

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO29/2009

[2016] SCSC 1066

THE REPUBLIC

versus

KRISHNAMART & COMPANY (PROPRIETARY) LIMITED

Accused

**NELSON PILLAY AND SAROJA PILLAY REPRESENTING AS
DIRECTORS OF KRISHNAMART & COMPANY (PROPRIETARY) LIMITED**

Accused

Heard:

Counsel: Mr Benjamin, Assistant Principal State Counsel for the Republic
Mr. Georges and Mr. Rajasundaram for the accused

Delivered: 19 October 2016

JUDGMENT

Robinson J

[1] **Background**

[2] The trial proceeded on an Amended Formal Charge dated 30 May, 2013.

[3] Count 1 and count 2 are as follows —

"Count 1

Statement of offence

Issuing cheque without provision contrary to and punishable under section 299 A (1) of the Penal Code CAP 158.

Particulars of offence

*Krishnamart and Company (Proprietary) Limited of 5th June Avenue, Victoria on the 30th April 2004 at Victoria, Mahe issued a Bank of Baroda cheque No. 051544 for the sum of SR2, 609,462.17 for the payment of which cheque there was no sufficient provisions.
".*

"Count 2

Statement of offence

Issuing cheque without provision contrary to and punishable under section 299 A (1) of the Penal Code CAP 158 and read with section 54 (1) of the Interpretations and General Provisions Act CAP 103.

Particulars of offence

Nelson Pillay and Saroja Pillay representing as directors of Krishnamart & Company (Proprietary) Limited of 5th June Avenue, Victoria on the 30th April 2004 at Victoria, Mahe consented to or connived with the said Krishnamart & Company (Proprietary) Limited or was negligent in the issuing of a Bank of Baroda Cheque No. 051544 for the sum of SR SR2, 609,462.17 for the payment of which cheque there was no sufficient provisions."

[4] Nelson Pillay pleaded not guilty on count 1 and count 2, separately, on 30 May, 2013. On the application of learned counsel for Saroja Pillay, the court entered a plea of not guilty for Saroja Pillay, on 30 May, 2013, on count 1 and count 2, separately. Saroja Pillay first attended the hearing of this case after the close of the case for the prosecution.

[5] Mr. Benjamin appeared on behalf of the prosecution. Nelson Pillay and Saroja Pillay are represented by learned counsel Mr. Georges and Mr. Rajasundaram, respectively.

[6] The prosecution adduced evidence by calling 5 witnesses, namely—

1. Maxime Payet, the first prosecution witness (PW-1)
2. Margaret Nourice, the second prosecution witness (PW-2)
3. Julia Monthy, the third prosecution witness (PW-3)
4. Fred Hoareau, the fourth prosecution witness (PW-4)
5. Francis Chang-Sam, the fifth prosecution witness (PW-5).

[7] After the close of the case for the prosecution, learned counsel for Nelson Pillay and Saroja Pillay made a submission of no case to answer. The court ruled that Nelson Pillay and Saroja Pillay each had a case to answer on both counts.

[8] Upon their election being put to them by the court, Nelson Pillay and Saroja Pillay elected to give evidence on oath. Nelson Pillay and Saroja Pillay did not call witnesses or produce other evidence.

[9] *Voire-Dire on the admissibility of a copy of cheque No. 051544*

[10] The cheque bearing number 051544, admittedly in the possession of the Seychelles Police Force, is the original and the best evidence. PW-1, PW-3 and PW-5 sought to produce a copy of the cheque bearing number 051544. The defence objected vehemently to the prosecution leading secondary evidence relating to the cheque bearing number 051544. The prosecution may lead secondary evidence relating to the cheque bearing number 051544 if it establishes to the satisfaction of the court that the original cheque had been lost or destroyed or could not be presented through impossibility. Upon the application of the prosecution, the court conducted a *voire-dire*. Following the *voire-dire*, the court was satisfied that no foundation had been laid by the prosecution for the admission of such secondary evidence by proof of the absence of the original cheque. The court ruled that copies of the cheque bearing number 051544 were inadmissible in evidence in this case.

