SUPREME COURT OF SEYCHELLES

Reportable
[2024]
CO 114/2021

In the matter between:

ANTI-CORRUPTION COMMISSION
(rep. by Mr Anthony Juliette)

and

MUKESH VALABHJI **1st Accused**
(rep. by F Bonte)

SARAH ZARQANI RENE **2nd Accused**
(rep. by R Laporte)

Neutral Citation:	*The ACCS v Valabhji & Ors* (CO 114/2021) [2024] (22nd April 2024)
Summary:	Leave to amend charges
Before:	Govinden CJ
Heard:	Written Submissions
Delivered:	22 April 2024

RULING

GOVINDEN CJ

INTRODUCTION

[1] The Applicant, the Anti-Corruption Commission of Seychelles (the ACCS) has filed a Notice of Motion dated 4th April 2023 to amend the existing charges against the 1st Respondent, Mukesh Valabhji, and the 2nd Respondent, Sarah Zarqani Rene by way of preferring the amended, substituted and additional charges. The applicant seeks to withdraw the existing charges in Annex A once pleas have been entered to the amended, substituted and additional charges, which are enclosed with the Application as Annex B.

SUBMISSIONS

Affidavit of Officer Stephenson

[2] The Application is supported by an Affidavit of Kevin Stephenson, an officer and investigator of the ACCS. According to the Affidavit of Officer Stephenson, on the 19th May 2022 the charges against the 1st and 2nd Respondent were already amended or substituted and other charges were withdrawn. On the 14th July 2022, the Respondents entered Not Guilty pleas to all charges against them. Officer Stephenson states that since that date, the ACCS' investigators have received and reviewed a large amount of material received in response to several MLA requests from the UK, the Isle of Man, the British Virgin Islands and from Switzerland as well as the material received from the Digital Forensics Review. Officer Stephenson avers that learned counsel for the ACCS have reviewed the received material and, consistent with their duties under the Code for Prosecutors, have reviewed the existing charges and have drafted charges to amend or substitute the said existing charges. Officer Stephenson sets out the offences that proposed charges cover, in summary form, at paragraph 8 of the Affidavit.

[3] To further summarize the offences and proposed amended charges are:

In respect of the 1st Respondent:

1. Theft, official corruption, and money laundering monies from USD 50 million loan from Abu Dhabi (amended Charges 1-4)
2. Transfer of USD 13.5 million of SMB funds (new Charge 5)
3. Sale of COSPROH assets to Berjaya (new Charges 6 and 7)
4. Sale of COSPROH assets to Club Vacanze SpA (new Charge 8)
5. Sale of COSPROH assets to HPLBVI (new Charge 9)
6. Sale of HPLBVI (amended Charge 10)
7. Money laundering of sale proceeds of HPLBVI (new Charge 11)

In respect of the 2nd Respondent alone, or together with the 1st Respondent:

8. Money from Kan Kim Sun and Jark Enterprise Pte (amended Charges 12 & 13 against 2nd Respondent)

9. Transfer of money from Brent International Investments Ltd (new Charges 14-19 against 1st and 2nd Respondents in substitution for the allegation of conspiracy reflected in existing charge 13, Annex A)

10. Money acquired from Jark Enterprise Pte and Kan Kim Sun after August 2008 (amended Charges 20 & 21)

11. Transfers of money from Golden Phoenix and CFH Investments Ltd (new Charges 22 and 23).

[4] Officer Stephenson avers that the proposed charges form or are part of a series of offences of the same or similar character within section 112 of the Criminal Procedure Code (Ch 54) and that the Respondents are properly joined within section 113 of the Criminal Procedure Code. Officer Stephenson further avers that the new charges are founded on evidence which has already been disclosed to the Respondents.

[5] At paragraph 11 of the Affidavit Officer Stephenson further states that there is a significant amount of further evidential material still awaited by the Applicant, which falls into two categories: further material from outstanding MLA requests to foreign jurisdictions; and material that will become available to the investigators after the conclusion of the LPP review procedure into Laura Valabhji's files and devices. Officer Stephenson states that the Applicant will continue to review material coming into its possession and will make such further application to the Court as appropriate.

Affidavit of Mukesh Valabhji, the 1st Respondent

[6] The 1st Respondent states in his Affidavit in response to the Notice of Motion to Amend the Charges that he was first charged in CR 114 of 2021 on the 17th December 2021. On the 19th May 2022 after the enactment of the Anti-Corruption Commission (Amendment) Act 2022 the charges were amended (current charges). The 1st Respondent avers that the Third Amended Charges proposed by the ACCS, dated 4th April 2023 are subject to objections on the following grounds:

(a) The ACCS does not have the jurisdiction to amend charges in accordance with the Anti-Corruption Act, 2016 and the Criminal Procedure Code ('CPC') or any other law;

(b) The proposed amended charges are null and void ab initio and defective on the grounds that they:

(i) are contrary to Article 19 (1), (2) (b) and (5) of the Constitution;

(ii) are not in compliance with sections 111 and 114 of the CPC;

(iii) amount to duplicity of charges in certain cases; and

(iv) amount to multiplicity of charges in other instances.

[7] The 1st Respondent avers that while under section 64 of the Anti-Corruption Act ('ACA') the ACCS has power to institute proceedings, the powers of the ACCS under the CPC are limited and do not extend to powers to amend the charges, which is specific provision in the CPC. It is further stated that the ACCS has failed to state provisions under which it is seeking to make the Third Amended Charges.

[8] The 1st Respondent avers that in order for him to have a fair hearing, he needs to know the nature of the offences he is being charges with; and as provided for in section 111 of the CPC, the charges have to contain sufficient information and be clear enough for him to know the charges against him and enable his counsel to adequately prepare the defence. It is averred that certain charges amount to duplicity or multiplicity as the 1st Respondent has been charges under one count for the same offence based on the same set of facts but in different capacity (ordinary individual and public servant). The 1st Respondent refers to Counts 1 and 4.

[9] The 1st Respondent further avers that Counts 1-9, 11, 14, 16 and 18 are contrary to Article 19(1) of the Constitution and do not conform to sections 111 and 114 of the CPC as there is ambiguity in the nature of the offence and particulars of certain offences do not specify the acts that the 1st Respondent have allegedly committed to enable him to understand the allegations against him to properly instruct counsel to prepare his defence.

[10] The 1st Respondent further avers that duplicity and multiplicity in charges will amount to double jeopardy in sentencing if the 1st Respondent is convicted contrary to Article 19(5) of the Constitution. It is averred by the 1st Respondent that certain charges do not exist in law and refers to the charge of "official corruption" under the Penal Code in Counts 2, 3, 5-9.

[11] Further, the 1st Respondent avers that charges under section 3(1)(a) and 3(2)(a) of the Anti-Money Laundering Act 1996 (Counts 11, 14, 16, 18 and conspiracy to launder money) are contrary to Article 19(1) of the Constitution and suffer from retrospectivity.

The 1st Respondent states that he is already challenging similar charges brought under this law before the Constitutional Court in case CP 9 of 2022. The 1st Respondent states that there is no offence for conspiracy to launder money under section 3(1)(a) and 3(2)(a) as stated in Count 4; that in order for him to be charged with the offence of conspiracy to launder money that offence has to be provided for under Anti-Money Laundering Act 1996.

[12] It is averred that under Article 19(2)(b) of the Constitution he has a right to be informed of details of the nature of the offences against him and that most of the charges in the proposed Third Amended Charges fail to meet this threshold; that the manner in which the charges have been drafted creates mischief and is prejudicial to him as an accused. The 1st Respondent prays this honorable court not to allow and to quash the Third Amended Charges.

Affidavit of Sarah Zarquani Rene, the 2nd Respondent and Submissions on her behalf

[13] The Submissions on objection to the Motion on behalf of the 2nd Respondent reiterated the averments of the 2nd Respondent in her Affidavit.

[14] The 2nd Respondent avers that by way of charges dated 16th December 2021 she was charged with two counts of conspiracy to commit money laundering contrary to sections 3(1)(c) and 3(3) of the Money Laundering and Countering the Financing of Terrorism Act 2020; that same charges allege a further count of concealment of property contrary to section 27(c) of the Anti-Corruption Act 2016 (Exhibit A1 attached to the Affidavit).

[15] The 2nd Respondent states that in July 2022 she was served with amended charges alleging under counts 11, 12, 14 and 15 offences of money laundering. It is averred that the trial date was fixed in July 2022 for the matter to be heard on the 11th May 2023 and subsequent dates thereafter until June 2023 on the basis of the charges laid against her in July 2022.

[16] The 2nd Respondent avers that by seeking to amend the charges *"on the last hour, going into the trial"* the ACCS is depriving her of her right to be tried within a reasonable time under Article 19(2)(c) of the Constitution. The 2nd Respondent cites decision of the Constitutional Court in *Sandapin v Government of Seychelles* SC CC 12/2010:

'in reviewing compliance with the reasonable time requirement, the Court always begins be determining the starting point (dies a quo) and the end (dies ad quem) of the period to be considered Basically the court assess whether the length of proceedings from the starting point to the end in the case before it has been reasonable or not.'

[17] The 2nd Respondent avers that the Motion to amend the charges at this stage of the proceedings is abusing her right to be tried within a reasonable time as the period since her arrest up to the date by which Applicant is seeing to amend the charges on a third occasion is excessing and amounts to an abuse of process.

[18] It is further averred that on the basis of fact the Applicant is seeking to amend the charges on a third occasion and seeking to substitute the charges initially filed against her, shows that the Applicant did not in the first instance have the evidence to prosecute her; have further failed to complete a proper investigations of the allegations; is set on a fishing expedition to support the allegations against her and further support her contentions that the Applicant is abusing the process.

[19] The 2nd Respondent states that further amendment of the charges at this stage will necessarily mean a postponement of currently fixed trial dates as she will have to prepare defence to the proposed new charges and the Court must now offer her and her attorney the opportunity to prepare the defence accordingly. The 2nd Respondent states that for the applicant to wait at the last hour to a date so close to the trial dates amount to an abuse of the Court process and of her right to have adequate time and facilities to prepare a defence to the charge filed against her and of her right to be tried within a reasonable time. The 2nd Respondent moves the Court to dismiss the Motion to amend the charges.

Submissions of the ACCS

[20] In their Submissions, the ACCS refers to the Affidavits in Reply of the 1st and 2nd Respondents and classify their arguments into the following categories:

(a) The defence will require further time to address the new charges, which will necessitate an adjournment and is said to deprive them of the right to a trial within a reasonable time, which is contrary to Article 19(1) of the Constitution;

(b) The ACCS does not have jurisdiction to amend charges;

(c) The proposed charges are not in compliance with sections 111 and 114 of the Criminal Procedure Code and contrary to Article 19(2)(b) of the Constitution;

(d) The proposed charges are duplicitous in certain cases and amount to a multiplicity of charges in other instances, such that the proposed amendments would produce a result contrary to Article 19(5);

(e) Certain charges do not exist in law;

(f) Certain charges suffer from retrospectivity.

