

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC ...
CR108/2015

THE REPUBLIC

(Rep by Hemanth Kumar)

v/s

KETHY ELNA ESPARON

(rep. by Karen Domingue)

1st Accused

TERRY ANDREW PORIS

(rep by Nichol Gabriel)

2nd Accused

WENDY CYNTHIA ESPARON

(rep by William Herminie)

3rd Accused

Neutral Citation: *Republic v Kethy Esparon & Ors* (CR108/2015) 2021 SCSC(4th March 2022).

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.

Heard: 4th, 5th, 12th March 2019, 28th July 2020, 4th June 2021

Delivered: 4th March 2022

ORDER

The prosecution has failed to discharge the burden of proof in respect of the 3rd and 5th elements of the offences and hence failed to prove all the offences against the 3rd accused beyond reasonable doubt. The 3rd accused is found not guilty and is acquitted on all 21 counts.

JUDGMENT

DODIN J.

- [1] This judgment is in respect of the 3rd accused only as the 1st and 2nd accused have been acquitted at the close of the case for the Prosecution on a submission of no case to answer.
- [2] The 3rd accused stands 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 by reason of assisting the 1st and 2nd accused to transfer sums of money to persons outside the jurisdiction of Seychelles with knowledge that the monies were proceeds of crime and with the aim of concealing or disguising the illicit origin of the property. All the counts are similarly worded except for the dates and the amount of money involved which are different.
- [3] According to the evidence adduced by the Prosecution, Cash Plus, a bureau de change, is engaged in exchanging currencies and transferring the same as required by clients. The 3rd accused was an employer of Cash Plus. Sometime in May 2015, one John Moyengo, a Ugandan teacher working in Seychelles received several messages on his mobile phone in respect of money transaction 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 3rd accused in the presence of the 1st accused and then in the presence of the 2nd accused. According to the witness the 2nd 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 3rd accused was only helping them. After further investigations, all three accused were arrested and later charged with the offences stated above. The 3rd accused gave an under caution statement which the Court ruled to be admissible.
- [4] The Prosecution called Francois Rose who testified that he was the Managing Director of Cash Plus where the 3rd accused was employed. He believed that the 3rd 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 3rd accused was transferring money to Kenya and to whom.

- [5] John Moyengo testified for the prosecution that he was a regular customer of Cash Plus and that he knew the 3rd accused as he dealt with her when he would go to Cash Plus to make transfers. Mr Moyengo testified that the 3rd accused had admitted that she was using personal details to make money transfers to Kenya. The 3rd accused arranged a meeting between him and two persons identified as the 1st and 2nd accused. The 2nd accused told him that they had a business and that is why they were transferring money to Kenya and that the 3rd accused was helping them.
- [6] Prosecution witness Yecoda Richard Ntaate testified that on the 6th May 2015 he and his friend John Moyengo met with the 3rd accused and a male person whom he could not see in court. He stated that during the course of the meeting the male person offered John Moyengo some money in order to settle the case.
- [7] 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.
- [8] Jean Remy D'Offay testified that he worked as an unlicensed taxi driver and that he had often done trips for the 1st accused and that he would help the 1st accused as who would his other clients. He once helped the 1st accused with a money transfer at Double Click and that this was nothing uncommon.
- [9] Tania Lozaique an officer of the Anti-Narcotics Bureau testified that she took the statement of the 3rd accused but she was not the one who headed the investigations. Mr Brandon Burke was the head of investigations.
- [10] Learned counsel for the Republic stated that he would not make any further submission but would adopt his submission made on the submission of no case to answer in so far as it can be applicable to prove the case against the 3rd accused beyond reasonable doubt.
- [11] In his submission on the motion of no case to answer learned counsel for the prosecution had submitted that based on the evidence the charges against the 3rd accused were proved by the prosecution.

- [12] 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 3rd 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 National Drug Enforcement Agency (NDEA) against her, they found in their investigation that the 3rd accused misused some of their customer details and did 21 suspicious money transactions thorough Cash Plus, for which the 3rd accused was terminated from Cash Plus.
- [13] The evidence of Mr. John Moyengo was relied upon 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 sent 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 on 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 to the 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 3rd accused who informed him that she was the one who sent the money using his name and contact details. The same day on 06th May 2015 at around 1.00 pm, when he entered the compound of Cash Plus in Victoria opposite to Church, the 3rd 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.
- [14] On the same day, after an hour, when he was there in the same compound at Happy Youth Club, the 3rd accused brought a lady later identified as the 1st accused and a gentleman and introduced them to 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 3rd 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 Happy Youth Club. He and the 3rd accused stayed there and waited for them until 8.30pm at Happy Youth Club. Since they did not come back, they left the place.

- [15] The following day, he approached the manager of Cash Plus and requested the receipts for the alleged suspicious transactions. On another day he again went to the office of Cash Plus and collected the receipts for those suspicious transactions. At the same time 3rd accused informed him that the owner will come to meet him along with the receipts for which, he replied that he will meet him in the same place where they had met the previous day at Happy Youth Club.
- [16] In the afternoon, when he was there at Happy Youth Club along with his friend namely Mr. Yecoada Richard Ntaate, the 3rd accused brought another gentleman referring to his name as "Terry" and introduced him. The gentleman (2nd accused) told to Mr. John Moyengo that the money used in those transaction were his money and that 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.
- [17] Learned counsel submitted that the above clearly proved the fact that the 1st and 2nd accused with the assistance of the 3rd accused transferred the money generated by their illegal acts in Seychelles to a particular persons in Kenya namely Winnie Ngima Mahinda, Bramwel Makuna Mole and Peres Anyango Omondi.
- [18] Learned counsel submitted that any reasonable person in democratic society will always, if he or she wants to transfer money to known persons overseas, either for personal or business purposes, legitimately approach the bank or money exchange directly by himself or herself and request the bank or money exchange to transfer the money overseas, if the money is generated by them legitimately by their reasonable work or business.
- [19] 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 illegal acts in Seychelles, which represents the benefit from criminal conduct of them. That is 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.

