IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 40 (19 August 2022)

Criminal Appeal SCA 18/2021

(Appeal from CR 108/2015)

In the matter of a Reference by the Attorney General under Section 342A of the Criminal Procedure Code

(rep. by Mr Steven Powles, State Counsel)

Neutral Citation: *Reference by the Attorney General under Section 342A of the Criminal Procedure Code* – Criminal Appeal SCA 18/2021 [2022] (Arising in CR 108/2015)

SCCA 40 (19 August 2022)

Before: Fernando President, Twomey-Woods, Andre JJA

Summary: Reference by the Attorney General under Section 342A of the Criminal Procedure Code seeking the opinion of the Court of Appeal in clarifying the correct application of Section 3(11) of the Anti-Money Laundering Act 2006.

Heard: 1 August 2022

Delivered: 19 August 2022

RELIEF

Clarification and correct application of Section 3(11) of the Anti-Money Laundering Act 2006 made.

JUDGMENT

FERNANDO, PRESIDENT

1. This is a reference by the Attorney General under section 342A of the Criminal Procedure Code (Cap 54), seeking the opinion of this Court on a point of law

which arose as a result of the Ruling of the Supreme Court dated 4 June 2021 in case number CR 108/2015.

2. The point of law specified is in relation to the application of section 3(11) of the Anti-Money Laundering Act, 2006 (now replicated in section 3(11) of the Anti-Money Laundering and Countering the Financing of Terrorism Act, 2020).

3. The Attorney General has in his Reference, submitted as follows in summary of his argument:

"29. It is respectfully submitted that in holding that the evidence failed to show a prima facie case that the money was the benefit of criminal conduct, the learned judge failed to properly apply the standard in Section 3(11) (a) of the Anti-Money Laundering Act, 2006, which requires only that evidence be adduced that gives rise to a "reasonable inference" that the money is the proceeds of criminal conduct. On any view, the evidence was such as to demonstrate that the property was or represented the benefit of criminal conduct.

30. Moreover, in observing that "no evidence was adduced to establish that the recipients of these sums were criminals engaged in criminal activities in Seychelles, Kenya or anywhere else" the learned judge plainly failed to adhere to Section 3(11) (b) of the Anti-Money Laundering Act, 2006, which expressly provides that it is not necessary for the prosecution to prove that the property in question represents the benefit of any particular conduct or that any person have been convicted of criminal conduct in relation to the property." (verbatim)

4. The disputed parts of the judgment found in paragraphs 52 and 53 of the Ruling and referred to at paragraphs 21 and 22 of Reference are as follows:

"In relation that the monies transferred were believed or known to be the proceeds of criminal conduct "the prosecution's argument is that if the money in question was being obtained by lawful business transactions, then the transfer need not have been made in such a manner as they could have done the transactions in their own names. That has some persuasiveness to it but it is up to the prosecution to support that contention with evidence. It must be noted that no evidence was adduced to establish that the recipients of these sums were criminals engaged in criminal activities in Seychelles, Kenya or anywhere else which would have supported that contention." (Paragraph 52 of the Ruling – emphasis placed by me)

"Having made the above assessment of the evidence I find that there is a strong presumption that transferring money overseas in the manner that was done in this case show possible impropriety by those involved. However, I find there is a clear lack of evidence to establish a prima facie case that the 1st and 2nd

accused were involved as charged and that the money in question were proceeds of criminal conduct." (Paragraph 53 of the Ruling– emphasis placed by me.)

5. The learned Trial Judge had in view of his findings above acceded to an application of 'no case to answer' and held that the 1st and 2nd accused who were charged along with the 3rd accused, have no case to answer on all the 21 counts of money laundering they had been charged and acquitted the 1st and 2nd accused of all charges. Thereafter trial had proceeded against the 3rd accused and she too had been acquitted by the learned Trial Judge by his judgment dated 4th March 2022.

6. It is the interpretation given by the learned Trial Judge to section 3(11) (a) and (b) of the Anti-Money Laundering Act, 2006, in acquitting the 1st and 2nd accused, that is the subject matter of this Reference. Since section 342A (8) of the Criminal Procedure Code states that the court to which a point of law is referred under this section shall ensure that the identity of the respondent is not disclosed on the Reference unless the respondent has given consent to such disclosure, I have not made any reference to their names in this judgment. Further section 342A (2) provides that a reference under section 342A shall not affect the acquittal of the accused. In compliance with section 342A (6) of the Criminal Procedure Code, the Registrar of this Court had caused a Notice of the Reference to be served on the 1st and 2nd accused and informed them that they can present arguments to the Court if they so wish either in person or by counsel in accordance with the provisions of section 342A (6) of the Criminal Procedure Code.