[11] **The case for the prosecution**

[12] Evidence of Maxime Payet (PW-1)

[13] The evidence of PW-1 is to the following effect. PW-1 has worked for the Seychelles Police Force for over 33 years. On 3 June, 2004, he was attached to the Criminal Investigation Unit of the Seychelles Police Force. PW-1 investigated a case of issuing a cheque without provision following a report made by PW-5, an Attorney-at-Law, by a letter dated 5 May, 2004, addressed to the Commissioner of Police. A cheque was attached to the letter.

[14] PW-1 produced exhibit P2, a print-out of the statement of account for the period of 1 April, 2004 to 2 June, 2004, for account number 0153640601. Krishnamart held account number 0153640601 with Bank of Baroda. PW-1 did not state in evidence whether he had seen the cheque in question. PW-1 stated that he could not recall on whose name the cheque was issued.

[15] Evidence of Margaret Nourice (PW-2)

[16] PW-2 is a senior registration officer in the Registration Division. PW-2 has been working as a registration officer since 1978.

[17] PW-2 produced exhibit P3, a certified copy of the original of the Particulars of Directors and Secretaries to Krishnamart, and exhibit P4, a certified copy of the Certificate of Official Search. P. Krishnamurthy Pillay, Rani Sulochana Pillay and Saroja Pillay were the directors of Krishnamart during the months of April and May, 2004, and remain the directors of Krishnamart to date.

[18] Evidence of Julia Monthy (PW-3)

[19] PW-3 works for Bank of Baroda as a bank supervisor. PW-3 has been employed by Bank of Baroda for over 32 years.

[20] The evidence of PW-3 is to the following effect. Krishnamart holds a business account, bearing number 0153640601 with cheque book facilities, at Bank of Baroda. Documents of Bank of Baroda established that any director could operate on the account. Documents

of Bank of Baroda have the signatures of Nelson Pillay and Saroja Pillay for Bank of Baroda's records. At the time, Nelson Pillay being a director of Krishnamart would normally sign cheques.

- [21] PW-3 recalled that a Krishnamart cheque bearing number 051544, for the amount of Seychelles rupees 2, 609,462.17/-, dated 30 April, 2004, was presented to Bank of Baroda for encashment, on 30 April, 2004, by Barclays Bank. The cheque bearing number 051544 was drawn in favour of PW-5. The signatories on cheque number 051544 were Nelson Pillay and Saroja Pillay. On presentation of the cheque, Bank of Baroda returned it to Barclays Bank, on 30 April, 2004, unpaid with the indorsement "*refer to drawer*". Barclays Bank presented the cheque bearing number 051544 to Bank of Baroda for encashment for a second time, on 4 May, 2004. Bank of Baroda once again returned it to Barclays Bank unpaid, with the indorsement "*refer to drawer*". The indorsement "*refer to drawer*" means an insufficiency of funds. The cheque bearing number 051544 has, to date, not been encashed.
- [22] PW-3 sought to give secondary evidence of a copy of the cheque bearing number 051544, which bears on its face the words "*verified original*". Both counsel for the defence objected to the production and admission of the secondary evidence on the ground that Bank of Baroda could not have verified the document as a copy of the original in the absence of the original cheque being kept by Bank of Baroda. The court allowed the objection. In light of the ruling of the court, indicated at paragraph [10] of this judgment, the evidence cannot be accepted.
- [23] PW-3 was cross-examined by counsel for Nelson Pillay. PW-3 explained that a signature card contains the account holder's details, the authorised signatories and the signature specimen of each signatory for Bank of Baroda's records.
- [24] Subsequently, the cross-examination of PW-3 was concerned with a copy of the cheque bearing number 051544. In light of the ruling of this court, indicated at paragraph [10] of this judgment, the evidence cannot be accepted.
- [25] PW-3 was cross-examined by counsel for Saroja Pillay. PW-3 confirmed that the words "*refer to drawer*", in the bank's parlance, means an insufficiency of funds.

