

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2021] SCSC 369

CO108/2015

**THE REPUBLIC**

*(Rep by Hemanth Kumar)*

v/s

**KETHY ELNA ESPARON**

*(rep. by Karen Domingue)*

**1<sup>st</sup> Accused**

**TERRY ANDREW PORIS**

*(rep by Nichol Gabriel)*

**2<sup>nd</sup> Accused**

**WENDY CYNTHIA ESPARON**

*(rep by Guy Ferley)*

**3<sup>rd</sup> Accused**

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**Neutral Citation:** *Republic v Kethy Esparon & Ors* (CR108/2015) 2021 SCSC 369 (4 June 2021).

**Before:** Dodin J.

**Summary:** Money laundering - section 3(1) of the Anti-Money Laundering Act read with section 23 of the Penal Code and punishable under section 3(4) of the Anti-Money Laundering Act - No case to answer.

**Heard:** Written submissions

**Delivered:** 4 June 2021

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**RULING**

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**DODIN J.**

[1] This is a ruling on submissions of no case to answer made by the 1<sup>st</sup> and 2<sup>nd</sup> accused at the close of the case for the prosecution. Despite having indicated that the 3<sup>rd</sup> accused intended to make a submission of no case to answer, no submission has been made by or on behalf of the 3<sup>rd</sup> accused to date.

- [2] The 1<sup>st</sup> and 2<sup>nd</sup> accused are charged with 21 counts of Money Laundering contrary to section 3(1) of the Anti-Money Laundering Act read with section 23 of the Penal Code and punishable under section 3(4) of the Anti-Money Laundering Act.
- [3] A brief summary of the evidence is that Cash Plus, a bureau de change concern is engaged in exchanging currencies and transferring the same as required by clients. The 3<sup>rd</sup> accused is an employer of Cash Plus whilst the occupation of the 1<sup>st</sup> and 2<sup>nd</sup> accused have not been established by the prosecution. Sometime in May 2015, one John Moyengo, a Ugandan teacher working in Seychelles received several messages on his mobile phone in respect of money transactions which he maintained were not done by him. He went to verify at Cash Plus why the said transactions were made using his name and signature. Later he met with the 3<sup>rd</sup> accused Wendy Esparon in the presence of the 1<sup>st</sup> accused and then in the presence of the 2<sup>nd</sup> accused. According to the witness the 2<sup>nd</sup> accused told him that the money was his money which he had transferred in respect of his business of importation of goods from Kenya and that the 3<sup>rd</sup> accused was only helping them.
- [4] After further investigations, all three accused were arrested and later charged with the offences stated above. The 1<sup>st</sup> and 3<sup>rd</sup> accused gave under caution statements. The Court ruled that the statement of the 3<sup>rd</sup> accused was given voluntarily and admissible whilst the statement of the 1<sup>st</sup> accused was not admissible.
- [5] The Prosecution called 6 witnesses.
- [6] Francois Rose testified that he was the Managing Director of Cash Plus where the 3<sup>rd</sup> accused was employed. He believed that the 3<sup>rd</sup> accused had used details of existing clients which were on the system to transfer money to Kenya. He had no knowledge on whose behalf the 3<sup>rd</sup> accused was transferring money to Kenya and to whom.
- [7] John Moyengo testified that he was a regular customer of Cash Plus and that he knew the 3<sup>rd</sup> accused as he dealt with her when he would go to Cash Plus to make transfers. Mr Moyengo testified that the 3<sup>rd</sup> accused had admitted that she was using his personal details to make money transfers to Kenya. The 3<sup>rd</sup> accused arranged a meeting between

him and two persons identified as the 1<sup>st</sup> and 2<sup>nd</sup> accused. The 2<sup>nd</sup> accused told him that they had a business and that is why they were transferring money to Kenya and that the 3<sup>rd</sup> accused was helping them.

[8] Yecoada Richard Ntaate testified that on the 6<sup>th</sup> May 2015 he and his friend John Moyengo met with the 3<sup>rd</sup> accused and a male person whom he could not see in Court. He stated that the male person during the course of the meeting offered John Moyengo some money in order to settle the case. He identified the 1<sup>st</sup> accused in the dock but did not clarify how he had come to know the 1<sup>st</sup> accused.