7. In brief the allegations against the three accused as borne out in the charges were that on various days between a period of 6 months, namely, 11 November 2014 to 15 May 2015, as specified in the indictment, the 1st and 2nd accused, with the assistance of the 3rd accused, who worked at Cash Plus Exchange, having a common intention, transferred a sum of SCR 475,650.00 to three named individuals in Kenya, from Cash Plus Exchange, Mahe, knowing or believing that the said money represented the benefit from criminal conduct. According to the evidence led in the case the moneys had been transferred from Cash Plus in the name of one John Moyengo, a Ugandan national working as a teacher in Seychelles, who was totally unaware that his name was been used to transfer moneys until he received messages from Cash Plus regarding the said transactions that were not made by him. The explanation of the 1st and 2nd accused when confronted by Moyengo, had been that that the moneys used in the transaction belonged to the 2nd accused, and that he had a business and wanted to send money to buy goods in Kenya.

8. The learned Trial Judge had correctly stated the position taken up by the Prosecution at paragraphs 38 and 39 of his Ruling thus:

"Learned counsel submitted that any reasonable person in a democratic society will always, if he or she wants to transfer the money to their known persons overseas, either for personal or business purpose, legitimately approach the bank or money exchange directly by himself or herself and request the bank or money exchange to transfer the money to overseas, if the money is generated by them legitimately by their reasonable work or business." (Paragraph 38 of the Ruling)

"Based on the analysis and discussions made above, any reasonable jury would find that the money used to do the 21 transactions with the assistance of the 3rd accused, as alleged in the indictment, must have been generated by the 1st and 2nd accused persons by their illegal acts in Seychelles, which represents the benefit from criminal conduct by them. That's why they used others, misused the customer names and contact details of Cash Plus to send their illicit money from Seychelles to Kenya, instead of directly sending the said money by themselves using their own names and contact details." (Paragraph 39 of the Ruling)

9. At paragraphs 24 and 25 of the Reference the Attorney General had submitted:

"Leaving aside the question of whether or not there was sufficient evidence as to the involvement of the 1st and 2nd Respondent (1st and 2nd accused before the Supreme Court) in the transactions, it is respectfully submitted that the learned judge erred in law in holding that there was "a clear lack of evidence to establish a prima facie case… that the money in question were proceeds of criminal conduct."

"It is clear from the Ruling that the learned judge failed to take into account or apply section 3(11) of the Anti-Money Laundering Act, 2006."

10. Section 3(11) of the Anti-Money Laundering Act, 2006 provides:

"***(11) (a)*** *As soon as the Court determines that the evidence adduced in the case gives rise to a reasonable inference that the property is or represents the benefit from criminal conduct the property shall be deemed to be the benefit from criminal conduct unless the defendant by evidence establishes otherwise to the satisfaction of the Court. The burden of proving that the property is not the benefit from criminal conduct shall be upon the defendant;*

(b) *It shall not be necessary in any event for the prosecution to prove that the property in question is or represents the benefit of any particular criminal*

conduct or that any person was convicted of criminal conduct in relation to the property."… (emphasis added)

11. Having cited the above provision from the Anti-Money Laundering Act, 2006 at paragraph 26 of his Reference, the Attorney General seeks the opinion of this Court, as to whether the facts of this case as briefly set out in paragraph 6 above, can properly have given rise to a "reasonable inference" that the property is or represents the benefit of criminal conduct as required by section 3(11) of the Anti-Money Laundering Act, 2006.

12. The Attorney General's challenge is to the learned Trial Judge's statement at paragraph 53 of the Ruling and as stated at paragraph 4 above (Paragraph 22 of the Reference) which states: "However, I find that there is a clear lack of evidence to establish a prima facie case…that the money in question were proceeds of criminal conduct…". The basis for the challenge of the Attorney General finds support from the learned Trial Judge's own observation at the commencement of paragraph 53 of the Ruling, where he states: "Having made the above assessment of the evidence I find that there is a strong presumption that transferring money overseas in the manner that was done in this case show possible impropriety by those involved." Also, the learned Trial Judge had stated at paragraph 52 of the Ruling and as stated at paragraph 4 above (Paragraph 21 of the Reference): "…the prosecution's argument is that if the money in question was being obtained by lawful business transactions, then the transfer need not have been made in such a manner as they could have done the transactions in their own names. That has some persuasiveness to it but it is up to the prosecution to support that contention with evidence."