[21] The ACCS submits that the defence objections are without merit. That the test is whether the proposed amendments can be made by the court without injustice, and it is submitted that they can be. The ACCS thereafter addresses the Respondent's arguments under three headings: 'timing', 'ability of ACCS to amend charges' and 'form of the charges'.

Timing

[22] The ACCS refers to section 187 of the Criminal Procedure Code submitting that an amendment to a charge may be made at any stage of proceedings including during the trial and that there is no restriction on the number of times charges may be amended. It is further submitted that the charges have been subject to review in light of the progressing investigation and the further evidence obtained; that the proposed amended charges reflect the evidence which has been served on the respondents and that the defence should be in a position to address the prosecution case having been served with the evidence more than five weeks before the trial date. It is the ACCS' position that if an adjournment would be necessitated by the amendments if granted, the fact the defence may need further time to prepare for a trial is not a basis for objection or refusal to amend the charges as an adjournment can be forthcoming upon defence request under section 187(3)(b) of the CPC if considered in the interests of justice.

[23] The ACCS summarized the applicable principles from section 187 of the CPC stating that the court may make any amendment of the charges it thinks necessary, provided no injustice is caused; the court may make such amendment before trial, or at any stage of a trial; if the amendment is allowed during the course of the trial, the court should ask the accused if he wishes to adduce additional evidence or recall any witnesses; the statutory power of 'amendment' includes the power to substitute charges or add new charges; where a charge is amended, it shall be noted on the charge and if the amendment is by way of substitution or addition of a new charge the accused shall be called upon to enter a plea to it; where a charge is amended and if the court is of the opinion that the interests of justice require it, the trail may be adjourned for such a period as is necessary.

Ability of ACCS to amend charges

[24] The ACCS submits that section 64 of the Anti-Corruption Act 2016 permits them to prosecute offences as specified by the section and that includes the offences under the Penal Code and money laundering offences. It is submitted that section 3 of the CPC provides for the trial of all offences under the Penal Code and that all other offences shall be tried according to the same provisions, subject to any specific statutory exceptions (not applicable in this case). The Application of the CPC is not dependent on which prosecution agency is bringing the case and there is nothing in the Anti-Corruption Act 2016 which suggests that the CPC is not applicable to cases brought by the ACCS. The ACCS submits that the Respondent's argument is without merit as that would suggest that whilst the ACCS is afforded the power to prosecute offences, any ACCS proceedings would not be subject to the normal criminal procedural rules set out in the CPC.

[25] It is submitted that given the offences concerned and the facts, the ACCS is permitted by the law to prosecute such offences, the procedure is government by the CPC and the ACCS is therefore permitted to apply to amend the charges in accordance with section 187.

Form of the charges

[26] The ACCS submits that the Respondent's contention that some of the proposed charges are not known in law is not correct. The ACCS refers to section 91 of the Penal Code which they submit specifically provides that official corruption is an offence and that section 3(2)(a) of Anti-Money Laundering Act 1996 specifically refers to term 'conspire' and makes it an offence of a person to conspire with another person to commit the offence of money laundering.

[27] With regards to the retrospectivity argument raise by the Respondent in relation to charges under the Anti-Money Laundering Act 1996, the ACCS submits that this is not retrospective as the indicted time period is 2002 to 2004, which is after the 1996 Act came into force and counts reflect alleged offending by the 1st Respondent in the period when the relevant anti-money laundering legislation was in force.

[28] In relation to charges being not particularized, the ACCS summits that the particulars of charge accord with sections 111 and 114 of the CPC; and that the amended counts

provide reasonable information as to the nature of the offending charged, there is no ambiguity and the alleged offences are clearly pleaded.

[29] The ACCS further submits that amended charges are not duplicitous and each of the charges reflects separate criminality based upon the evidence served. The ACCS refers to counts 1 and 4 as an example, stating that they are not duplicitous as count 1 addresses the 'agreement' to steal USD 50 million or part thereof, while count 4 addresses the subsequent, separate money laundering of part of the proceeds of the 50 million together with other funds transferred from the SMB.

[30] Under the heading 'the law' of their submissions, the ACCS cites relevant legal provisions referred to by them in their submissions as addressed above.

[31] The ACCS concludes that the court may make any amendment of the charges it thinks necessary, provided no injustice is caused; that the proposed amended charges reflect the evidence disclosed by the Prosecution; no injustice is caused in this matter by making the amendments requested. The ACCS further states that the Respondents always have the safeguard of being able to make a submission of no case to answer in respect of a particular count at the close of the prosecution case, and submissions on the inadequacy of the evidence at the close of the trial.

Submissions of the 1st Respondent

[32] With regards to the jurisdiction of the ACCS, firstly, it is submission of the 1st Respondent that from the outset, section 64 of the ACA (amended by Act 8 of 2019) is unconstitutional for it removed the provision for the Applicant to institute prosecution with the fiat of the Attorney General. It is submitted that Article 76(11) is the only derogation that allows an Act to provide for institution of proceedings by a person or authority other than the Attorney General and that is with respect to military offences under military law before a military court or tribunal. It is submitted that any other body or authority require the consent of the Attorney General for institution of proceedings, therefore, any proceedings instituted under section 64 including amending of charges is also tainted with unconstitutionality and this is currently being challenged in the Constitutional Court by the Respondent.

[33] The 1st Respondent submits that the ACCS derives its power to institute prosecution under section 64(1) of the ACA as amended and therefore it is undisputed that the ACCS does not derive its powers to prosecute from the CPC as that position changed when the amendment was made to the ACA by Act 8 of 2019 which removed the provision that allowed the ACCS to prosecute with the consent of the Attorney General. Furthermore, the ACCS is not acting under the directions of the Attorney General when it prosecutes under the ACA.

[34] Secondly, the 1st Respondent argues that the prosecutors of the Applicant are not Public Prosecutors appointed under the CPC in accordance with sections 2 and 63 of the CPC[1] as they were not appointed by President nor by the Attorney General. It is submitted that public prosecutors derive their powers under the CPC (some powers being applicable to all public prosecutors whilst others apply specifically to certain public prosecutors).

[35] The 1st Respondent, therefore, submits that even though the ACCS have been granted powers to institute prosecution pursuant to section 64 of the ACA, its prosecutors are not Public Prosecutors and, therefore, the whole of the CPC does not apply per se to the ACCS. It is further submitted that the ACCS is not an alternate Attorney General with all the powers of the Attorney General but rather it is a statutory body which has been granted certain prosecutorial powers which are limited only to what is specified in the ACA.

[36] The 1st Respondent refers to section 3 and section 52A of the ACA:

> *"3. (1) The provisions of this Act shall, notwithstanding anything inconsistent contained in any other written law, for the time being in force, prevail to the extent of the inconsistency.*
>
> *52A: Subject to this Act, the provisions of the Criminal Procedure Code (Cap.54), the Police Force Act (Cap. 172) and any other law conferring on the police the rights, powers, authorities, privileges and immunities necessary for the detection, prevention and investigation of offences shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Commissioner and any officer authorized under section 9(1)(b) or 9(3) in the performance of their duties under this Act as if reference in those provisions to a police officer included reference to the Commissioner or officer of the Commission."*

[1] "public prosecutor" means any person appointed under section 63 and includes the Attorney General and any person acting under the directions of the Attorney General;
63. Appointment of public prosecutors
(1) The President may appoint generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called public prosecutors.

[37] The 1st Respondent submits that firstly the powers that section 52A grants to the Commissioner and her officers are in respect of detection, investigation and prevention of offences. Secondly, it is submitted that these powers granted under the CPC and Police Force Act are strictly limited to powers conferred to the Police and not to Public Prosecutors. Therefore, it is the position of the 1st Respondent that powers of the ACCS in respect of the CPC, the only ones that they have, are in respect of the police powers specified in section 52A of the ACA.

[38] Further, it is submitted that police officers are not empowered to conduct prosecution under the CPC unless the office is of the rank of Sergeant and above and that police officer must have been appointed in writing by the Attorney General to be a Public Prosecutor (reference to section 63(2) of the CPC). The 1st Respondent therefore argues that even if the Attorney General would have wanted to treat the Commissioner and ACCS officers as police officers qualified to be appointed as Public Prosecutors that still would be not possible for the following reasons: current prosecutors on behalf of the ACCS are neither the Commissioner nor officers of the ACCS authorized under sections 9(1)(b) or 9(3) of the ACA; powers conferred under section 52A are in respect of police powers and not for prosecution; the Commissioner has not been vested with the authority to appoint current prosecutors as officers appointed under section 9(1)(b) or 9(3); and lastly, officer Kevin Stephenson does not have authority to swear the affidavit in support of motion as under section 9(3) the Commissioner may only delegate powers to an officer in respect of inquiry or investigation and not in respect of swearing affidavit (as opposed to the Attorney General who has delegation powers under Article 76 of the Constitution).

[39] The 1st Respondent submits that, therefore, not all provisions of the CPC apply to the ACCS, and they do not have the powers to amend the charges, but only to institute prosecution. The 1st Respondent argues that the fact that the legislative drafters found it necessary to bring section 52A to expressly confer police powers under the CPC confirms that the legislators were aware that merely conferring investigation powers to the ACCS under the ACA does not automatically confer the police powers under the CPC. It is submitted that section 52A is a required provision to expressly confer onto the ACCS the powers of the police under the CPC and similar an express provision is required to confer powers of the Public Prosecutes under the CPC onto the ACCS in respect of the prosecution. With regards to these arguments, the 1st Respondent concludes that the

ACCS does not have powers to amend the charges under the CPC; and that the Commissioner does not have power to delegate swearing affidavits.

[40] With regards to section 187 of the CPC, it is submitted that amendments can be made where it appears to the Court that the charge is defective and neither the Notice of Motion nor the affidavit in support of the application state that the current charges are defective. The 1st Respondent, therefore, states that section 187 of the CPC is not applicable in respect of the Third Amended Charges and cannot be relied on as section 187 of the CPC is applicable solely where the charges are defective. The 1st Respondent refers to case of *Republic v Nelson Payet & others* CR 20/2009 SCSC 92 dated 30th August 2009 where Burhan J referred to *Soomery v R* 1975 SLR 24 where Sauzier J held: *"the amendment of a charge is governed by section 183(1) of the Criminal Procedure Code which is borrowed from section 5(1) of the English Indictment Act 1915 and certain principles have evolved by the courts in England"* (it was noted that section 183(1) of the CPC is now 187(1) of the CPC).