[20] Learned counsel submitted that the Prosecution has proved its case against all the 3rd accused that the accused was 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 represent the benefit from Criminal Conduct of them.

[21] Learned counsel for the 3rd accused also adopted the submission made on behalf of the 1st and 2nd accused on the motion of no case to answer in so far as it is applicable to the 3rd accused.

[22] Learned counsel rehearsed the facts of the case and the testimonies of the witnesses as reproduced above. Learned counsel submitted that the Prosecution has to prove all the elements of the offences as charged beyond reasonable doubt. Learned counsel submitted that the under caution statement of the 3rd accused has not been corroborated at all by any other witness. The evidence only showed that the 3rd accused was an employee of Cash Plus and an acquaintance of the 1st and 2nd accused.

[23] Learned counsel further submitted that the evidence of the prosecution witnesses has serious inconsistencies. Learned counsel submitted that in view of the inconsistencies and the failure of by the Prosecution to prove all the elements of the offences beyond reasonable doubt, the 3rd accused must also be acquitted of the offences.

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

- i. on the various dates as per the charges;

- ii. at or using the facilities of Cash Plus;
- iii. acting with common intention with Kethy Esparon and Terry Poris;
- iv. the 3rd accused transferred money to persons in Kenya; and
- v. that the monies transferred were believed to be or known to be proceeds of criminal conduct.

[25] The evidence shows that the 1st, 2nd and 4th 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 Kenya and the recipients in Kenya were Winnie Ngima Mahinda, Bramwel Makuna Mole and Peres Anyango Omondi. The employee at Cash Plus who made the transactions on each occasion was the 3rd accused using the facilities of Cash Plus.

[26] In respect of the 3rd element of the offence I maintain the same analysis as in the Ruling on the motion of no case to answer. On the second element of common intention, the evidence established that the 3rd accused worked at Cash Plus and made the transactions but there is no independent evidence as to who delivered the money to the 3rd accused or that the 1st and 2nd accused assisted the 3rd accused in the banking transactions. The prosecution argues that the money came from either the 1st or the 2nd accused. Other than the statement of the 3rd 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 3rd accused in the company of the 1st and 2nd accused but their evidence do not conclusively establish the participation of the 1st, 2nd and 3rd accused in the bank transactions together or having common knowledge or intention.

[27] Common intention implies a pre-arranged plan and acting in concert pursuant to the plan. The test as to whether there was common intention is an objective test. In the case of R v AAP [2012] QCA 104 Kiefel J quoted with appreciation from the case of R v Keenan (2009) 236 CLR 397:

“The question posed by the section is whether in fact the nature of the offence was such that its commission was a probable consequence of the prosecution of the common unlawful purpose and not whether the accused was aware

that its commission was a probable consequence”.

The Court must determine from the facts whether there was plan for the persons to act in concert with one another to fulfil the set objective.

[28] The evidence adduced by the Prosecution showed that it was after the complaint by John Moyengo that the 1st and 2nd accused at one time or another met Mr Moyengo in the presence of the 3rd accused. There is no evidence to show that the three accused had met or had had the opportunity to meet or communicated before the transactions. In fact it seems that some of the transaction were made by Jean-Remy D’Offay but at Double Click and not at Cash Plus. The evidence showed that the 3rd accused was more in apprehension of losing her job for the irregular transactions than the actual transactions themselves.

[29] The only evidence remaining that can be relied upon to show that the 3rd accused had met the 1st accused before is the confession statement of the 3rd accused. The 3rd accused admitted that she suspected that the 1st accused might be involved in something illegal because she wanted the money transferred on somebody else’s name. However she never admitted that the money she was asked to transfer was proceeds of criminal activities. She also never had any communication with the 2nd accused about the transactions. Assessing the evidence objectively, I find that the 3rd accused, through ignorance or negligence assisted the 1st accused to transfer money abroad using another customer’s account but the evidence did not show beyond reasonable doubt that the 3rd accused acted in conjunction with the 2nd accused at all.

[30] In respect to the 5th element the prosecution 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. The logic of this argument is obvious but the prosecution has to support that contention with evidence. The 3rd accused in her statement under caution stated that she suspected that the 1st accused might be doing something unlawful if she did not want the money to be transferred on her name. However she further stated that the 1st accused informed her that she had business there and that she had made many transfers in her name. The 3rd accused

did not seem to know anything more. There was no evidence of any of the accused involvement in any criminal activity which the 3rd accused could have been aware of.

[31] Further, no evidence was adduced by the prosecution 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. The prosecution has therefore failed to prove knowledge of the 3rd accused in respect of the real purpose for which her help was being requested for the said transactions. In respect of this element of the offence the Prosecution failed to discharge its burden of proof beyond reasonable doubt.

[32] In view of the failure of the prosecution to discharge the burden of proof in respect of the 3rd and 5th elements of the offences, I find that the Prosecution has failed to prove all the elements of the offences against the 3rd accused beyond reasonable doubt.

[33] Consequently I find the 3rd accused not guilty of all 21 counts and I acquit the 3rd accused on all 21 counts accordingly.

Signed, dated and delivered at Ile du Port on the 4th day of March 2022.

Dodin J.