13. I have no doubt in my mind that the learned Trial Judge's statement: "that there is a clear lack of evidence to establish a prima facie case…that the money in question were proceeds of criminal conduct…", is erroneous in view of the clear provisions in section 3(11) (a) of the Anti-Money Laundering Act, 2006, as referred to at paragraph 10 above, the evidence adduced by the prosecution and the learned Trial Judge's own observations referred to at paragraph 11 above. In my view that is not only the 'reasonable inference' but the only inference that could have been drawn from the facts adduced by the prosecution. The inculpatory facts, mainly the uncontradicted admission on the part of the two accused to John Mayengo as referred to at paragraph 7 above are incompatible with the fact that the money in question were not proceeds of criminal conduct and cannot be explained by any other reasonable hypothesis, save by a fanciful defence, the two accused may have put up. It is my view that in view of the evidence led by the prosecution there could not have been any other circumstances to weaken or destroy the inference that the money in question is or represents the benefit from criminal conduct. In the circumstances it is my view that the prosecution has proved that the money in question were proceeds of criminal conduct not merely on the basis of a prima facie case but beyond a reasonable doubt.

14. I believe what is sought to be corrected by the Attorney General is the above statement by the learned Trial Judge as stated at paragraph 24 of the Reference (see paragraph 9 above), and not the issue of the sufficiency of evidence as to the involvement of the 1st and 2nd accused in the transactions. That is why it is stated in the Reference: "Leaving aside the question of whether or not there was sufficient evidence as to the involvement of the 1st and 2nd Respondent in the transaction…" The learned Trial Judge probably erred by linking his statement at paragraph 53 of the judgement, referred to at paragraph 4 above, pertaining to 'sufficiency of evidence that the money in question were proceeds of criminal conduct'; with that of 'sufficiency of evidence pertaining to the involvement of the 1st and 2nd accused as charged'. I do not wish to comment on the learned trial Judge's statement that there was insufficient evidence pertaining to the involvement of the 1st and 2nd accused to convict them.

15. As regards the clarification sought from this Court as to the correct application of section 3(11) of the Anti-Money laundering Act, 2006, it is my opinion that the learned Trial Judge's determination that: "Having made the above assessment of the evidence I find that there is a strong presumption that transferring money overseas in the manner that was done in this case show possible impropriety by those involved" and "the prosecution's argument… has some persuasiveness" as stated at paragraph 13 above undoubtedly gave rise not only a 'reasonable inference', but the only inference that the property is or represents the benefit from criminal conduct, in the absence of other evidence. In such an event section 3(11)(a) of the Anti-Money Laundering Act, 2006 provides the property shall be deemed to be the benefit from criminal conduct unless the defendant by evidence establishes otherwise to the satisfaction of the Court. Section 3(11)(b) states that it shall not be necessary in any event for the prosecution to prove that the property in question is or represents the benefit of any particular criminal conduct In view of this the learned Trial Judge was in error to look for further evidence that the money in question were proceeds of criminal conduct at the close of the prosecution case.

16. I am of the view that the learned Trial Judge had erroneously been of the view and quite contrary to the clear wording in section 3(11)(a) of the Anti-Money Laundering Act, 2006, that to establish a prima facie case when charged with the offence of money laundering, there had to be more evidence than what could give rise to 'a reasonable inference' that the property is or represents the benefit from criminal conduct. In doing so he had been confused as regards the two issues of 'prima facie case' and reasonable inference'.

17. A 'reasonable inference' is a rational conclusion drawn by the fact finder from evidence that has been accepted as believable. A fact may be inferred so long as it is reasonable and possible. The process that is used in drawing an inference is deductive reasoning and is a persuasive form of circumstantial evidence. In my view there is no difference between the level of the standard of

proof when a court determines that the evidence adduced in the case has given rise to a 'reasonable inference' and that a 'prima facie' case has been established after evaluation of the evidence led at the close of the prosecution case.

18. To determine whether a 'prima facie case' had been established the Court in a normal criminal trial evaluates the case at the close of the prosecution case to determine if there is any support for proceeding further with the case by calling for a defence. It is a standard of proof under which the party with the burden of proof need to present enough evidence to create a rebuttable presumption that the matter asserted is true. In **Black's Law Dictionary 1228 (8th ed)** it is said: "*Prima facie means generally that the evidence is sufficient to establish a fact or raise a presumption unless disproved or rebutted*".