[41] The 1st Respondent further refers to decision in *R v Bradley* 58 Cr. App. R 394 and submits that it was held that the trial court should give a fairly liberal meaning to the language of section 5(1) of the 1915 Act:

> *"a charge may be defective either due to a patent defect that is when it is bad in form or bad on its face as in the case of duplicity of misjoinder. In a summary trial the charge would be defective if it fails to allege an offence disposed by the evidence or alternatively, if it alleges an offence not displaced by evidence, such defects are termed latent defects. In Soomery v R (Supra) at 28 it was held that court had the power to cure these latent defects under section 183(1) presently 187(1) of the Criminal Procedure Code by addition of a new count under this section."*

[42] The 1st Respondent submits that, therefore, even if the court holds that the ACCS does have jurisdiction to amend the charges, the ACCS is unable to come under section 187(1) of the CPC as there is no averment that the charges are defective, which is confirmed by the ACCS arguments that there is no duplicity/multiplicity therefore informing the Court that existing charges do not suffer from patent defects. The 1st Respondent also submits that the court cannot at this state of the trial rule that there are latent defects as the Court has not heard the evidence to be able to conclude that. It is submitted that the only way that the Applicant can bring an amendment to the current charges is to withdraw the current ones and that this process is well known to all Public Prosecutors. It is argued that

section 187 can never be made use of to amend charges when the current charges are not defective, but the prosecutor prefers to bring in a different set of charges.

[43] The 1st Respondent submits that the amendment is sought after almost a year the charges were amended first time and just six days before the scheduled start of the trial. It is argued that waiting until the last minute to bring in amended charges and substantially new ones and yet expecting to still keep to the timetable set for the trial is unreasonable and contrary to fair hearing and will cause great prejudice to the 1st Respondent. It is concluded that based on the above submissions there is sufficient and ample grounds for the Court to dismiss the Notice of Motion to amend the charges, however, for the completeness sake the 1st Respondent will address the other grounds as to why the Notice of Motion should be dismissed. The submissions next address arguments that the Third Amended Charges are null and void as they are (i) contrary to Article 19 (1), (2) (b) and (5) of the Constitution; (ii) are not in compliance with sections 111 and 114 of the CPC; (iii) amount to duplicity of charges in certain cases; and (iv) amount to multiplicity of charges in other instances.

[44] The 1st Respondent refers to Article 19(1), 19(2)(b) and 19(5); and sections 111 and 114 of the CPC. It is submitted that the charge must not be vague, must disclose a crime and therefore must specify: (a) the nature of the charge, that is to say all the averment that make up the essential elements of the crime; (b) reasonable sufficient particulars as to the date and place at which the crime was committed; (c) reasonably sufficient particulars as to any person against whom the crime was committed; and (d) reasonable sufficient particulars as to any property in respect of which the crime was committed.

Count 1

[45] The 1st Respondent submits that Count 1, Conspiracy to Steal under sections 260, 265 and 381 of the Penal Code is contrary to Article 19 (1) and (2)(b) of the Constitution and does not conform to section 111 and 114 of the CPC. It is submitted that Count 1 is defective, firstly, as it is wrongly drafted and confusing because despite stating that the offence is conspiracy to steal (which is under section 381), the statement continues to state that the offence of conspiracy is contrary to section 260 (offence of stealing in an individual capacity) and to section 265 (offence of stealing as a public servant) and contrary to section 381. Further, the statement of the offence gives punishment for both a charge of

theft and a charge of conspiracy to steal or for both. Secondly, it is submitted that Count 1 is defective as it is not clear whether the 1st Respondent is being charged with conspiracy to steal as an individual or as a public servant.

[46] The 1st Respondent argues that Count 1 does not specify the acts that the 1st Respondent is alleged to have committed and is not sufficiently particularized in order for him to understand the nature of cause since the offence of theft and a conspiracy to commit theft is wide and there is more than one ways in which the offences could have been committed. The submissions refer to decision in *R v Rabe* 1947 (2) SA 1198 (C) where accused was charges with selling adulterated milk and there was an extended definition of word 'sell' to include several conducts. The court held that the charge should have indicated in what way the accused was alleged to have 'sold' the milk.

[47] The 1st Respondent further refers to decision in *Choolun v R.* [1979] MR 290 which held that duplicity is *"matter of form, independently of the evidence"* and submits that whether an information is bad for duplicity is to be decided solely by looking at the wording of the information itself to see if more than one offence is being charged in the same count. It is submitted that when looking at Count 1 it is clear that more than one offence is being charged, namely, stealing by ordinary individual, stealing by public servant and conspiracy to steal as an individual and as a public servant, consequently charging the 1st Respondent with four offences under one count, which makes the charge duplicitous. If the Applicant is charging the 1st Respondent with one offence then reading it with other offences in the same count amounts to multiplicity of charges and if conviction is successful, the 1st Respondent will be punished and sentenced on each of those counts and would face double jeopardy contrary to Article 19(5) of the Constitution.

Count 2

[48] It is submitted that Count 2, Official Corruption under section 91 of the Penal Code is contrary to Article 19 (1) and (2)(b) and does not conform to sections 111 and 114 of the CPC. The 1st Respondent submits that Count 2 is defective in that, firstly, the statement of the charge does not specify under which subsection of section 91 the 1st Respondent is being charged, which is unfair and prejudicial to the 1st Respondent to have to prepare his defence based on assumption as to which subsection he is being charged under.

[49] Secondly, it is submitted that Count 2 is defective in that the Applicant has used the marginal notes to create an offence as words "official corruption" is not an offence under our laws as it is not used in section 91 and therefore cannot be used for statement of offence. The 1st Respondent refers to section 7 of the IGPA which states that, *"Marginal notes and heading in an Act and references to other Acts in the margin of or at the end of an Act do not form part of the Act and shall be treated as having been inserted for convenience only"*.

[50] Thirdly, it is submitted that Count 2 is defective as the particulars of the offence is not sufficiently particularized to enable the 1st Respondent to understand the nature of the accusations.

[51] Fourthly, it is argued that the particulars of the offence do not disclose the commission of an offence under section 91.

[52] Lastly, it is submitted that the particulars of the charge mentions two different positions of the 1st Respondent has held but fails to state in what capacity he is alleged to have committed the offence and that again causes prejudice to the 1st Respondent as he has to make several assumptions when preparing his defence since his duties and powers in these two capacities were very different to each other.

Counts 3, 5-9

[53] It is submitted that Counts 3, 5-9 for official corruption contrary to section 91 of the Penal Code are contrary to Article 19(1) and (2) and do not conform to section 111 and 114 of the CPC. The 1st Respondent supports its submissions with the same arguments as argued in respect of Count 2 above.

Count 4

[54] It is submitted that Count 4 for conspiracy to launder money, contrary to section 3(1)(a) and 3(2)(a) of the Anti-Money Laundering Act 1996 and punishable under section 3(3) of the same Act is contrary to Article 19(1) and (2) and do not conform to section 111 and 114 of the CPC. The 1st Respondent submits that Count 4 is prejudicial and confusing as while the Count states that offence is conspiracy to launder money, there is no offence of conspiracy to launder under AML 1996 and offences under sections 3(1)(a) and 3(2)(a)

are offences of money laundering, not conspiracy to launder. It is submitted that allowing the Applicant to charge the 1st Respondent with conspiracy to launder money where the AML 1996 does not provide for such offence will be contrary to Article 19(1) and (2)(b) of the Constitution.

[55] It is further submitted that the 1st Respondent is unable to understand if he is being charged for two counts of money laundering in Count 4 or one; and if only for one count – which section is he actually being charged under. The 1st Respondent submits that the way the statement of the offence is drafted amounts to splitting of charges which is not permissible and leads to duplication of conviction as two sections for the same offence have been cited which may lead to the court to punish the 1st Respondent more than once for what is a single offence. It is argued that duplication leads to loss of sight of the fact that the accused's conduct consist of a single transaction, motivated by a single purpose and to impose several punishments for a single course of conduct is unjust.

[56] The Submissions refer to decision in *Choolun v R* (supra) reiterating the earlier argument in relation to Count 1 that duplicity is a matter of form, independently of the evidence. It is argued that it is clear that more than one offence is being charged in Count 4, namely money laundering under section 3(1)(a) and the same offence albeit different ways of doing so under section 3(2) of the AML 1996. Consequently, charging the 1st Respondent with the two offences under the one count makes the charge duplicitous.

[57] The 1st Respondent submits that the particulars of the offence is not sufficient and clear enough to enable him and his counsel to adequately prepare his defence as the information only repeats section 3(1) of the AML 1996 and that the 1st Respondent agreed with Latif Karimjee and persons unknown to engage in transaction that involved money that was proceeds of crime.

[58] It is further submitted that if the Applicant is charging the 1st Respondent with one offence as per Count 4, then charging it with other offences in that same count amounts to multiplicity of charges and if Count 4 is allowed and conviction is successful the 1st Respondent will be punished and sentenced on each of those counts and will face double jeopardy contrary to Article 19(5) of the Constitution.

Counts 10, 11, 14, 16, 18 and 22

[59] It is submitted that Counts 10, 11, 14, 16, 18 and 22 have been brought under the repealed 1996 and 2006 Anti-Money Laundering Acts and up to the 18th May 2002 there was no retrospective/retroactive application under the ACA and the AMLCFT 2020 and there was no powers for the ACCS under the ACA to prosecute offences under the repealed AML 1996 and 2006. On the 19th May 2022 the amendments made to the ACA by Act 9 of 2022 created a "back-door" empowering the ACCS to act retroactively and apply the ACA retrospectively and the said Counts are brought through this very back door. It is submitted that this is contrary to Article 19 of the Constitution and the matter is already being challenged by the 1st Respondent before the Constitution Court in CP 9 of 2022, where the 1st Respondent is claiming that this affects his Constitutional right to a fair hearing. It is submitted that should this Court allow the amendments to charges it should then stay the trial and refer the case to the Constitutional Court for a determination as to whether the above mentioned counts are unconstitutional or not, otherwise great prejudice would be suffered by the 1st Respondent. It is submitted that should the Constitutional Court rule in favour of the 1st Respondent at least half of the charges will be struck off and that would amount to a waste of Court's time, resources and unnecessary cost to the 1st Respondent.

[60] The 1st Respondent further submits that according to the Applicant's submissions, the Third Amended Charges have been reviewed in light of the progressing investigations and further evidence obtained from the MLA to external jurisdictions and from digital forensic investigation. The 1st Respondent states that he can deduce that the further evidence came after the last service of disclosure otherwise he finds it inconceivable that the ACCS would have waited all this time from last disclosure to file amended charges. It is submitted that none of the further evidence obtained were attached to the affidavit in support and have not been served on the 1st Respondent. It is argued that the ACCS' submissions in respect of document it will be relying on for the trial is contradictory as on the one hand it submits that the 1st Respondent has already been served with all documents and on the other hand it submits that the Thirds Amended Charges are based on further evidence obtained. It is submitted that the 1st Respondent is not privy to what evidence the ACCS has obtained and states that without service of those newly obtained evidence to the 1st Respondent great prejudice will be caused on the 1st Respondent and further time would be needed to consider any new disclosure. It is further submitted the given the extremely voluminous disclosure that has already been served and amendment

of charges for the 3rd time (if allowed), the ACCS is duty bound to indicate to the 1st Respondent what out of disclosure will it be relying on in respect of the Third Amended Charges at the trial. Otherwise, it is submitted the 1st Respondent will suffer great prejudice in having to review extremely copious amount of evidence and trying to figure out what will be relied on by the Applicant at trial resulting in great delays in the start of the trial, unnecessary cost and waste of resources to the 1st Respondent.