[9] Adventina Onyango testified that she had been arrested by the NDEA and treated as a suspect. It seems that her details had also been used to transfer money but it was not clear whether it was in this case or any other case. Otherwise her testimony was on the alleged issue that she was not informed of the reason of her arrest and no rights were read to her.

[10] Jean Remy D'Offay testified that he worked as an unlicensed Taxi driver and that he had often done trips for the 1<sup>st</sup> accused and that he would help the 1<sup>st</sup> accused as he would to his other clients. He once helped the 1<sup>st</sup> accused with a money transfer at Double Click and that this was nothing uncommon.

[11] Tania Lozaique an officer of the Anti-Narcotics Bureau testified that she took the statement of the 3<sup>rd</sup> accused but she was not the one who headed the investigations. Mr Brandon Burke was the head of investigations.

[12] In her submissions of no case to answer learned counsel for the 1<sup>st</sup> accused submitted that from the evidence adduced before the Court the Prosecution has only proved the following:

1. That money was transferred to Kenya by the 3<sup>rd</sup> accused and
2. That the 1<sup>st</sup> accused met with John Moyengo and at some point John Moyengo and Richard Ntaate met with the 1<sup>st</sup> and 2<sup>nd</sup> accused:

[13] Learned counsel submitted that the Prosecution has failed to prove the following elements of the offence with which the 1<sup>st</sup> accused is charged:

1. That the 1<sup>st</sup> accused is guilty of money laundering in that any property that the 1<sup>st</sup> accused had presented is property obtained from criminal conduct;
2. No proof was brought to prove that the money which was being transferred by the 3<sup>rd</sup> accused to Kenya belonged to the 1<sup>st</sup> accused and/or how the money was obtained;
3. No link can be established between the transfers to the 1<sup>st</sup> accused save for the statement given by the 3<sup>rd</sup> accused who implicates both the 1<sup>st</sup> and 2<sup>nd</sup> accused.
4. Although the 1<sup>st</sup> and 2<sup>nd</sup> accused were identified by the witnesses, such identifications were dock identifications and the witnesses never mentioned the names of the 1<sup>st</sup> and 2<sup>nd</sup> accused in their respective statements.

[14] Learned counsel submitted that it is trite law that the statement of a co-accused cannot be used against another co-accused. Hence, the statement of the 3<sup>rd</sup> accused must be treated with caution and the weight to be attached to it must be minimal if not none at all.

[15] Learned counsel further submitted that no criminal conduct can be imputed to the 1<sup>st</sup> accused as the Prosecution failed to prove who the owner of the money transferred to Kenya was and that the 1<sup>st</sup> accused was the person who undertook the transfers of money from Seychelles. Further the Prosecution has failed to prove that the 1<sup>st</sup> accused was acting jointly with the 2<sup>nd</sup> and 3<sup>rd</sup> accused.

[16] On the law, learned counsel for the 1<sup>st</sup> accused submitted that a submission of No Case to Answer will be upheld in the following circumstances; where there is no evidence to prove an essential element in the alleged offence or where the evidence adduced by the Prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

- [17] The Court should be further guided by the principles that if a submission is made that there is no case to answer, the court should make a decision based on whether the evidence is such that a reasonable court might convict the accused and not whether the court, if compelled to do so, would at that stage convict or acquit the accused.
- [18] Where a court comes to the conclusion that the Prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is the duty of the court, upon a submission being made, to stop the case.
- [19] Where the Prosecution evidence is such that its strength or weakness depends on the view to be taken on the reliability of a witness or other matters within the province of the jury, and where on one possible view of the facts there is evidence upon which a jury could properly come to a conclusion that the accused is guilty, then the Judge should allow the matter to be tried.
- [20] Learned counsel referred the Court to the cases of *R v. Lepere (1971) SLR 112*; *R v. Stiven (1971) 137*; *R v. Olsen (1973) SLR 188*; *R v. Mareno (2004) SLR 116*; *R v. Matombe (no.1) (2006) SLR 32* in support of her submission.
- [21] Learned counsel move the Court to find that the 1<sup>st</sup> accused has no case to answer as the Prosecution has failed to discharge its burden to the standard required.
- [22] Learned counsel for the 2<sup>nd</sup> accused submitted along the same lines of the 1<sup>st</sup> accused in addition to the following analysis.
- [23] On the evidence, learned counsel submitted that the prosecution has the duty to prove all the elements of the charge. It has to prove on a prima facie basis that the accused committed the offences at the given dates and times as laid out in the charge on each and every element.
- [24] Learned counsel submitted that the statement under caution of Wendy Esparon which was admitted in evidence has no direct evidence of participation of Terry Poris in any of the offences for which he is being charged with. The 3<sup>rd</sup> accused was an employee at Cash Plus and she is an acquaintance of Terry Poris and Kethy Esparon the first accused.