- [26] PW-3 confirmed that the signature card for Bank of Baroda's records at the time contained, *inter alia*, the authorised signatories' details.
- [27] Subsequently, the cross-examination of PW-3 centred on a copy of the cheque bearing number 051544. As indicated above, the evidence cannot be accepted by the court.
- [28] In re-examination PW-3 could not remember whether Saroja Pillay was one of the authorised signatories to operate the account of Krishnamart on 30 April, 2004.
- [29] Evidence of PW-3 (Recalled)
- [30] PW-3 testified that Krishnamart had agreed an overdraft facility with Bank of Baroda, for the period of 25 April, 2004 to 17 May, 2004, with regard to account number 0153640601.
- [31] PW-3 produced exhibit P6, which showed that Nelson Pillay was an authorised signatory on the account of Krishnamart until 21 May, 2004.
- [32] PW-3 was cross-examined by learned counsel for Nelson Pillay. PW-3 confirmed that Krishnamart had agreed a formal overdraft arrangement with Bank of Baroda. PW-3 did not shed light on the authorised overdraft limit. PW-3 explained that the Krishnamart account had been overdrawn before.
- [33] PW-3 confirmed in re-examination that Krishnamart had an overdraft facility on the account.
- [34] Evidence of Fred Hoareau (PW-4):
- [35] PW-4 is the Deputy Registrar in the Registration Division. PW-4 produced exhibit P5, a certified copy of the original of the Annual Return for Krishnamart, for the year ending 31 December, 2004. Exhibit P5 attested to the fact that, as of 5 December, 2005, P. Krishnamurthy Pillay, Rani Sulochana Pillay and Saroja Pillay were the directors of Krishnamart. Nelson Pillay was a member and shareholder of Krishnamart. Nelson Pillay was removed, by P. Krishnamurthy Pillay, as a director of Krishnamart, in 2002. PW-4 was not aware whether or not Nelson Pillay and Saroja Pillay were directors of

Krishnamart during the period of 25 April, 2004 to 17 May, 2004, or at any point in 2004.

[36] PW-4 was cross-examined by learned counsel for Nelson Pillay. He stated that Nelson Pillay ceased to be a director of Krishnamart in 2002, and was not a director of Krishnamart in 2003 and 2004.

[37] In re-examination PW-4 confirmed that Nelson Pillay was removed as a director of Krishnamart in 2002.

[38] Evidence of Mr. Francis Chang-Sam (PW-5):

[39] The gist of the evidence of PW-5 is to the following effect. PW-5 is an Attorney-at-Law. PW-5 recalled that Nelson Pillay and Saroja Pillay, in his office at Kingsgate House, signed and handed over to him a cheque, in the amount of Seychelles rupees 2, 609, 462.17/-, on behalf of Krishnamart, in favour of his client's account. Nelson Pillay and Saroja Pillay signed the cheque in their capacity as directors of Krishnamart. The cheque was issued on Bank of Baroda.

[40] PW-5 placed the cheque in his bank, Barclays Bank, for encashment on three occasions. On two occasions Barclays Bank returned the cheque to him unpaid with an indorsement "*refer to drawer*". PW-5 testified that Nelson Pillay asked him to "*re-present*" the cheque after it was returned to him unpaid the first and second time. 4 May, 2004, was the last time that the cheque bounced. On the third occasion, he did not "*re-present*" the cheque after it was again returned to him unpaid. PW-5 produced exhibit P10, establishing that the cheque credited to his client's account on 30 April, 2004, and 3 May, 2004, and drawn on Bank of Baroda, were returned to his bank marked "*re-present*", and that the one dated 4 May, 2004, and drawn on Bank of Baroda, was returned to his bank marked "*refer to drawer*".

[41] PW-5, subsequently wrote a letter, dated 5th May, 2004, to the Commissioner of Police reporting the offence. PW-5 produced the letter as exhibit P7. Exhibit P7 contained a note stating, "*letter and original cheque handed over to Mr. Quatre, who is now the Commissioner of Police, was then at the time head of CID, [...]*". Both counsel objected to the production and admission of a copy of the cheque in the absence of the original

cheque. In light of the ruling of the court indicated at paragraph [10], of this judgment, the evidence cannot be accepted.

