the right for the accused to be afforded a fair hearing within a reasonable time is settled, the purport of the principles of abuse of process is to stay cases:

a. Where the court concludes that the accused cannot receive a fair trial.
b. Where the court concludes that it would be unfair for the accused to be tried.

The first limb is to ensure that the accused does not suffer from prejudice or impediment which would cause a hindrance to the preparation of a proper defence. Such prejudice is normally forensically measurable by the use of established legal rules. The second is more concerned with the sense of justice and propriety which falls within the inherent discretion of the court. The scrutiny is objectively laid on the behaviour of the prosecution and the surrounding circumstances of the case. Both may overlap in a motion of abuse of process. I can only infer that it was the purport of the submissions on behalf of all the accused parties.

The points raised by the defence, even if they are to varying peculiarity to each accused party, may nevertheless be summarised as follows:

i. The non-availability of witnesses due to the passage of time.
ii. The non-availability of records and information, relevant to the defence due to the passage of time and change in the law.
iii. Inordinate delay.

Non-availability of witnesses

Paragraph 7 of the affidavit (Doc AFF2) of the accused no.2 lists three names who would have had knowledge of the impugned transactions and the compliance measures in place at the relevant time. It is averred that they are no longer employed by the accused and not available to give evidence in court.

The Information is laid against the three accused parties as corporate entities, and the current charge is coupled with section 44(2) of the IGCA. Employees, as part of their functions, act on behalf of the corporate entity for which they are in employment. The accused no.2, being a body corporate, can only work through the delegation and distillation of functions through its employees. As such, duties and tasks are fulfilled through powers expressly or tacitly conferred on employees by the accused no.2. It stands to reason that any act carried out by any of its employees would be regarded as an act of the accused no.2 itself. It is therefore construed that, irrespective of the identity of the employee who carries out a delegated act, the accused no.2, as a body corporate, assumes responsibility for it. A reading of paragraph 7 of Doc AFF2 clearly shows that the listed potential witnesses were empowered to act on behalf of the accused no.2. It would be baffling if the accused

no.2, no longer has in employment a money laundering reporting officer (MLRO) after the one name Mr Edwin Marion had retired, similarly for the other retirees and their respective positions. The proposition of the defence that all knowledge of the impugned transactions and compliance measures in place at the time, had been lost from the company when the three listed individuals had retired, cannot carry much weight. Furthermore, the averment is that they are not available because they are no longer in employment. There is nothing to suggest that they are untraceable or unable to come to court at this point in time. I thus find no merit in the above proposition.

Loss or destruction of evidence

The point was mainly argued on behalf of accused no.1 where the allegation was that records and information, which would have been relevant to the preparation of the accused's defence, have now been lost or destroyed.

The submissions of the prosecution raised the issue that, in the event that the accused no.1 had indeed records or information which would have amounted to a proper defence, such should have been disclosed at enquiry stage when the case was put to the accused. It is understood that the prosecution did not suggest that the accused should have waived its right to silence, but rather that had the accused decided not to disclose the relevant information, it cannot benefit from the non-availability of such information thereafter.

The rebuttal from the defence stood on two limbs. First according to the law, the banks destroyed all records after 7 years of safekeeping. The section being relied upon is as follows:

Section 33 of the Banking Act 2004:

Every record under this section shall be kept—

(b) for a period of at least 7 years after the completion of the transaction to which it relates;

A literal interpretation of the above section clearly illustrates that there is no mandatory requirement for the banks to destroy any record after 7 years. It is rather a requirement to keep the records for a minimum of 7 years.

There is no clear evidence from the accused no.1 as to which records or information are missing, and how they would have been highly relevant to the preparation of its

defence. Consequently, there is nothing on record which pinpoints the precise moment when those records were destroyed. There are annexes attached to Doc AFF1 which postdate the lodging of the case. A general contention that records were destroyed after 7 years as per established practice and thus must be relevant to the defence since they include compliance procedures, is not sufficient to permit the court to assess the relevancy of the said records. Ultimately such test can only be reasonably carried out in the light of the whole evidence adduced at trial.

To buttress the point the following extracts from **DPP v Chetty 2023 SCJ 245** are of relevance:

The Court, at this stage of the proceedings, could only have acted on mere speculation by staying the proceedings prematurely, for none of the witnesses, either for the prosecution or for the defence for that matter, had deposed. It is only after all the witnesses have deposed that the court can examine critically how important the missing evidence is in the context of the case as a whole.