19. Thus, in making his determination the learned Trial Judge had erred in failing to realize that the burden set by section 3(11) (a) of the Anti-Money Laundering Act, 2006 on the prosecution in proving its case, before the burden shifts to the defence, is similar to the burden on the prosecution in establishing a prima facie case in a normal criminal trial. The other error made by the learned Trial Judge had been his failure to take into consideration the 'deeming' provision in section 3(11) (a) which states that as soon as the Court determines that the evidence adduced in the case gives rise to a reasonable inference that the property is or represents the benefit from criminal conduct, the property shall be deemed to be the benefit from criminal conduct unless the defendant by evidence establishes otherwise to the satisfaction of the Court. The burden of proving that the property is not the benefit from criminal conduct then shifts to the defendant in accordance with section 3(11) (a) of the Anti-Money Laundering Act, 2006.

20. In a normal criminal trial, the burden of proving all the elements of its case always remains on the Prosecution to the very end of the trial, despite the fact that the Court has ruled at the end of the prosecution case that a prima facie case has been established and called for a defence and the defence has failed to come up with a proper defence. Save in the cases where the defence of insanity or diminished responsibility have been raised, the burden never shifts to the defence, it remains always on the prosecution. Having ruled that a prima facie case has been established, a court would have to continue to determine whether the prosecution has established its case beyond a reasonable doubt in relation to all the elements of the offence, which is the standard of proof the Prosecution has to meet in a normal criminal trial. It is clear therefore that in view of the 'deeming' provision in section 3(11) (a) of the Anti-Money Laundering Act, 2006, as referred to at paragraph 19 above, that in a prosecution for an offence of money laundering once the Court determines that the evidence adduced in the case gives rise to a reasonable inference that the property is or represents the benefit from criminal conduct; the burden on the Prosecution to prove any further that the property is or represents the benefit from criminal conduct

ceases, if the defendant fails to come up with a defence acceptable to court. In such circumstances, and according to the facts of this case, I do not see what further proof was necessary on the part of the prosecution in regard to that element.

21. As to which party bears the legal burden is determined by the rules of substantive law set out in the statute. The general rule, in criminal cases, as stated earlier, is that the legal burden of proving any fact essential to the prosecution case rests upon the prosecution and remains with the prosecution throughout the trial. **Adrian Keane in his book, The Modern Law of Evidence, 3rd Edition** states that there are three categories of exception to this general rule, namely where a statute expressly places the legal burden on the defence, where a statute impliedly places the legal burden on the defence and where the accused raises the defence of insanity. In **Woolmington V DPP, 1935 AC 462, Lord Sankey LC** said: "*Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject…to any statutory exception…*" (emphasis added)

22. Adrian Keane cites **Section 2 of the Prevention of Corruption Act, 1916** as an example, a statute which expressly places the legal burden on the defence which is an exception to the general rule: "*Where in any proceedings against a person for an offence under the Prevention of Corruption Act, 1906, or the Public Bodies Corrupt Practises Act, 1889, it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body… the money, gift or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved*." (emphasis added) Keane goes on to state that under the above-mentioned section 2, where the prosecution has led evidence that the money, gift, or other consideration was paid, given or received, the legal burden shifts to the defendant to prove otherwise. He also cites section 1(1) of the Prevention of Crime Act, 1953 which states that it is an offence for a person to have an offensive weapon with him in a public place without lawful authority or reasonable excuse, the proof whereof shall lie on him as another example where the legal burden shifts to the defendant. Section 19 (1) of the Misuse of Drugs Act 2016, Seychelles, states a person who is proved or presumed to have had in his possession or custody or under his or her control certain types of drugs specified therein and above the quantity as stated therein shall be presumed, until the person proves the contrary, to have had the controlled drug in his or her possession with intent to traffic. The difference nevertheless between section 19 (1) of the Misuse of Drugs Act and section 3(11) (a) of the Anti-Money Laundering Act is, is the 'deeming' provision in the Anti-Money Laundering Act and the specific reference in the latter Act that the burden of proving that the property is not the benefit from criminal conduct is specifically placed upon the defendant once the court determines that

the property is or represents the benefit from criminal conduct. Section 3(11) (a) of the Anti-Money Laundering Act referred to at paragraph 10 above is thus a clear example of where a statute expressly places both the legal and evidential burden on the defence.