[42] Because the police did not act on the report, PW-5 filed a civil case, before the Supreme Court, against Krishnamart, claiming the sum due to his client. Subsequent to the filing of the civil case, PW-5 received a banker's cheque, from Nelson Pillay and Saroja Pillay, issued for the sum of Seychelles rupees 500, 000.00/-, enclosed with a letter dated 27 May, 2004. PW-5 produced the letter dated 27 May, 2004, as exhibit P8. Exhibit P8 reads —

"May 27th 2004

*Mr. Francis Chang-Sam
Attorney At Law
Kingsgate House
Victoria*

Dear Sir,

*Re: Civil Side No. 111 of 2003-Part Payment of Sr. 500, 000/-
against BOB cheque no. 051544-Opportunity International
General Trading LLC Dubai*

This has reference to the above and we would like to inform you that we are paying a sum of SR500, 000/- against the bounced Bank of Baroda cheque no. 051544 issued for the sum of SR 2, 609, 462.17.

Please find enclosed a banker's cheque no. 715440 issued for Sr. 500, 000/- favouring you.

Kindly acknowledged the same.

Thanking you,

Yours faithfully

*Nelson Pillay SD: Nelson Pillay SD: Saroja Pillay
Director Saroja Pillay
Director*

Received BOB Bankers Cheque no. 715440 of Sr. 500, 000/-

- [43] PW-5 was cross-examined by learned counsel for Nelson Pillay. PW-5 testified that he filed a case after the dishonour of cheque. PW-5 is not aware whether the civil case before the Supreme Court has been completed.
- [44] In light of exhibit P8, learned counsel put to PW-5 that Nelson Pillay could not have signed the cheque bearing number 051544, in the capacity as a director of Krishnamart, because he was not a director of it, but that he signed the cheque bearing number 051544 because he had the mandate to sign cheques on behalf of Krishnamart. PW-5 explained that he mentioned specifically in exhibit P7 that Nelson Pillay was a director of Krishnamart because Nelson Pillay signed on the cheque as a director.
- [45] PW-5 was cross-examined by learned counsel for Saroja Pillay. PW-5 stated that he did not check whether Nelson Pillay and Saroja Pillay were directors of Krishnamart because he knew that they were directors of Krishnamart.
- [46] The cross-examination of PW-5 centred on civil cases filed by PW-5 and Krishnamart before the Supreme Court. It was put to PW-5 that Krishnamart won the civil case with the consequence that PW-5 returned the sum of Seychelles rupees 500, 000.00/- to Krishnamart. PW-5 confirmed that it was the case.
- [47] The court notes that it is abundantly clear by the circumstances disclosed by the evidence of PW-5 that there is an underlying debt which rendered the payment by the cheque issued necessary.
- [48] The prosecution then closed its case.
- [49] **Submission of no case to answer**
- [50] Following the ruling of the court that Nelson Pillay and Saroja Pillay had a case to answer, Nelson Pillay and Saroja Pillay elected to give evidence on oath. Nelson Pillay and Saroja Pillay did not call any witnesses or other evidence.
- [51] **Case for the defence**

[52] Evidence of Nelson Pillay:

[53] Krishnamart is an importer, wholesaler and retailer based in Seychelles. Krishnamart operates a supermarket outlet in Seychelles. Nelson Pillay was a director and shareholder in Krishnamart. Prior to 2004, Nelson Pillay was responsible for managing the affairs of Krishnamart. Nelson Pillay ceased to be a director of Krishnamart in 2004 (exhibit P3) and is now only a shareholder of Krishnamart.

[54] Krishnamart held accounts with Bank of Baroda. Nelson Pillay was a signatory on those accounts until 2004, when he was removed as such (exhibit P6).