ACCS' response to respondents' objections to amend the charges

[61] The ACCS has filed a Response to Respondents' objections to amendment of charges dated 20 July 2023. The ACCS states that they received further objections served on behalf of the 1st Respondent and 2nd Respondent on 12 May and 23 June 2023 respectively. The ACCS states that this further submissions seek to address the law advanced, and response to the objections set out therein if not already addressed in the Applicant's document dated 4th May 2023.

[62] The ACCS addresses the 1st Respondent submissions by categorizing them into six categories. Firstly, constitutional arguments:

ii. that section 64 of the ACA is unconstitutional;

iii. that ACCS powers are limited to analogues police powers, namely to detect, prevent and investigate offences pursuant to section 52A of the ACA, and therefore they cannot swear affidavits.

[63] Secondly, argument that the ACCS cannot use the CPC:

iv. that as the ACCS derives its power to prosecute from section 64 of the ACA and is not a 'public prosecutor', the ACCS' power to prosecute does not derive from the CPC and therefore the ACCS' procedure cannot be governed by it;

v. that as section 52A of the ACA was expressly inserted to confer powers that are akin to police powers on the ACCS, there would need to be express provision to confer powers akin to a public prosecutor on the ACCS, such that the CPC can be relied upon.

[64] Thirdly, argument that sections of the CPC is not met because there is no assertion by the ACCS that the charge is defective.

[65] Fourthly, compliance of the charges with section 111 and 114 of the CPC, on the basis of the 1st Respondent's argument that the charges duplicate each other or "amount to a multiplicity of charges"; and individual criticisms of charges.

[66] Following that, the fifth category of 1st Respondent's argument relate to the Respondent being unclear about or not having the evidence on which the charges are based.

[67] Finally, the sixth category relates to alleged breach of Article 19 of the Constitution.

[68] The ACCS states that the substance of the 2nd Respondent's submissions is contained in paragraphs 4-6 of her Submissions (relating to arguments regarding trial within reasonable time under "*(sic) Article 19(2)(c) of the Constitution"*). The ACCS submits that the 2nd Respondent's objection in summary is mainly that allowing an amendment would breach her right to be tried within a reasonable time and amount to an abuse of process. The ACCS submits that Article 19(2)(c) of the Constitution relates to the defence being given adequate time and facilities to prepare a defence to the charge.

[69] In response to the 1st Respondent's submissions regarding section 5(1) of the Indictment Act 1915 the ACCS refers to leading commentary in Archbold 2023 addressing the section from 1-257 to 1-260. The full citation can be found at paragraph 9 of the ACCS' Response Submissions and the commentary highlighted by the ACCS are reproduced below:

> *"The present position as to the exercise of the power to permit amendments is largely set out in the judgment of the Court of Appeal in Johal and Ram (1972) 56 Cr. App. R. 348, where reference is made to several of the earlier authorities. The effect of s.5 (1) of the Indictments Act 1915 (S 1-249) is, therefore, as follows (the word "indictment" including "count" where there is more than one count).*
>
> *(1) . . . (a) when it does not accord with the relevant evidence, either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is so disclosed: Martin [1962] 1 Q.B. 221; (1961) 45 Cv. App. R. 199, CCA;*
>
> . . .
>
> *(f) when new evidence post-dating the case being sent becomes available: Thompson (Frederick) [2011] EWCA Crim 102; [2012] 1 Cv. App. R. 12, following Osieh [1996] 2 Cv. App. R. 145, CA;*
> . . .

(2) The court has power to order an amendment which involves the substitution of a different offence for that originally charged in the indictment, or even the inclusion of an additional count for an offence not previously charged: Johal and Ram, above.

(3) An amendment of any kind, including the addition or substitution of a count, may be made at any stage of the trial provided that, having regard to the circumstances of the case and the power of the court to direct a separate trial of any accused or to postpone the trial, the amendment can be made without injustice: Smith (1950) 34 Cr. App. R. 168, CCA; Johal and Ram, above; Harris (1976) 62 Cr. App. R. 28, CA. In Love and Hyde [2013] EWCA Crim 257; [2013] 2 Cr. App. R. 4, it was held that an indictment may be amended at any time prior to sentence, but that where this is done after the defendant has pleaded guilty be should be rearraigned, so as to give him the opportunity to plead not guilty to the amended indictment."

[70] The ACCS submits that the case law provides a far wider scope to the statutory language that the 1st Respondent contended and argues that it allows for the amendment of charges in circumstances equivalent to those before this Court.

[71] With regards to the 2nd Respondent's reference to *Sandapin v Government of Seychelles & Anor* (CP 13 of 2010) [2012] SCCC 6 (13 November 2012), the ACCS submits that in addition to part quoted by the 2nd Respondent, Burhan J held the following when referring to the test to be applied when considering the reasonableness of the length of the proceedings pursuant to Article 19(1) of the Constitution:

"In the case of Frydlender v France (30979/96) ECHR 27 June 2000 it was held by the European Court of Human Rights that -

the "reasonableness" of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of relevant authorities and what was at stake for the applicant in the dispute. (emphasis mine).

It further stated that reasonableness is to be assessed primarily with the reference to "the circumstances of the case" and emphasized that such assessment is highly relative and specific to each case Konig v Federal Republic of Germany (1983) 5 EHRR 1.

This court too is of the view that the test for reasonableness requires an objective assessment of a number of criteria namely –

a. the nature of the case which would include as set out in the Frydlender case (supra) the complexity of the case and what is at stake for the applicant, and

b. the conduct of the applicant and of relevant authorities.

In regard to paragraph (a) ie the nature of the case, the complexity of the case would be in regard to complexity in facts, complexity in legal issues and complexity in proceedings. Complexity in facts would be, to name a few, the number and particular nature of the charges, the number of defendants and witnesses (Dobbertin v France (1993) 16 EHRR 558). Complexity in legal issues would include respect for the principle

of equality of arms and include questions of jurisdiction and constitutionality or interpretation of international treaty, while complexity of the proceedings would include the number of interlocutory applications, the number of parties and witnesses, obtaining files and documents of foreign proceedings and transfer of cases from one division to another on grounds of public safety.

In regard to paragraph (b) ie the conduct of the applicant (the person seeking redress and alleging failure to comply with the reasonable time requirement) would include requests for adjournments, repeated changes of lawyers, fresh allegations of fact which prove to be incorrect, failure to appear at hearings, creating a procedural maze ie applications for release, challenges against judges, request for transfer of proceedings to other courts, uncooperative attitudes etc (Frédéric Edél (supra) at 53 and 54). The conduct of the applicant should be examined to determine whether the applicant delayed the procedure with his acts or with his omissions. Such delays cannot be considered as contributing towards a failure to comply with the requirements of a reasonable time.

Conduct of the relevant authorities would include delays on the part of Judiciary authorities including the registry, administrative authorities and other national authorities including the government and legislature. In Moreira de Azevedo v Portugal (1991) 13 EHRR 721 it was held "the court notes that the State is responsible for all its authorities and not merely its judicial organs". According to established case law Buchholz v Federal Republic of Germany (A-42, 7759/77) ECHR 6 May 1981, "only delays attributable to the State may justify [the Court's] finding … a failure to comply with the requirements of 'reasonable time'". . . .

. . . It is the view of this court that reasonable time for a case to be concluded should be decided on a case by case basis taking into consideration the aforementioned circumstances peculiar to each case."

[72] The ACCS' position regarding the constitutional issues raised by the Respondents is that the law permits the ACCS to prosecute offences pursuant to section 64 of the ACA and as such all that goes along with doing so (e.g. the swearing of affidavits by officers and use of counsel to prosecute). It is submitted that any arguments regarding unconstitutionality of the legislation or actions of the ACCS is a matter for the Constitutional Court and this Court should proceed on the law as it currently stands.

[73] With regards to the application of the CPC the ACCS reiterates that section 64 of the ACA permits the ACCS to prosecute offence, which include offences under the Penal Code and money laundering offences. It is submitted that the CPC as set out in section 3 applies to all offences under the Penal Code, and all other offences shall be tried according to the same provisions, subject to any enactment regulating the manner of their inquiry, which does not apply in this case. Further, the ACCS submits the application of the CPC is not dependent on the identity of the prosecutor and there is nothing in the ACA which suggests that the CPC is not applicable to cases brought by the ACCS; simply because the ACA is silent on the procedure does not prevent the CCP from

applying; and the procedure of prosecuting the offences under the Penal Code is government by the CPC and the ACCS is permitted to apply to amend the charges in accordance with section 187.

[74] The ACCS submits that the 1st Respondent concedes that section 187 is akin to section 5(1) of the Indictment Act 1915. It is submitted that the guidance in Archbold makes it clear that an amendment can take place in circumstances such as in the present case.

[75] In relation to proposed amendments the ACCS submits that the amended charges are based upon the evidence disclosed and the Respondents has been served with the evidence in tranches and should be able to address it. Further, it is submitted that the proposed charges are clear and not duplicitous, and that the indictment is not overloaded.

[76] With regards to the specific complaints made, the ACCS reply on paragraph 20 is as follows:

- Count 1: *"the particulars make clear what is being alleged, and are properly pleaded to reflect the allegation of theft (in an aggravated form) and that it is a conspiracy"*.

- Count 2, 3, and 5-9: *"the particulars make clear what is being alleged. Section 91 of the Penal Code specifically provides that Official Corruption is an offence, with an individual if convicted liable to imprisonment for seven years"*.

- Count 4: section 3(2)(a) of the AML 1996 specifically refers to 'conspires' and makes it an offence to conspire to commit offence of money laundering. Count 4 addresses the subsequent, separate money laundering of part of the proceeds of the 50 million, together with the other funds transferred from the SMB to Karimjee and Jivanjee in the United Kingdom.

[77] With regards to Article 19 of the Constitution, it is submitted that under section 187 of the CPC the amendment to a charge may be made at any stage of proceedings; there are no restriction on the number of times the charges may be amended and the court may make any amendment it thinks necessary provided no injustice is caused. The ACCS submits that the proposed amended charges are based upon evidence and the Respondent has been served with the evidence in tranches and should be in a position to address it. Further, it is submitted that there is currently no trial date fixed for this matter and the Respondent has a significant amount of time to consider the proposed amended charges before the trial commences. Lastly, the ACCS states that the proposed amendment does

not contravene Article 19 as it does not prevent the Respondent being tried within a reasonable time.

[78] In relation to issue of whether any injustice will be caused by the amendment, the ACCS submits that no injustice is caused and each Respondent will continue to have the safeguards contained in the trial process of being able to (i) to apply to exclude evidence; (ii) to make a submission of no case to answer; (iii) to make further submissions on the adequacy of evidence after all evidence has been adduced before the close of the trial. Finally, it is submitted that the learned trial judge will in any event oversee the fairness of the proceedings to ensure that the Respondents are not prejudiced in their defence.