There is no involvement of the accused Terry Poris in the transactions at Cash Plus. He may have attended a meeting at the Happy Youth Club where he was introduced to one John Moyengo. This is no evidence to convict because the accused himself had never been to Cash Plus to conduct any transaction whatsoever.

[25] Learned counsel further submitted that Jean Remy D'Offay stated that he was a Taxi pirate and that he would conduct money transfers for the first accused at Double Click in town near the Bus Station. He was doing it as a favour for the first accused Kethy Esparon. He never mentioned the name of Terry Poris in his evidence.

[26] Witness Francois Rose who was the Manager of Cash Plus based at the Olivier Maradan Building, Victoria gave evidence on behalf of one Sharath Kumar who was being questioned by the NDEA regarding transactions at the Company. Kumar had given information in regards to twenty one transactions that were downloaded from the Computer. The receiver was one Winnie Mahinda. The third accused was employed at the time by Cash Plus and on that basis her employment was terminated.

[27] John Moyengo is a teacher by profession. He stated that he is a regular customer at Cash Plus sending money to his family and mainly his wife Patience in Uganda. He was informed by text messages of transactions that he had never done. He contacted Cash Plus for clarifications and he got a call from the third accused who informed him, that she was the one who made those transactions and she was scared of being found out and losing her job. It was then that he decided to meet with Wendy and two other persons one of whom was later identified as the first accused but the second person was never identified nor mentioned by name. This witness never mentioned the second accused Terry Poris nor even met him or knew him in person. He was invited to make a dock identification of accused number 2 during the trial. However it is trite law that dock identification by a witness in Court is unsafe and cannot be admitted in evidence.

[28] Learned counsel submitted that given the lack of consistency in the evidence of the witnesses and the contradictory testimonies of the same witnesses, the Prosecution has failed to prove this case on a prima facie basis and the 2<sup>nd</sup> accused must therefore be acquitted.

[29] Learned counsel for the Republic submitted that it is pertinent to point out that Section 183 of the Criminal Procedure Code dealing with the issue of No case to Answer in our jurisdiction which set the principles for consideration on the matter of no case to answer are well settled in the case of *R v Galbraith (1981) 73 Criminal Appeal Report 124*, which were adopted in several cases relates to the issue of no case to answer. Learned counsel referred the Court to the statement of Lord Lane CJ in the above-mentioned case.

[30] Learned counsel further referred the Court to the case of *The Republic Vs Winsley Cedras (2015) SCSC 311* referring to the following extract:

*"Although in a Criminal Trial, the standard that must be met by the prosecution's evidence is proof beyond reasonable doubt that the accused person committed the offence charged, when an accused seeks an acquittal on account of having no case to answer, the standard of evidence to be assessed by the court is not proof beyond reasonable doubt but whether the prosecution has established a prima facie case against the accused person".*

[31] Learned counsel submitted that based on the evidence the following facts were proved against all the three accused persons by the prosecution. The evidence has been fully rehearsed above and I shall refer only to the testimonies of the Managing Director of Cash Plus and that of the virtual complainant John Moyengo.

[32] The evidence of the Managing Director of Cash Plus namely Mr. Francoise Rose is relied upon by the Prosecution for the fact that during the relevant periods mentioned in the charges, the third accused Ms. Wendy Cynthia Esparon was an employee at Cash Plus. When they received the complaint from one of their customers namely Mr. John Moyengo and from National Drug Enforcement Agency (NDEA) against her, they found in their investigation that the 3<sup>rd</sup> accused misused some of their customer details and did 21 suspicious money transactions thorough Cash Plus, for which the 3<sup>rd</sup> accused was terminated from Cash Plus.