[55] Opportunity International General Trading LLC (hereinafter referred to as the "Company") is a company operating from Dubai. The Company had been sending goods to Krishnamart since the early 1990's. Before 2004, there were disputes between Krishnamart and the Company with regards to money. Krishnamart and the Company did not manage to settle the disputes on their own. Consequently, Nelson Pillay received communication from PW-5 on behalf of the Company. The dispute over money continued. The Company sued Krishnamart before the Supreme Court of Seychelles. The Company and Krishnamart entered judgment by consent against Krishnamart on 6 January, 2004 (exhibit D2). Nelson Pillay, a director of Krishnamart, signed the judgment by consent on behalf of Krishnamart. In terms of the judgment by consent, Krishnamart agreed to pay the Company in four instalments until payment in full.

[56] It is not clear on a reading of the proceedings as to whether Krishnamart paid the Company, in terms of the judgment by consent. Nelson Pillay testified that "*few payments were made*" (proceedings of 2 September, 2015 at 1:45 p.m.) and a payment "*was not missed but was delayed*" (proceedings of 2 September 2015 at 1:45 p.m.). Krishnamart sought assistance from banks and private money lenders to pay its debt. On 30 April, 2004, a cheque to the sum of Seychelles rupees 2, 600, 000.00/- was issued by Krishnamart to PW-5. Baroda Bank did not pay the cheque. Subsequently, in May, 2004, Nelson Pillay and Saroja Pillay went to the law chambers of PW-5 to pay part of the amount that was not paid by Bank of Baroda. A part payment of Seychelles rupees 500, 000.00/- was made to cover the cheque that was not paid (exhibits P8 and P9). Nelson Pillay was not charged with any offence in 2004.

- [57] The court has not accepted any evidence centred on a copy of the cheque bearing number 051544.
- [58] Krishnamart applied to the Supreme Court to set aside the judgement by consent. On 5 May, 2006, the judgment was set aside, and the Company was ordered to refund the Seychelles rupees 500, 000.00/- paid out by Krishnamart towards the settlement of the judgment debt. Hence a new trial before the Supreme Court. The case was dismissed by the Supreme Court. The Company took the case to the Seychelles Court of Appeal. The court completed the hearing of this case before the delivery of the judgment by the Seychelles Court of Appeal. The Court of Appeal delivered a judgment against Krishnamart.
- [59] Nelson Pillay was cross-examined by counsel for Saroja Pillay. Nelson Pillay stated that before he was removed as a director of Krishnamart, two directors could act on behalf of Krishnamart. Nelson Pillay was cross-examined about exhibit P10. He stated that exhibit P10 refers to a "*bank slip*", the indorsement on it saying "*refer to drawer*". There is no indorsement from the bank stating that funds in the account are insufficient. He stated that the Company refunded the sum of Seychelles rupees 500, 000.00/- to Krishnamart.
- [60] Nelson Pillay was cross-examined by counsel for the prosecution. Nelson Pillay stated that he was a director and shareholder of Krishnamart on 30 April, 2004. Saroja Pillay was also a director of Krishnamart.
- [61] On 30 April, 2004, the signatures of two directors of Krishnamart were required to sign cheques on behalf of Krishnamart. On 30 April, 2004, he (Nelson Pillay), Saroja Pillay and his father had the power to sign cheques on behalf of Krishnamart.
- [62] From January, 2004, to May, 2004, he acted under the instructions of his father, who was the senior shareholder and a director of Krishnamart. Nelson Pillay resigned as a director in May, 2004, because of a family dispute.
- [63] Nelson Pillay confirmed that the Company is based in Dubai. Krishnamart had dealings with the Company. Nelson Pillay, as a director of Krishnamart, liaised with the Company with regards to the importation of goods, on behalf of Krishnamart.