The second limb of the accused's rebuttal is with regards to the change in the law regulating corporate liability, namely with the Supreme Court case of **Change Express Ltd v ICAC 2022 SCJ 301**. The submission of the defence was worded as such: '*the corporate responsibility of an accused would be engaged in certain circumstances and to defence itself, a corporate entity should be able to show that its guiding mind had no intention of committing an offence. This can no longer be done.*'

A cursory reading of **Change Express Ltd (supra)** shows that there has been no change in the law of corporate liability since the time the law was laid out in the cases; **CEB v State 2010 SCJ 75, The Director of Public Prosecutions v La Clinique Mauricienne 2014 SCJ 070, Shibani Finance Co Ltd v The Independent Commission Against Corruption & anor 2012 SCJ 413.**

Without the need of a thorough analysis of the law of corporate liability, it suffices to say that **Change Express Ltd (supra)** has merely clarified the principles, without changing the elements which are needed to prove the commission of the offence under section 5 of FIAMLA. The identification principle used by most of the above cases stems from the English case of **Tesco Supermarkets Ltd. v. Nattrass [1971] 2 W.L.R. 1166, 1176**, which dates back to 1971. The recent judgment marks no significant divergence from the set principles of corporate liability which could warrant a change in the nature of the case the accused has to answer.

It has to be noted that, ultimately, the burden of proof rests on the prosecution to prove all the elements of the offence under section 5 of FIAMLA. As submitted on

behalf of accused no.1, the above cases have laid down the principles giving rise to the elements which the prosecution will have to prove beyond reasonable doubt. It cannot be pre-empted by the court that the defence will have to adduce evidence in rebuttal of the prosecution's case even before the trial starts.

Delay

As per the Information, the dates of offence range from 2002 to 2004 spread over 16 Counts. By virtue of section 10 of the Constitution, any person charged with a criminal offence must be afforded a hearing within a reasonable time. In the absence of a date of arrest, it is averred in the affidavit of the prosecution (Doc AFF3) that the first statements given under caution from the then representatives of the banks, were in the years 2011, 2012 and 2013. Such period of time is therefore taken as the time when official notification was given to the accused parties by a competent authority, being the ICAC, of an allegation that they may have committed a criminal offence. Therefore, slightly more than 10 years have elapsed since.

Time frame from caution to formal charge

The defence did not seriously challenge the averments of the prosecution in its affidavit for the explanation leading to the lodging of the case in court. The ICAC received a complaint in August 2010 and the enquiry was completed in July 2013. A decision by the Office of the Director of Public Prosecutions was taken in October 2013 to put the case in abeyance pending the outcome of the Privy Council judgment in the case Beezadhur v ICAC 2013 SCJ 92. The said judgment was delivered in August 2014. The case was lodged at the Intermediate Court Criminal Division in February 2015. The delay was explained by the number of witnesses interviewed, the number of documents obtained through disclosure orders and the overall complexity of the case. The offence under section 5 of FIAMLA may appear ex facie straightforward. However, the complexity is significantly increased by the fact that the accused parties are corporate entities, thus, the need to prove mens rea through corporate liability.

Time frame from the lodging of the Information

The case has been postponed numerous times for a plethora of reasons. Without considering the validity of those reasons, they can safely be attributed to the accused parties, whose representatives have been absent multiple times, to counsels who were taken up in other courts, and to the prosecution for varying reasons. Some of the

postponements can be imputed to the judicial system as a whole and the practical realities of litigation work have to be taken into account.

Their Lordships in the Privy Council case of **Boolell v State 2006 MR 175** propounded the following:

(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.

(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all.

Even if the delay may not be as extensive as it was in **Boolell (supra)**, there has been some. However, special circumstances do exist in the current matter. A Privy Council decision was being awaited on a point of law very much relevant to this case. A new division of the Intermediate Court, where this case is now being heard, had been created to expedite such matters. There are other factors such as the transfer of magistrates which weigh in the balance. However, it is settled that a permanent stay of proceedings is an exceptional remedy which can only be sparingly used, vide **Attorney General's Reference No. 1 of 1990, 95 Cr. App. R. 302.** The factors considered in this argument are not enough to tilt this case into the exceptional category. Nevertheless, when viewed together with all the circumstances of this case, which will invariably come to light at trial, the court will be tasked to once again assess the reasonableness of the delay, and apply the appropriate remedy. At this stage of proceedings, I do not find the delay in itself as inordinate.

For the above reasons, I hold that the accused parties can benefit from a fair trial, and I do not find that that it would unfair to try them. I thus set aside the motion for abuse of process.

P K Rangasamy
Magistrate of the Intermediate Court
27.02.24