Written Submissions of the 2nd Respondent

[79] Written submissions of the 2nd Respondent were filed on the 13th November 2023. It is stated that the 2nd Respondent had filed objections against the Third Amended Charges, which were later substituted on a change of Counsel and the following objections have been raised including:

(i) Incurably Defective Affidavit
(ii) Application prima facie having no substance and does not sustain in law;
(iii) The Applicant is lacking the requisite statutory power for substitution of charges;
(iv) Abuse of Process

Defective Affidavit

[80] The 2nd Respondent submitted that the affidavits are sworn evidence and have to be in compliance with the law of evidence and that it is well settled that it is not sufficient for an affidavit to simply contain averments in support of an application before a Court. The facts averred have to be supported by documentary evidence which have to be exhibited to the affidavit. The 2nd Respondent refers to decision in *Bordino and Anor v Government of Seychelles* (SCA 67 of 2022) [2022] SCCA 76 (16 December 2022) where the court referred to relevant part of Order 41 rule 1 of the While Book in relation to requirements of the form of affidavits. The 2nd Respondent further cited Order 41 "Form of Affidavit". The 2nd Respondent emphasized the following requirements:

(i) Affidavit sworn in a cause or matter must be entitled in that cause or matter;

(ii) Affidavit must state the place of residence of the dependent and his occupation; if he is employed by a party to the cause in which the affidavit is sworn, the affidavit must state that fact;
(iii) Affidavit must be in book form, following continuously from page to page, both sides of the paper being used;
(iv) Content of affidavit – any documents to be used in conjunction with an affidavit must be exhibited and not annexed, to the affidavit.

[81] The 2nd Respondent submits that affidavit of Officer Stepheson is defective as it ought to have made reference to the Motion rather than stating main case; by stating that deponent is an office and investigator and part of the team of international consultants for ACCS he did not satisfy requirement (ii) above; and that he did not exhibit evidence of his authorization to swear an affidavit on behalf of the ACCS, nor proof of his employment. Further the 2nd Respondent states that affidavit is not printed on both sides of the paper contrary to requirement (iii) above. Finally, it is submitted that Annexures containing current and proposed counts should have been exhibits instead of annex (requirement (iv) above) and as it has not been exhibited, it cannot be admitted and made part of evidence. The learned Counsel cited Robinson J decision in *Lablache De Charmoye vs. Lablache De Charmoye* SCA MA08/2019 [17th September 2019] which states that document used in combination with an affidavit must be exhibited and filed. The submissions conclude that failures in relation to the affidavit render the entire Application incurably defective and it ought to be dismissed.

Jurisdiction and Authority in relation to the Application

[82] It is submitted that even with the enactment of the Anti-Corruption Commission (Amendment) Act, 2022 (Act 9 of 2022) the ACCS, being the Private Prosecutor does not have power nor jurisdiction to amend or substitute charges as the Act 9 of 2022 merely provided for the institution of proceedings and discontinuance of such proceedings. The 2nd Respondent submits that noting the Constitutional role of the Attorney General's Chambers and limited powers of the ACCS under the legislation, it is erroneous to consider that the silence of the law confers such jurisdiction of authority on the ACCS. The 2nd Respondent submits that in criminal law, the principle of legality requires that powers, especially those that can affect the rights of the accused, must be expressly granted and clearly defined. It is argued that the absence of explicit statutory authorization for amending or substituting charges cannot be interpreted as an implied power and the law should not be presumed to grant such significant powers without clear

legislative intent. It is submitted that there would necessarily have to have been a specific amendment referencing the provisions of the CPC which was not done and not including such express provisions indicates a deliberate choice of the legislature; implied power would be contrary to the principles of separation of powers, encroaching upon the legislative function.

[83] The 2nd Respondent further submits that the ACCS does not derive its powers from the CPC; is not acting under the direction of the Attorney General; and the prosecutors of the Applicant are not Public Prosecutors (reference made to sections 2 and 63 of the CPC; stating that the ACCS counsels have not been appointed as Public Prosecutors by either the President (section 63(1)) or the Attorney General (section 63(2))). Further, it is submitted that the ACCS as a statutory body is empowered with specific prosecutorial powers as provided in the ACA, distinct from the comprehensive powers held by the Attorney General. The 2nd Respondent submits that it is notable that no other entity or individual is authorized to prosecute without the Attorney General's sanction (such as FIU or the SRC for example).

[84] It is further submitted that the Application is silent in terms of which provision of law it is being brought under and as such the Application is deficient in that regard.

Impact on Fair trial and timelines

[85] The 2nd Respondent submits that Applicant's notion that they can move for amendment as many times as they desire with no restriction on the number of times charges may be amended is flawed as the doctrine of abuse of process and the constitutional rights of the accused are primordial consideration to such propositions for amendment of charges.

[86] It is noted that 22 months has passed since the 2nd Respondent has been charged with no trial in sight, the Third Amendment is being brought and investigation being still ongoing. It is submitted that this contravenes all the fundamental doctrines in relation to prosecution, disclosure, and 2nd Respondent's fundamental rights. The 2nd Respondent refers to the extract from the decision of the Constitutional Court in *Sandapin v Government of Seychelles* SC CC 12/2010 (already mentioned above) and submits that the length of proceedings from December 2021 to date cannot be construed as having been reasonable nor can amendment be permitted noting excessive lapse of time.

[87] The 2nd Respondent further cites Article 48 of the Constitution (Consistency with international obligations of Seychelles) and Article 19(1), (2) and (5), emphasizing that this Chapter of the Constitution *"shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of - (a) the international instrument containing these obligations"*. Further emphasis is made on a right to a fair hearing within reasonable time and right to be informed of the nature of the offence accused is being charged with as soon as is reasonable and practicable (Article 19(1) and (2)). The 2nd Respondent submits that in support of these international obligations and in relation to such human rights reference is made to *Prosecutor v Milan Kovacevic before the International Criminal Tribunal at Hague* (05/03/1998). It is submitted that the case deals with amendment of indictment which was not permitted on the basis that such amendment should have been made more promptly, the amendments are not necessarily the result of subsequent acquisition of materials unavailable at the time and the Prosecutor was duly aware of these information, infringement of the right of the accused to be informed promptly of the charges against his.

Amended Charges

[88] The 2nd Respondent argues that late amendments necessitate a complete reevaluation of the defence strategy, effectively delaying the trial and infringing upon the right to a timely trial. The 2nd Respondent refers to section 111 and 114 of the CPC submitting that charges laid against the 2nd Respondent fall short of the requirements of the sections and are in any event defective. The 2nd Respondent further cites decision in *R v Bradley* 58 Cr. App. R 394 regarding fairly liberal meaning to the language of section 5(1) of the Indictment Act 1915 (already cited above in relation to the 1st Respondent's submissions). The 2nd Respondent argues that it is not clear to her whether she is being charged as an individual or as a public servant with further ambiguity as to why she, being one amongst a number of directors is being solely charged. Further, it is submitted that the elements of the crimes alleged specifically described the charges are prolix and lacking and are defective. It is submitted that the particulars of the offences do to specify the acts allegedly to have been committed and is not sufficient particularized.

[89] The 2nd Respondent submits that indictment should set out the specific allegations that the prosecution assert justify conviction and will contain the following details: a) describes the offence in ordinary language; b) identifies any legislation which creates it; c) contains such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant; d) the specific date of the offence should be stated in the indictment as accurately as possible. The 2nd Respondent submits that the dates are crucial and must be checked carefully to ensure that the offence charged was in force at the time of the offending behaviour.

[90] At paragraph 51 of the Written Submissions, the 2nd Respondent submits that the counts have been brought under the repealed 1996 and 2006 Anti-Money Laundering Acts and there was no retrospective/retroactive application under the Anti-Corruption Act nor the AMLCFT 2020 and there was no powers for the ACCS to prosecute offences under the repealed Acts. It is submitted that amendments made to the ACA by Act 9 of 2022 created a "back-door" empowering the ACCS to act retroactively and apply the ACA retrospectively. It is submitted that this is contrary to Article 19 of the Constitution and the matter is to be the subject of a Constitutional Petition amongst with other contraventions of fundamental rights.

Procedural Irregularities and Abuse of Process

[91] The 2nd Respondent raises an issue of abuse of process at paragraphs 52-61 of the submissions. It is argued that the continued investigation and repeat amendment of charges falls squarely within the ambit of vexatious prosecution and amounts to abuse of process. It is submitted that the jurisdiction for the court to stop proceedings as an abuse of process arises where the prosecuting authority has acted unconscionable so that a continued prosecution would offend the court's sense of justice and bring the criminal justice system into disrepute (second limb) or it would be impossible to try the defendant fairly (first limb); reference to *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 ALL E.R. 138 (House of Lords).

[92] The learned counsel outlined scenarios of the 'first limb' and 'second limb' supported by case law with emphasis on: significant delay by the prosecution in bringing the proceedings; adverse media publicity; fundamental breach of the duty of disclosure by the prosecution leading to prejudice to the defendant; continuation of the proceedings

amounting to a breach of the state's international legal obligation; manipulation by the prosecution of particular procedures.

[93] It is further submitted that the jurisdiction to stay proceedings as an abuse of process is an exceptional one so that where the impropriety or unfairness can be cured by the criminal justice system itself, then that system should be used to allow the trial to proceed.

[94] The 2nd Respondent concludes that the excessive delays caused by the prosecution in either amending their legislation, amending the charges on three occasions and the continued infringement of the human rights of the accused, arbitrary exercise of discretion on the part of prosecution, abuse of process in using the courts as a forum to investigate alleged criminal offence while not fully prepared to prosecute the offences, warrants permanent stay of these proceedings or the dismissal of the application to amend the charges.

ANALYSIS AND DETERMINATION

[95] Firstly, this Court observes that several allegations of breach of the Constitution has been raised by the Respondents, namely, in relation to jurisdiction of the ACCS to prosecute and amend the charges; retrospectivity of the repealed AML Act of 1996 and 2006 and infringement of their right under Article 19.

[96] The 1st Respondent has submitted that the issues of ACCS' jurisdiction and constitutionality of retrospective application of AML Act of 1996 and 2006 are before the Constitutional Court for determination in CP 9 of 2022. The 1st Respondent further submitted that should this Court allow the amendments to charges it should then stay the trial and refer the case to the Constitutional Court.

[97] Under Article 46(7): *"Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court"*.

[98] The above named issues are already before the Constitutional Court in CP 9 of 2022. In *Valabhji v The Republic & Ors* (MA 205/2023 (Arising in CP 09/2022)) [2023] SCCC 8 (21 November 2023) the Constitutional Court granted Mr Valabhji's, the 1st Respondent, application for stay of proceedings in CP 9 of 2022 pending the determination of the Notice of Motion to amend the existing charges in CR114 of 2021. Which is the present Notice of Motion before this Court. Therefore, the issues of jurisdiction of ACCS and alleged contraventions of the Constitution in relation to AML 1996 and 2006 shall be the subject to decision of the Constitutional Court. The application before this Court is for determination whether the amended charges proposed by the ACCS will be permitted. The 1st Respondent submitted that this court should stay the trial for Constitutional Court to determine the issues. I agree with this submission, the trial should be stayed pending the determination of the Constitutional Court. These issues have been raised before both this trial court and the Constitutional Court. This causes a clear conflict of jurisdiction with regards to them. To me it is abundantly clear that the conflict should be resolved by giving precedent to the Constitutional Court. This Court will therefore proceed to determine the new issues before it in relation to charges, and specifically, whether the amended charges should be accepted.