[33] The evidence of Mr. John Moyengo is relied by the Prosecution for the fact that he is a Ugandan National working as a teacher in Seychelles. He is a customer of Cash Plus and

most of the time he sends his money to his native place by Cash Plus Money Exchange of Seychelles. At one point of time in May 2015, he received quite a number of messages to his mobile number from Cash Plus for the money transactions not sent by him which prompted him to call the office of Cash Plus and made enquiries about the said messages he received. The person who attended a call at Cash plus informed him that the money was in fact sent on his name. Thereafter on the same day, he received a call from the 3<sup>rd</sup> accused who informed him that she was the one who sent the money using his name and contact details. The same day on 06<sup>th</sup> May 2015 around 01.00 pm, when he entered into the compound of Cash Plus in Victoria town opposite to Church, the 3<sup>rd</sup> accused approached him and told him that she will lose her job if he goes inside the office of Cash Plus and complain about her. He then told her that he did not mind her losing the job but he just wants to know who used his name in those money transactions.

[34] On the same day, after an hour, when he was there in the same compound at Happy Youth Club, the 3<sup>rd</sup> accused brought a lady later identified as the 1<sup>st</sup> accused and a gentleman and introduced them with him informing that the money she sent on his name are for them. He then asked them "Where are the receipts? How did you signed my signature? For which, the said gentleman replied that the 3<sup>rd</sup> accused just helped them since they do some business in Kenya and they wanted to send money to Kenya. Since Mr. John Moyengo insisted to see the receipts from them for the money they sent using his name, the lady and a gentleman said that they will go and look for the receipts and then they will come back. Thereafter both of them left from Happy Youth Club. He and the 3<sup>rd</sup> accused stayed there and waited for them until 08.30pm at Happy Youth Club. Since they did not come back, they left the place.

[35] The following day, he approached the manager of Cash Plus and requested the receipts for the alleged suspicious transactions. Thereafter on another day he again went to the office of Cash Plus and collected receipts for those suspicious transactions. At the same time 3<sup>rd</sup> accused informed him that the owner will come to meet him along with the receipts. For which, he replied to her that he will meet him on the same place where they had a meeting on a previous day at Happy Youth Club.



- [36] In the afternoon, when he was there at Happy Youth Club along with his friend namely Mr. Yecoada Richard Ntaate, the 3<sup>rd</sup> accused brought another gentleman referring his name as " Terry " and introduced him. The gentleman (2<sup>nd</sup> accused) told to Mr. John Moyengo that the money used in those transaction are his money, they have a business and they wanted to send money to buy goods from Kenya. He asked the gentleman why he did not use his own name for those transactions for which the gentleman has given the answer to him that Wendy helped them since they needed to bring goods.
- [37] Learned counsel submitted that the above evidence and exhibits admitted before this Court connected clearly proved the fact that the 1<sup>st</sup> and 2<sup>nd</sup> accused with the assistance of the 3<sup>rd</sup> accused transferred the money generated by their illegal acts in Seychelles to particular persons in Kenya namely Winnie Ngima Mahinda, Bramwel Makuna Mole and Peres Anyango Omondi.
- [38] Learned counsel submitted that any reasonable person in 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.
- [39] 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 3<sup>rd</sup> accused, as alleged in the indictment, must have been generated by the 1<sup>st</sup> and 2<sup>nd</sup> 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.
- [40] Learned counsel submitted that the stance taken by the defence in this case moving the application of no case to answer on behalf of the two accused persons that they did not do any act of money laundering as alleged by the prosecution against them in the indictment, do not have any merit and ought to be rejected by this court.

- [41] Learned counsel submitted that the Prosecution has made out its prima facie case against all the three accused persons establishing that all the three accused persons were actively involved in money laundering and transferred the illicit money from Seychelles to particular persons in Kenya as mentioned in the indictment and that it is known or believed that the said money represents the benefit from criminal conduct of them.
- [42] In order to determine whether an accused has a case to answer the Court must make an assessment of the evidence vis-à-vis the elements of the offence that need to be established by the prosecution and determine whether a prima facie case has been made by the prosecution against the accused.
- [43] The assessment must be of the evidence as a whole and not just focus on the credibility of individual witnesses or on evidential inconsistencies between the witnesses. Where the prosecution's evidence fails to address a particular element of the offence at all, then no conviction could possibly be reached and the Court must allow the application of no case to succeed. Where there is some evidence to show that the accused committed or must have committed the offence but for some reason such evidence seems unconvincing, the matter is better left for the end of the trial where the evidence would be weighed and the Court would reach a verdict after assessing the witnesses' credibility together with all available evidence.
- [44] Further, where the evidence before the Court has been so compromised by the defence or by serious inconsistencies in the prosecution's testimonies, the Court is entitled to consider whether the evidence adduced taken as its highest would not properly secure a conviction. If the Court determines that in such a circumstance a conviction could not be secured, the submission of no case must also succeed.
- [45] The case of *R v Galbraith [ 1981 ] 1 WLR 1039* referred to by the Prosecution above Lord Lane C.J. rightly summarised the above principles as follows:

*“How then should a judge approach a submission of 'no case'?*  
*If there has been no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or*

*vagueness or because it is inconsistent with other evidence. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."*

[46] See also the cases of *Green v. R [1972] No 6*, *R v. Stiven [1971] No 9* and *R v. Olsen [1973] No 5* all agreeably referred to by all counsel in their respective submissions.

[47] It is trite law that in order to secure a conviction in a criminal case the prosecution has to establish all the elements of the offences as charged beyond reasonable doubt. However, at this stage, the Court must only be satisfied that a prima facie case on each charge has been made by the prosecution in order to find that the accused has a case to answer.

[48] The elements of the offences in this case are that:

- i. on the various dates as per the charge;
- ii. acting with common intention;
- iii. at or using the facilities of Cash Plus;
- iv. the three accused persons Kethy Esparon, Terry Poris and Wendy Esparon transferred money to persons in Kenya; and
- v. that the monies transferred were believed to be or known to be proceeds of criminal conduct.

[49] There is no doubt from the evidence that the 1<sup>st</sup> and 3<sup>rd</sup> elements of the offence have been established by the prosecution in that the evidence and exhibits adduced established that monies were transferred by Cash Plus to the following recipients in Kenya, Winnie Ngima Mahinda, Bramwel Makuna Mole and Peres Anyango Omondi.

[50] In respect of the 2<sup>nd</sup> element of common intention, the evidence established that the 3<sup>rd</sup> accused worked at Cash Plus and made the transactions but there is no independent

evidence as to who delivered the money to the 3<sup>rd</sup> accused or that the 1<sup>st</sup> and 2<sup>nd</sup> accused assisted the 3<sup>rd</sup> accused in the banking transactions. The prosecution argues that the money came from either the 1<sup>st</sup> or the 2<sup>nd</sup> accused. Other than the statement of the 3<sup>rd</sup> accused, there is no evidence to support that contention. There is also the evidence of Mr. Moyengo and Mr Ntaate that at one stage they met with the 3<sup>rd</sup> accused in the company of the 1<sup>st</sup> and 2<sup>nd</sup> accused but their evidence do not conclusively establish the participation of the 1<sup>st</sup> and 2<sup>nd</sup> accused in the bank transactions.

[51] The same assessment is made of the 4<sup>th</sup> element of the offences as the evidence strongly suggest that the transactions could only have been made by a Cash Plus employee who had access to the equipment and customer profiles necessary to perform the transaction. The prosecution's argument is that the 1<sup>st</sup> and 2<sup>nd</sup> accused were involved as the supplier of the money. However, the only inference from where this could obtain some support is the statement under caution statement of the 3<sup>rd</sup> accused which is not evidence against the 1<sup>st</sup> and 2<sup>nd</sup> accused.

[52] In respect to the 5<sup>th</sup> element of the offence the prosecution's argument is that if the money in question was being obtained by lawful business transactions then the transfers need not have been made in such 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.

[53] 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 that there is clear lack of evidence to establish a prima facie case that the 1<sup>st</sup> and 2<sup>nd</sup> accused were involved as charged and that the money in question were proceeds of criminal conduct. I further find that the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> elements of the offence have not been established even on the balance of probabilities. Hence I must come to the conclusion that "*that the prosecution*

*evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it.”*

[54] Consequently I find that the 1<sup>st</sup> and 2<sup>nd</sup> accused have no case to answer on all counts and I acquit them on all counts accordingly.

Signed, dated and delivered at Ile du Port on the 4<sup>th</sup> day of June 2021.

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Dodin J.