- [64] Nelson Pillay could not recollect issuing the cheque in question. The court states in passing that it is noteworthy that the cross-examination of PW-5 by learned counsel for Nelson Pillay says otherwise. The cross-examination was to the effect that Nelson Pillay had signed on the cheque. The point of contention was whether he had signed on the cheque as a director of Krishnamart or because he was mandated as a similar officer to sign on the cheque. Learned counsel put exhibits P6, P8, P9, and P10 to Nelson Pillay and invited him to confirm that he had issued a cheque bearing number 051544 on 30 April, 2004. Nelson Pillay stated that he had issued many cheques in 2004, but could not remember issuing the specific cheque. The court has not accepted any evidence centred on a copy of the cheque bearing number 051544.
- [65] Nelson Pillay could not recollect in detail the civil cases before the Supreme Court. Nelson Pillay came across to the court as indirect, evasive and unreliable.
- [66] *Evidence of Saroja Pillay*
- [67] Saroja Pillay is a director and shareholder of Krishnamart. In 2004, Nelson Pillay and Saroja Pillay were directors of Krishnamart. Nelson Pillay was removed as a director of Krishnamart in 2004.
- [68] Saroja Pillay stated that she was not actively involved in Krishnamart, in 2004, because she gave birth in 2004. Nelson Pillay and her father, P. Krishnamurthy Pillay, were involved in Krishnamart. Saroja Pillay would only sign cheques on behalf of Krishnamart when her father was not feeling well. Saroja Pillay remembered the payment to the sum of Seychelles rupees 500, 000. 00/- made to PW-5.
- [69] Saroja Pillay could not recall issuing a cheque in favour of PW-5 that was dishonoured. The examination of Saroja Pillay then centred on the cheque in question. The court has not accepted the evidence.
- [70] Saroja Pillay was cross-examined by learned counsel for Nelson Pillay. She stated that she was summoned to appear before the Supreme Court with regards to the charges in 2009.

[71] Saroja Pillay was cross-examined by learned counsel for the prosecution. Saroja Pillay stated that she was a director of Krishnamart on 30 April, 2004. Saroja Pillay could neither remember attending the Chambers of PW-5 on 30 April, 2004, nor signing the cheque in question on the said date. Saroja Pillay stated that she rarely signed cheques and she could not recollect signing such a cheque in 2004. When exhibit P8 was put to her, she acknowledged her signature on it. Subsequently, the cross examination of Saroja Pillay centred on the cheque that the court had ruled inadmissible. The court cannot accept the evidence. Saroja Pillay came across to the court as evasive.

[72] The defence then closed its case.

[73] **Submission of counsel and discussion**

[74] Against that background, the court considers count 1 and count 2 against Krishnamart, Nelson Pillay and Saroja Pillay, the provisions of the law as set out, and the evidence in light of the submissions of learned counsel.

[75] First, the court deals with count 1 against Krishnamart. In the present case the original cheque bearing number 051544 was not produced by the prosecution. Two copies of a cheque bearing number 051544 were ruled inadmissible by the court following a *voire-dire*.

[76] The court accepts the evidence of PW-1 that a complaint was made, under section 299A of the Penal Code, by PW-5, to the Commissioner of Police, by a letter dated 5 May, 2004, and a cheque was attached to the letter. PW-5 confirmed that he had made a complaint to the Commissioner of Police. The court accepts the evidence of PW-5 that the original cheque bearing number 051544 was attached to the said letter. Nelson Pillay and Saroja Pillay admitted in evidence that they were directors of Krishnamart on 30 April, 2004, and operated on the account of Krishnamart. On the evidence of PW-3 the court accepts that Nelson Pillay and Saroja Pillay were authorised signatories on Krishnamart's business account bearing number 0153640601 with cheque facilities. Nelson Pillay and Saroja Pillay have also admitted that they were authorised signatories on Krishnamart's business account at the material time. Krishnamart had resolved on 10

May, 2004, to remove Nelson Pillay's "[s]ignature from [its] accounts and related matters". The resolution was sent to Bank of Baroda by letter dated 22 May, 2004.