[99] Secondly, the 2nd Respondent extensively submitted on alleged defectiveness of the Affidavit in Support of the Notice of Motion. Upon perusal of the Affidavit, the Court is satisfied that Officer Stephenson sufficiently stated information regarding his employment and referred to address of the employer, the ACCS. This Court does not hold the view that printing affidavit on one side instead of both sides of the paper is capable of rendering the application incurably defective.

[100] In relation to documents enclosed with the Affidavit, the Court of Appeal decision in *Lablache De Charmoy v Lablache De Charmoy* (SCA 8 of 2019) [2019] SCCA 35 (16 September 2019), while stating that documents to be used in combination with an affidavit must be exhibited and filed, did not prohibit filing of such documents by way of annexure. The approach taken in *Lablache De Charmoy* and *Elmasry & Anor v Hua Sin* [2019] SCSC 962 is a strict approach in relation to defective affidavits. It is established that parties cannot waive the evidential rules regarding affidavits. However, both cases were in respect of application for stay of execution where a general rule is to decline a stay unless solid grounds are shown. Arguably such applications require a very strict

approach in relation to defective affidavits, however, this is not necessarily applicable to every other case with different circumstance. The said judgments do not expressly exclude court's discretion to admit a defective affidavit or permit the defect to be remedied in certain circumstances. Further, in *Elmasry* the court analyzed the defect in relation to jurat and emphasized that the requirement must be followed in order to prevent potential tampering with evidence. The affidavit of Officer Stephenson even though is printed not on both sides, contains numbered paragraphs, which arguably may also prevent tampering with the testimony. In any case there is also case law where the courts have admitted defective affidavits or permitted the defect to be remedied (see *Mrs Lea Raja M Chetty v Mr Mariapen Srinivasen Chetty*, CS 327 of 2006; *Paul Chow v The Commissioner of Elections*, CC 3/2007; *United Opposition v Attorney-General* (unreported) CC 8/1995).

[101] Furthermore, the courts also recognize that while procedure must be followed it must also not defeat justice. In *Chetty v The Estate of Regis Albert & Ors* (CS 131/2018) [2020] SCSC 500 (7 May 2020), albeit in relation to civil procedure requirements, it was stated:

> *"The issue of a procedural irregularity being a bar to a legal remedy has been considered on many occasions. Courts have recognised that a strict adherence to procedural requirements risks a perverse outcome and that a failure to comply with civil procedure should not be the basis for denying otherwise legally acquired rights. In Coles and Ravensher (1907) I KB 1 Collins MR aptly stated:*
>
> > *"Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."*

[102] Having scrutinized the Affidavit of Office Stephenson and Submissions of the 2nd Respondent, in my considered view, the fact that strict adherence to Order 41 of the White Book as submitted was not followed, in particular: printing affidavit on both sides and enclosing current and proposed charges as annex instead of exhibit, does not affect the substance of the Motion, does not render the affidavit defective and does not render the application incurably defective to justify its dismissal.

[103] The Court will now proceed to address the issue of whether the ACCS' proposed amended charges will be permitted. Respondents presented multiple arguments in relation to amendment as a whole and further specific objections in relation to particular

charges. This Court will first address whether amendment as a whole can be permitted at this stage and then will proceed to analyze objections in relation to each proposed amended counts.

Objections to third proposed amendment of charges

ACCS powers under the CPC

[104] The 1st Respondent has argued that the ACCS cannot amend the charges applying the CPC as they have not been expressly granted such powers under section 64 of the ACA in comparison to their express powers under section 52A (investigation and detection etc).

[105] Section 3 of the CPC states:

> *"3. Trial of offences*
>
> *(1) All offences under the Penal Code shall be inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.*
>
> *(2) All offences under any other law shall be inquired into, tried and otherwise dealt with according to the same provisions, subject, however, to any enactment for the time being in force regulating the manner or place of inquiring into, trying or otherwise dealing with such offences.*
>
> *(3) Notwithstanding anything in this Code contained, the Supreme Court, may, subject to the provisions of any law for the time being in force in Seychelles, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure described by this Code is inapplicable, or for which no procedure is so prescribed, exercise such jurisdiction according to the course of procedure observed by and before the High Court of Justice in England.*

[106] The existing charges and proposed amended charges are brought under the Penal Code and Anti-Money Laundering legislation. The proceedings before this Court are criminal in nature, therefore, it is the view of this Court that the CPC applies to the current proceedings. The law as it is currently stands states that the ACCS may institute the prosecution for the offences as stated in section 64 of the ACA. Without delving into determination of the ACCS powers, which is before the Constitutional Court and subject to the determination of that Court, this Court is of the opinion that amending charges falls within the notion of instituting prosecution as a charge sheet forms the basis of the process of instituting proceedings and such basis is sought to be amended.

Requirements under section 187 of the CPC to amend the charge

[107] Section 187 of the CPC provides:

> *"187. Amendment of charge (1) Where it appears to the court that the charge is defective, the court may make such order for the amendment of the charge as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice.*
>
> *(2) An amendment may be made—*
>
> > *(a) before trial or at any state of a trial, except than in a trial held by the Magistrates' Court no amendment may be made after the close of the case for the prosecution;*
> >
> > *(b) up to the close of the case for the prosecution by way of substitution or addition of a new charge.*
>
> *(3) Where a charge is amended—*
>
> > *(a) the amendment shall be noted on the charge and it shall be treated for the purposes of the trial and of all proceedings in connection therewith as having been originally drawn up or presented and signed by the proper officer in the amendment form:*
> >
> > *Provided that, where the amendment is by way of substitution or addition of a new charge, the accused shall be called upon to plead to the new charge;*
> >
> > *(b) the court shall, if it is of opinion that the interests of justice so required, adjourn the trial for such period as may be necessary;*
> >
> > *(c) the court shall ask the accused whether he wishes to adduce additional evidence or to recall any witnesses for the purpose of further examination or cross-examination and if he so wishes the court shall allow him to do so.*
>
> *(4) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."*

[108] The ACCS submitted that the charges may be amended at any stage of proceedings and there is no restriction on the number of times the charges may be amended and the court may make any amendment it thinks necessary provided no injustice is caused. The test for determination therefore according to the ACCS is for the court to determine whether any injustice will be caused by amending the charges and for the reasons stated in their submissions the current amendment will not cause injustice.

[109] The position of the Respondents is that no restriction on the number of times the charges may be amended violates their fundamental rights, in particular right to be tried within reasonable time, be given adequate time and facilities to prepare a defence, be informed of the charges as soon as is reasonably practicable. The 1st Respondent further states that

the test for the determination is not only in regards of injustice being caused but that the existing charges must be defective for the court to consider the amendment and the ACCS has not pleaded that the charges are defective but that the charges have been reviewed due to information received in response to MLA requests and material received from the Digital forensic review. Both Respondents further object to the proposed amended charges alleging that they do not conform to sections 111 and 114 of the CPC.

Charge must be defective

[110] With respect to the 1st Respondent's argument that in order for the charge to be amended pursuant to section 187 of the CPC, it must be defective, in addition to the Respondents' submissions regarding liberal meaning to the language of section 5(1) of the 1915 Act with regards to charge being defective and the ACCS' reference to Archbold 2023 it was held in *Mote v R* [2007] EWCA Crim 3131:[2]

> *[44] . . . The indictment was not defective, ergo section 5(1) had no application. This submission accorded to the word 'defective' a very narrow meaning. . . . He contented, however, that this inadequacy or deficiency in the indictment was not a 'defect' within the meaning of section 5(1) of the 1915 Act. There was nothing inherently defective in the indictment as originally drafted.*
>
> *[45] This is an argument that was made and rejected by this court over 30 years ago in R v Johal and Ram (1972) 56 Cr App R 348. It suffices to quote the following passage from the judgment of the court delivered by Ashworth J at p. 351:*
>
> > *"The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore is bad on the face of it.* ***We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person."***
>
> *[46]* ***In that and subsequent cases the courts have given a very wide construction to a 'defective indictment' for the purposes of section 5(1) or the 1915 Act****. It is the appellant's own case that the indictment as originally drafted was not wide enough to encompass the case that the prosecution had sought to advance from the outset. We are in no doubt that this amounted to an argument that the indictment was 'defective' and that the judge had jurisdiction under section 5(1) to give permission to amend the indictment in order to cure the alleged deficiency. Accordingly we reject this ground of appeal."*
>
> (emphasis added)

[2] https://www.casemine.com/judgement/uk/5a8ff6fb60d03e7f57ea538e

[111] It is considered view of the Court that according to the Affidavit of Officer Stephenson, the amendments to the charge are proposed in order to meet the evidence further obtained and thus the present case falls into the category of cases where new evidence post-dating the case becomes available cited by the ACCS from Archbold 2023 and amendment can be made as long as it causes no injustice to the accused persons.

Timing of the amendment

[112] Firstly, this Court notes that while section 187 does not explicitly provide that there is a specific number of times the charges may be amended, the power to amend the charges is not unrestricted as the court retains discretion to determine whether amendment will cause injustice and cases where it would, amendment will not be permitted. It was held in *R v Barreau* (CO64/2017) [2018] SCSC 8340 (6 December 2018):

> *"It is my view that the Republic has no absolute right to amend its charges under section 187 of the Criminal procedure Code. Any amendment, whether because of a typographical error or as a result of variance between the charge and the evidence adduced can only be done, "unless having regards to the merits of the case the required amendment cannot be made without prejudice". The facts of each case and any prejudice arising as a result of the amendment will therefore determine the outcome of the motion seeking leave to amend. The burden lies upon the Republic to establish that the amendment would not cause prejudice to the accused, the accused having nothing to disprove."*

[113] In that case it was decided that accused would be prejudiced by amended charges, despite the remedial provisions of section 187. However, the case was at the trial stage where all the Republic witnesses have been examined and cross-examined, the defendant did not contest some of the evidence in respect of existing charges and the court noted that this could have been not the case or could have been done differently if the defendant was facing the proposed amended charges. In the present case we are still at the pre-trial stage.

[114] Section 187 provides that amendment may be made before trial or at any stage of a trial, up to the close of the case for the prosecution by way of substitution or addition of a new charge. Therefore, with regards to timing of the amendment, the power is significantly wide. As held in *R v Barreau* (supra) the burden is on prosecution to show that no injustice will be caused. The ACCS submitted that no injustice is caused as the Respondent will continue to have the safeguards contained in the trial process of being able to (i) to apply to exclude evidence; (ii) to make a submission of no case to answer;

(iii) to make further submissions on the adequacy of evidence after all evidence has been adduced before the close of the trial.