23. It is my view that both the legal and evidential burden, of proving that the property is not the benefit of criminal conduct shifts to the defence once the Court determines that the evidence adduced in the case gives rise to a reasonable inference that the property is or represents the benefit from criminal conduct, in view of article 19 (10) (b) of the Constitution, referred to below. According to Article 19 (10) (b) of the Anti-Money Laundering Act "*imposes upon any person charged with an offence the burden of proving particular facts…*" In **R V Edwards 1975, QB, 27/ 59 Cr. App 213**, the Court of Appeal held where the exception to the general rule applies both the legal and evidential burden shifts to the accused. According to **Adrian Keanee** "*where the defence bears the legal burden of proving an issue pursuant to an express statutory exception, the defence also bears the evidential burden on such issues*."

24. The legal burden on the accused being to prove that the property is not the benefit of criminal conduct and the evidential burden, in relation to it, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the property is not the benefit of criminal conduct. If the accused fails to discharge his burden the property will be deemed to be the benefit from criminal conduct, and there will be nothing further for the Prosecution to prove or disprove in regard to this element.

25. The standard of proof when the legal burden lies on the defence is on a preponderance (or balance) of probability. (See **paragraph 4-448 of Archbold 2012**) It was stated in **R V Carr-Briant ,1948, KB 607/ Cr. App R. 76 CCA** that the defence will have proved a fact if it is 'more probable than not' or 'more likely than not' that the fact existed; when the burden has shifted to the defence.

26. I wish to add that this shifting of the burden on the accused under section 3(11) (a) of the Anti-Money Laundering Act, 2006 is not contrary to **article 19(2)(a) of the Constitution of Seychelles** which stipulates that "*Every person who is charged with an offence is innocent until the person is proved or has pleaded guilty*". This is in view of the derogation to that right in article 19(10) (b) of the Constitution. **Article 19(10) (b)** states: "*Anything contained in or done under the authority of <u>any law necessary in a democratic society</u> shall not be held to be inconsistent with or in contravention of clause 19(2)(a), to the extent that **<u>the law in question</u>** <u>imposes upon any person charged with an offence the burden of proving particular facts or declares that the proof of certain facts shall be prima facie proof</u> of the offence or <u>of any element thereof</u>*". (emphasis added) There has not been any challenge to the Anti-Money Laundering Act 2006, that, it is not a law necessary in a democratic society. We therefore need

to be guided by article 19 (10) (b). There is no incompatibility between section 3(11) (a) of the Anti-Money Laundering Act, 2006 and article 19 (10) (b) of the Constitution.

27. The principle of the presumption of innocence does not exclude legislatures from creating criminal offenses containing a presumption by law as long as the principles of rationality (reasonableness) and proportionality are duly respected.

28. There is a need to strike a reasonable balance between the general interest of the community and protection of the fundamental rights of the individual. It was stated in the case of **Sheldrake V DPP, 2005, 1 AC 264** by **Lord Bigham** the ECHR does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. Lord Bingham placed emphasis on the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. The Salabiaku test; which emerged from **the decision of the ECHR in Salabiaku v. France, (1988), Application no. 10519/83, Section 28**; is based on the recognition that "*presumptions of fact or of law operate in every legal system, but that States must confine presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense*." The Court of Appeals in Hong Kong SAR, China, came to a similar conclusion in **Attorney General v. Hui Kin Hong, Court of Appeal no. 52 of 1995**. While it accepted that requiring the accused to discharge the burden of proof deviates from the presumption of innocence, it held the following: *"There are exceptional situations in which it is possible compatibly with human rights to justify a degree of deviation from the normal principle that the prosecution must prove the accused's guilt beyond reasonable doubt."*

29. The learned Trial Judge erred in making the statement at paragraph 52 of his Ruling: "It must be noted that no evidence was adduced to establish that the recipients of these sums were criminals engaged in criminal activities in Seychelles, Kenya or anywhere else which would have supported that contention." It was not necessary for the prosecution to prove that the recipients of these sums were criminals engaged in criminal activities anywhere, in view of the clear provisions of section 3(11) (b) of the Anti-Money Laundering Act, 2006 as referred to at paragraph 10 above.

A. Fernando, President

I concur:

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Dr. M. Twomey-Woods JA

I concur:

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S. Andre JA

Signed, dated and delivered at Ile du Port on 19 August 2022.