- [77] The court has considered the evidence of PW-3 and PW-5 and is sure that Krishnamart represented by Nelson Pillay and Saroja Pillay issued a Bank of Baroda cheque on 30 April, 2004, for the sum of Seychelles rupees 2, 609, 462.17/. On that point Nelson Pillay and Saroja Pillay came across as evasive. The court accepts the evidence of PW-5 that Nelson Pillay and Saroja Pillay appeared before him on 30 April, 2004, and signed on the cheque bearing number 051544 in their capacity as directors of Krishnamart.
- [78] There is no dispute that the cheque was not presented to Bank of Baroda for encashment during the period of validity.
- [79] PW-3 confirmed that Krishnamart had an overdraft facility on the account and the account had before been overdrawn. However, there is no evidence that Krishnamart had any authority to overdraw in respect of the specific cheque. On PW-3's evidence the cheque was presented to Bank of Baroda for payment and it was returned by Bank of Baroda unpaid because there was an insufficiency of funds and for no other reason. That fact is further borne out by exhibits P8, P9 and P10. Exhibit P8 emanating from Nelson Pillay and Saroja Pillay informed PW-5 that *"we would like to inform you that we are paying a sum of SR500, 000/- against the bounced Bank of Baroda cheque no. 051544 issued for the sum of SR 2, 609, 462.17"*.
- [80] Further, the court does not accept the submission of learned counsel for Nelson Pillay that in 2009, the original complaint had been condoned by PW-5, that PW-5 was estopped from reviving the complaint, and out of time for doing so, and that the original offence could not in consequence be revived. There is evidence from PW-5 and Nelson Pillay that the Krishnamart cheque was issued in discharge, in whole, of a debt. The prosecution has substantiated the existence of an underlying debt which rendered the payment by the cheque issued necessary. It is neither here nor there that PW-5 and Nelson Pillay had entered into a subsequent arrangement for payment, the terms of which are not clear to the court. On that point the court also takes judicial notice of the orders made by the Seychelles Court of Appeal. The debt subsists.

[81] For those aforementioned reasons, the court is satisfied that the prosecution has proven beyond reasonable doubt the elements of the offence against Krishnamart on count 1.

[82] Second, the court considers count 2 against Nelson Pillay and Saroja Pillay.

[83] Section 54 of the Interpretation and General Provisions Act (the Act), in so far as relevant, provides under subsection (1) that —

"54(1) Where at any time a body corporate commits an offence under an Act enacted after the commencement of this Act with the consent or connivance of, or because of neglect by, any individual, the individual commits the same offence if at that time

(a) he is a director, manager, secretary or similar officer of the body corporate;

[...]."

[84] The prosecution of a director or similar officer under section 54 (1) of the Act requires it first to be established that a body corporate of which he is a director or similar officer has committed an offence under section 299 A (1) of the Penal Code. It is also clear on a reading of section 54 (1) that Nelson Pillay and Saroja Pillay as directors or similar officers of Krishnamart commit the same offence only if Krishnamart committed it with the consent of or connivance of, or because of neglect by, Nelson Pillay and Saroja Pillay.

[85] The court opines that the burden under section 54 (1) of the Act is upon the prosecution to prove consent, connivance or neglect on the part of Nelson Pillay and Saroja Pillay, and it is the duty of the prosecution to prove that Krishnamart committed the offence with the consent or connivance of, or because of neglect by, Nelson Pillay and Saroja Pillay. These are things related to the state of mind of Nelson Pillay and Saroja Pillay that must be proved against them: see R v Chargot Ltd (trading as Contract Services) & ors [2008] UKHL 73. The prosecution has to establish that chain of causation.

[86] The question for the determination of the court is whether on the evidence it is established beyond reasonable doubt that the offence committed by Krishnamart, on

count 1, was with the consent or connivance of, or because of the neglect by, Nelson Pillay and Saroja Pillay in their capacity as directors of Krishnamart? Admittedly, Nelson Pillay was a director of or a similar officer of Krishnamart and Saroja Pillay was a director of Krishnamart, at the material time.