[115] Both Respondents allege that amendment at this stage would violate their right to a fair hearing under Article 19. With regards to the right to be tried within reasonable time the parties relied on decision in *Sandapin v Government of Seychelles & Anor* (CP 13 of 2010) [2012] SCCC 6 (13 November 2012) cited above. It was held that, *"... the court assess whether the length of proceedings from the starting point to the end in the case before it has been reasonable or not"*. Further, it was held with reference to decision of European Court of Human Rights in *Frydlender v France* (30979/96) ECHR 27 June 2000 that, *"the "reasonableness" of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of relevant authorities and what was at stake for the applicant in the dispute"*. The decision above cited addresses the said criteria in more detail.

[116] In *Azemia & Anor v Republic* (CO 99 of 2021) [2023] SCSC 108 (10 February 2023) in consideration of bail application, where at the time of application period of 22 months would have elapsed pending the conclusion of the trial, the court decided that the trial has not been unnecessarily prolonged in breach of the right to tried within reasonable time for the following reasons:

> *"… I state this on the premise that, whatever delays the Applicants suggest, such has not been due to the actions of the prosecution or this Court as earlier submitted by the Republic.* ***The Applicants have also not substantiated their claim of delay to show, in a premise and concise manner, who has caused the delay****. As such, the Applicants' reliance on Esparon & Ors v Republic cannot come to their aid."*
> (emphasis added)

[117] In the present case, the main contention of the Respondents in respect of the right to be tried within reasonable time appears to be that the amendment is brought so close to the trial date and further time would be needed for the Respondents to prepare defence, therefore further delaying the trial. This Court observes that according to the Affidavit in support of Motion and Annexed Proposed Amended Charges the amended charges are proposed in light of further information obtained during the ongoing investigation and disclosure has been done. The averments of the 2nd Respondent that the ACCS did not in the first instance have the evidence to prosecute; have failed to complete a proper

investigations of the allegations; and is set on a fishing expedition to support the allegations are not substantiated.

[118] Further, looking at the statement of offences in the proposed and existing charges, the Court observes that proposed charges are brought under the same legislation as existing charges. The second amendment to charges (which is now existing charges) were not objected to by the Respondents. It is now that the Respondents are challenging the statement of offence (as well as particulars of offence). Respondents' challenges of particular charges will be analyzed in detail later in the rULING. However, at this point, it is also relevant to observe that in respect of the 1st Respondent, count for conspiracy to steal; counts for official corruption; and count for conspiracy to launder money are being challenged in terms of drafting of the statement of offence, among other objections. The 1st Respondent alleges that the manner in which statement of offence was drafted creates duplicity, multiplicity of charges and charges the 1st Respondent with non-existent offences. It is observed that the manner in which statement of offence was drafted in these counts is the same as in the second amended charges (currently present charges) which were not objected to. Similarly, counts under repealed 1996 and 2006 Anti-Money Laundering Acts in relation to both Respondents, which are challenged in terms of retrospectivity of legislation are also present in the current charge sheet against 1st and 2nd Respondent. Therefore, the objections in relation to drafting manner and legislation potentially could have been brought when second amendment was sought. This was not done.

[119] In *Sandapin* (supra) it was further held:

> *"It should be borne in mind while the Constitution guarantees the right of the Attorney-General to institute and undertake criminal proceedings against any person,* ***such persons are not precluded from challenging such decisions made by the Attorney-General in a competent court at any stage (emphasis added)*** *even at the stage of the very institution of the case. In this instant case I note, as pointed out by counsel for the respondents, that no such prior challenge was made. Counsel for the petitioner was provided with all the statements soon after the case was filed in the Supreme Court and would have been aware of the contents of the statement . . .* ***and therefore could have challenged even the institution of proceedings before court. Having not done so counsel for the petitioner cannot now seek to complain that he was in remand custody for a period of 11 months as the "wheels of justice" turn slow.****"*
>
> (emphasis added)

[120] Considering the above analysis, this Court is of the view that certain objections to the third proposed amended charges are applicable to current charges and therefore could have been brought when second amendment was sought. This observation is not made to criticize the particular defence strategy chosen by the Respondents at that time. However, the above cited case law illustrates that when an allegation of delay in the proceedings is made, the court needs to consider the reasonableness of the length of proceedings (from starting point to the end) in the light of the complexity of the case and the conduct of the applicant and of relevant authorities, among other factors. The defendant alleging the delay needs to show that delay is caused by the conduct of the authorities. In my view, this is what the Respondents failed to show with their current objections.

[121] In support of the arguments in relation to breach of Constitutional right to fair hearing within reasonable time (Article 19(1)) and being informed of the charges as soon as reasonably practicable (Article 19(2)), the 2nd Respondent relied on decision in *Prosecutor v Milan Kovacevic before the International Criminal Tribunal at Hague* (05/03/1998). The 2nd Respondent submitted that in that case the amendment to indictment was not permitted on the basis that it should have been made more promptly. It is further submitted that the decision deals with the amendments being not necessarily the result of subsequent acquisition of materials unavailable at the time and the prosecutor was duly aware of these information, infringement of the right to be informed promptly of the charges against the accused.

[122] In that case, the accused, during his Initial Appearance, pleaded “not guilty” to a single charge of complicity in genocide in breach of Article 4 of the Statute of the International Tribunal. Shortly before the Initial Appearance, the prosecution notified the defence about their intention to amend the charges. However, the scope of amendment was only revealed around half a year later by filing the request for leave to amend. The prosecution sought to add 14 counts to the existing single count. The proposed counts covered Articles 2, 3 in addition to initial Article 4 and were based on substantially expanded factual allegations. In consideration of whether to permit the amendment the Trial Chamber noted that the prosecution accepted that the power to amend is not unlimited and the accused must be guaranteed the fair trial (including expeditors trial without undue delay and right to be promptly informed of the charges).

[123] The Trial Chamber refused the request for leave to amend for the following reasons. Firstly, it was held that the amendment including 14 additional counts and factual allegations was so substantial as to amount to a substitution of a new indictment; and amendment of such proportion should have been made more promptly (not nearly a year after confirmation; and seven months after the arrest of the accused). Secondly, it was held that the amendment sought was not the result of the subsequent acquisition of materials unavailable at the time of indictment, nor were all the added counts covered by the factual allegations in the original indictment. The reasons given by the prosecution did not justify the delay in bringing the request to amend. The Trial Chamber stated that the prosecution knew the whole case against the accused long before it was made known to the accused. The prosecution should have made every effort to bring the whole case before the confirming Judge to avoid the impression that the case was constructed subsequently to accused's arrest. Thirdly, it was held that to allow substitution of a new indictment at this late stage infringes the right to be informed promptly of the charges and allowing further time to prepare the defence would further postpone the trial for another seven months depriving the accused of his right to an expeditious trial. It should be also noted that the accused in that case was held in custody, his provisional release was rejected, and it was held that it was in the interests of justice that his trial should begin.

[124] On the one hand, this Court observes certain similarities in *Milan Kovacevic* case and present case, that is considerable amount of time has passed since the second amendment and the ACCS is seeking to substitute the current charge sheet with the proposed one, which contains more charges. Under current charge sheet, there are 11 Counts against the 1st Respondent (2 being in the alternative); 5 Counts against the 2nd Respondent. The proposed amended charge sheet contains 15 Counts against the 1st Respondent and 8 Counts against the 2nd Respondent. There are more proposed charges than originally, although, not as significantly more as in *Milan Kovacevic* case (from 1 to 15). As noted earlier, the proposed counts are substantially under the same legislation as current charges. In respect of the 1st Respondent, two counts in the alternative for 'abuse of authority of office' are removed in the proposed charge sheet (Counts 3 and 6 in the current indictment); count 1 for conspiracy to steal is found in both current and proposed charge sheets; there is only one count for conspiracy to launder money as opposed to two counts in the current indictment; five additional counts for official corruption; four additional counts for money laundering. In respect of the 2nd Respondent count for

'conspiracy to launder money' is removed in the proposed indictment (Count 13); four additional counts for money laundering are proposed.

[125] Therefore, it is the view of this Court, that proposed amended charges are not as substantial as in *Milan Kovacevic* case to cause injustice to the Respondents under section 187 of the CPC. Some charges are proposed to be removed, while some additional charges are proposed to be brought in light of the evidence further obtained by the ACCS.

[126] Further, present case may be distinguished from *Milan Kovacevic* case on the basis that there it was held that amendment was not the result of the subsequent acquisition of materials unavailable at the time of indictment, unlike the present case; and reasons given by the prosecution did not justify the delay. In the present case, according to Affidavit of Officer Stephenson, further evidence was received from MLA to external jurisdictions and from digital forensic investigation. The case in *Milan Kovacevic* was in relation to genocide, while present case involves numerous financial transactions, including international elements. Considering the complexity of the present case, including tracing financial transactions, international elements of the alleged offences, requests under MLA, digital forensic evidence, the reasons given by the ACCS for bringing further amendment, in the opinion of the Court, justifies the potential delay, at this point in time. Furthermore, *Milan Kovacevic* was in custody, while in present case bail has not been objected by the ACCS in respect of both Respondents.

[127] In *Republic v Payet and Others* (20 of 2009) [2009] SCSC 92 (30 August 2009) the following was held in respect of amendment of charges:

> *"The second amendment was not in respect of the statement of offence but in respect of the particulars of offence where the words "a preparation of the product" of Morphine were amended to "an esther" of Morphine. It is clear that this amendment was based on the evidence given by Dr Jakaria. However since trial commenced with the leading of evidence, these are the first amendments the prosecution has made in respect of the statement of offence contained in the charges. Hence it could not be said that, by continuously and unnecessarily seeking amendments to the charges, an abuse of process has occurred, resulting in an injustice being caused to the accused. Furthermore the addition of the new charge count 4 in the alternative to count 3 has occurred prior to the close of the prosecution case, which is permitted by section 187 (2) (b) of the Criminal Procedure Code, subject to the proviso contained in section 187 (3) (b) and (c) which provides that in the interests of justice, the court may adjourn the trial for such period as may be necessary and the accused may be offered an opportunity to adduce additional evidence or to recall any witness for the purpose of further examination or cross examination.*

> ***Hence it follows, that as long as the aforementioned provisions as provided for by law are followed, the accused cannot seek to complain of not being provided with adequate time or facilities to prepare a defence or that their right to a fair hearing has been infringed, as all these procedures fall well within the precincts of the established law***. *Further the fact that there is a variance in the evidence led and the charge does not preclude the prosecution from amending the said charge. In fact one of the reasons for the exercise of power to permit amendments, as set out in the case of R v Johal and Ram 56 Cr. App.R 348, is when the indictment does not accord with the evidence at the trial."*
>
> (emphasis added)

[128] It is therefore the view of the Court that the ACCS has brought the proposed amendment within the precincts of the established law and the rights of the Respondents are also safeguarded under section 187 of the CPC. Section 187 of the CPC allows amendments to be done even at later stage of the trial. At this point in time, considering the complexity of the case, the delay may be justified and the Respondents have also not shown to the Court that it is the conduct of the ACCS, not other circumstances of the case that are causing the delay.