[87] What is meant by "consent", "connivance" or "neglect"? The court has not come across a decision of the Seychelles court in which the meaning of consent, connivance and neglect has been considered. The court refers to English authorities which have considered those elements. In **Chargot** the House of Lords considered the meaning of consent, connivance and neglect with regards to an offence under section 37 of the Health and Safety at Work etc. Act 1974 section 2 (1) and section 3 (1) arising from the death of a dumper-truck driver. The House of Lords held that in a prosecution under section 37 of the Act, there was no fixed rule as to what had to be proved to establish that an officer's state of mind amounted to consent, connivance or neglect. According to Lord Hope —

"In some cases, as where the officer's place of activity was remote from the workplace or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence ... In others, where the officer was in day to day contact with what was done there, very little more may be needed".

The House of Lords in **Chargot** agreed with the definition of consent as given in Attorney General's Reference (No 1 of 1995) [1996] 1 W.L.R. 970; [1996] Crim. L.R. 575 ..., i.e., that it implies both knowledge and a decision made on the basis of that knowledge, but added that consent and connivance can also be established by inference as well as by proof of an express agreement. See also R. v P [2007] EWCA Crim 1937. In the case of Huckerby v Elliot [1970] 1 All E.R. 189 the Divisional Court stated that a person is said to have connived at an offence when —

"... he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it."

In R v P [2007] EWCA Crim 1937 the Court of Appeal held that neglect does not necessarily require actual knowledge, if the circumstances were such that they should have put the officer on enquiry.

[88] How are these different considerations to be applied to the facts of the case? The court has considered the evidence on record. Nelson Pillay and Saroja Pillay did not categorically deny signing on the cheque bearing number 051544. Nelson Pillay and Saroja Pillay stated that they could not recollect signing on the cheque because of the time that has elapsed since 2004. Nelson Pillay and Saroja Pillay came across as very evasive on that point. In the circumstances disclosed by the evidence the court is sure that Nelson Pillay was well aware of what was going on in Krishnamart and was actively involved in the business affairs of Krishnamart, at the material time. The court is also sure that on 30 April, 2004, Nelson Pillay signed on the cheque bearing number 051544 well aware that there was an insufficiency of funds in the account of Krishnamart to effect payment. The court is sure that Nelson Pillay issued the cheque without regard to whether there was any chance of it being paid or not. The fact that he tried subsequently to produce money to pay the cheque is neither here nor there. The short fact of the matter is that the debt still exists.

[89] With regards to Saroja Pillay although she came across as evasive the court is not sure whether she was aware of what was going on in Krishnamart at the material time. On the evidence the court cannot say whether she was in day to day contact with what was done in Krishnamart. Saroja Pillay stated that she gave birth in 2004 and was not actively involved in Krishnamart. The court also entertains doubts as to whether she actively encouraged what happened.

[90] For those aforementioned reasons, the court is satisfied that the prosecution has proven beyond reasonable doubt the elements of the offence, on count 2, only against Nelson Pillay.

[91] **Decision**

- [92] On count 1, the court is satisfied that the prosecution has proven beyond reasonable doubt the elements of a charge of issuing a cheque without provision contrary to and punishable under section 299 A (1) of the Penal Code against Krishnamart. The court finds Krishnamart guilty of issuing a cheque without provision contrary to and punishable under section 299 A (1) of the Penal Code and convicts Krishnamart. Section 154 (2) of the Act applies.
- [93] On count 2, the court is satisfied that the prosecution has proven beyond reasonable doubt the elements of a charge of issuing a cheque without provision contrary to and punishable under section 299 A (1) of the Penal Code and read with section 154 (1) of the Act. The court is satisfied that the prosecution has proven beyond reasonable doubt that Krishnamart committed the offence with the consent or connivance of, or because of neglect by, Nelson Pillay a director of Krishnamart or similar officer, whereby Nelson Pillay as a director or similar officer is guilty of the same offence, and proceeds to convict Nelson Pillay. On count 2, the court is not satisfied that the prosecution has proven beyond reasonable doubt the elements of a charge of issuing a cheque without provision contrary to and punishable under section 299 A (1) of the Penal Code and read with section 154 (1) of the Act against Saroja Pillay. The court acquits Saroja Pillay on count 2.

Signed, dated and delivered at Ile du Port on 19 October 2016

F Robinson
Judge of the Supreme Court