[129] At the same time, however, in ***Republic v Payet and Others*** it was the first amendment and the court have not considered it to be an abuse of process, whereas in the present case this is the third proposed amendment. The Court also notes Affidavit averment of Officer Stephenson that the ACCS will continue to review materials coming into its possession and will make such further application to the Court as appropriate. As stated above, while section 187 of the CPC does not expressly provide that there is a specific number of times the charges may be amended, the power to amend the charges is not unrestricted and the prosecution has no absolute right to amend its charges under section 187 as the court retains discretion to determine not to permit amendment where it would cause injustice depending on the circumstances of the case.

[130] Under section 187(3) *"(b) the court shall, if it is of opinion that the interests of justice so required, adjourn the trial for such period as may be necessary; (c) the court shall ask the accused whether he wishes to adduce additional evidence or to recall any witnesses for the purpose of further examination or cross-examination and if he so wishes the court shall allow him to do so"*. These provisions safeguard the accused rights to prepare adequate defence. Therefore, as stated in ***Republic v Payet and Others*** as long as these provisions are followed at this stage the Respondents *"cannot seek to complain of not being provided with adequate time or facilities to prepare a defence or that their right to*

a fair hearing has been infringed, as all these procedures fall well within the precincts of the established law".

[131] In respect of disclosure, this court observes that there are somewhat contradicting submissions on behalf of the ACCS. On the one hand, the Applicant states that amended charges come in light of further evidence obtained, and on the other hand it states that the disclosure has been done. It is, therefore, unclear whether the disclosure in respect of the evidence which triggered the amendment of charges has been done. The Court reiterates its findings in *ACCS v Valabhji and Ors* (CO114/2021) [2022] SCSC 287, that disclosure is a continuing and ongoing obligation especially in complex cases. Further in respect of disclosure, the Court agrees with the ACCS submission that the Respondents are safeguarded by ability (i) to apply to exclude evidence; (ii) to make a submission of no case to answer; (iii) to make further submissions on the adequacy of evidence.

[132] Therefore, to conclude this part of the analysis, this Court is of the view that at this stage of the proceedings, considering the complexity of the case including the volume of evidence, involvement of MLA with foreign jurisdictions and Digital Forensic evidence, the unreasonable delay and abuse of process on the part of the ACCS has not been established. With regards to the submission regarding abuse of process filed by the 2nd Respondent, this Court is of the view that the amendment of charges is sought within the precincts of the established law and at this point in time I do not find that the ACCS has acted unconscionably and that it would be impossible to try the Respondents fairly. As already noted, the delay is justified considering complexity of the case and the 2nd Respondent has not shown to the court that there was any fundamental breach of disclosure duty, adverse media publicity, breach of international obligations and manipulation of procedures. I am therefore of the view that at present no abuse of process has occurred.

[133] Based on these findings, the Court is of the opinion that alleged breach of Constitutional rights under Article 19 in relation to the issues discussed above, is frivolous and vexatious and does not necessitate referral to Constitutional Court under Article 46(7) at this stage.

Conformity with sections 111 and 114 of the CPC

[134] Both Respondents argued that proposed amended charges do not conform with sections 111 and 114 of the CPC and are contrary to Article 19 of the Constitution. Sections 111 and 114 of the CPC provide:

> *111. Offences to be specified in charge and information with necessary particulars*
>
> *Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*
>
> *114. Rules for the framing of charges and informations*
>
> *The following provisions shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code—*
>
> *(a) (i) A count of a charge or an information shall commence with a statement of the offence charged, called the statement of offence;*
>
> *(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;*
>
> *(iii) after the statement of the offence, particulars of such offences shall be set out in ordinary language, in which the use of technical terms shall not be necessary;*
>
> *Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;*
>
> *(iv) the forms set out in the fourth schedule to this Code or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect of conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case;*
>
> *(v) where a charge or an information contains more than one count, the counts shall be numbered consecutively.*
>
> *(b) (i) Where an enactment constituting an offence states the offence to be an omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matter stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;*

(ii) it shall not be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or qualification to, the operation of the enactment creating the offence.

(c) (i) The description of property in a charge or an information shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;

(ii) where the property is vested in more than one person, and the owners of the property are referred to in a charge or information, it shall be sufficient to describe the property as owned by one of those persons by name with the others, and if the persons owning the property are a body of persons with a collective name, such as a joint stock company or "Inhabitants," "Trustees," "Commissioners," or "Club" or such other name, it shall be sufficient to use the collective name without naming any individual;

(iii) property belonging to or provided for the use of any public establishment, service or department may be described as the property of the Republic;

coin and bank notes may be described as money; and any allegation as to money, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank or currency note (although the particular species of coin of which such amount was composed, or the particular nature of the bank or currency note, shall not be proved); and in cases of stealing and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note or any portion of the value thereof, although such coin or bank currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person and such part shall have been returned accordingly.

(d) The description or designation in a charge or an information of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessary stating his correct name, or his abode, style, degree or occupation; and if owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "a person unknown."

(e) Where it is necessary to refer to any document or instrument in a charge or an information, it shall be sufficient to describe it by any name or designation by which it is usually known, or by the purport thereof, without setting out any copy thereof.

(f) Subject to any other provisions of this section it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any charge or information in ordinary language, in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.

(g) It shall not be necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person, where the enactment creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence.

(h) Figure and abbreviations may be used for expressing anything which is commonly expressed thereby.

(i) When a person is charged with any offence under sections 265, 266, 267 or 268 of the Penal Code it shall be sufficient to specify the gross amount of property in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular times or exact dates.

Count 1 – Conspiracy to Steal

[135] The 1st Respondent's submissions specify in which ways proposed Count 1, Conspiracy to Steal contrary to sections 260, 265 and 381 of the Penal Code and punishable under section 265 and 381, is contrary to Article 19(1) and (2)(b) of the Constitution and does not conform to section 111 and 114 of the CPC. To summarize the arguments, the 1st Respondent alleges that it is not clear in which capacity the 1st Respondent is being charged (individual or public servant), for which offence (conspiracy to steal or stealing), does not specify the acts the Respondent have allegedly committed and is not sufficiently particularized. The 1st Respondent further alleges duplicity, multiplicity causing double jeopardy contrary to Constitution if the Respondent would be convicted. The ACCS in reply stated that the particulars make clear what is being alleged, and are properly pleaded to reflect the allegation of theft (in an aggravated form) and that it is a conspiracy.

[136] Upon perusal of existing Count 1 and proposed amended one, statement and particulars of offence are the same even though according to the ACCS the charge is amended. Sections 260, 265 and 381 of the Penal Code state:

"260. General punishment for theft

A person who steals anything capable of being stolen is guilty of the felony termed theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for seven years.

265. Stealing by public servants

If the offender is a person employed in the public service and the thing stolen is the property of the Republic or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for ten years.

381. Conspiracy to commit felony

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Seychelles would be a felony, and which is an offence under the law in force in the place where it is proposed to be done, is guilty of a felony, and is

liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser imprisonment."

[137] The particulars of offence allege that the 1st Respondent *"while being employed in Public Service as Economic Adviser to the President of Seychelles, agreed …"* to steal USD 50,000,000. The reference is clearly being made to employment in Public Service.

[138] On the one hand, sections 260 and 265 are separate and different offences. Although the statement of offence does not mention punishment under section 260, reference thereof may be viewed as creating an ambiguity in the charge, in particular in which capacity the 1st Respondent is being charged and for how many offences under one count he is being charged. However, on the other hand, section 260 is a general offence of stealing and section 265 relates to more specific offence in capacity as public servant with the higher sentence upon conviction. As submitted by the ACCS, the allegation is of theft (in an aggravated form) and that it is a conspiracy.

[139] In *Ndubiwa v The State* (Criminal Appeal No. 26 of 1993) [1994] BWCA 6; [1994] BLR 30 (CA) (31 January 1994)[3] the Court of Appeal of Botswana faced somewhat similar issue in relation to count of stealing as a public servant. In that case, however, the appellant actually raised an issue that the prosecution did not include in the charge section of "General punishment for theft". The appellant basically argued that prosecution in Botswana case should have done what the ACCS had done in present case. The analysis is useful as the Botswana court agreed that 'general section' for theft should have been included in the charge but held that failure to do so was not fatal to the validity of a charge of theft and actually concluded that a reference to the said section was not in fact necessary in the circumstances of that case.[4]

[140] Firstly, Botswana Court of Appeal basically explained that where charge is brought under other than general section in relation to theft (specific section for stealing in capacity as

[3] https://www.saflii.org/cgi-bin/disp.pl?file=bw/cases/BWCA/1994/6.html&query=duplicity%20of%20charge

[4] Under the Botswana Penal Code, in addition to general section creating offence of theft (as in Seychelles), there is also a section which defines 'stealing' (unlike Seychelles). Section 264 defines 'stealing' and section 271, which is almost identical to Seychelles section 265, save for punishment, provides for general offence of theft. Section 272-281 of the Botswana Penal Code thereafter provide for the other circumstances of the theft, similarly to our Penal Code sections 261-270. The charge in Botswana case stated that stealing is contrary to section 264(1) (definition of stealing) read with section 276 (Stealing by persons in public service) of the Penal Code and omitted reference to section 271 (General punishment for theft).

public servant for example) an accused is being charged with theft with higher punishment:

> *" . . . Here section 276 of the Code which permits increased punishment makes such punishment possible if the property belongs to the State (employer) or comes into the possession of the accused by virtue of his employment.*
> . . .
> *Strictly, the form of the allegation relating to the money said to be owned by Botswana and also coming into the possession of the Appellant by virtue of his employment* ***is not relevant to the question of theft: it only has bearing upon whether there are present the additional facts which would justify a higher sentence.*** *As Counsel for the Appellant points out the section of the Penal Code which creates the offence of theft is section 271.*
>
> *Be that as it may, the ultimate question to be answered is whether the charges fall within the provisions of section 128 of the Criminal Evidence and Procedure Act which is definitive of the requirements of a valid indictment or summons. It provides:*
>
> *"Every indictment or summons shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*
>
> *There are two legs to the matter. The specific offence must be stated and, secondly, particulars must be given which constitute reasonable information as to the nature of the offence charged. The purpose of the section is to ensure that an accused person should be in a position to defend himself against the charge. The form of the charge in the present case follows this general pattern. It sets out the charge, namely, stealing by a person employed in the Public Service."*

[141] In relation to issue raised by the appellant that the prosecution failed to include general section for offence of theft in the charge, the Court of Appeal held the following:

> *"The next criticism of the charge is the failure to refer to section 271 in the charge.*
> . . .
> ***I am inclined to agree with Counsel for the Appellant that this section the provision which declares that theft shall be a crime and that all charges of theft should contain a reference to that section with a further reference to any other section which deals specifically with a different punishment in certain circumstances***.
>
> ***I do not agree however with Counsel that a failure to refer specifically to the sections is fatal to the validity of a charge of theft.*** *Section 131 (a)(i) provides, inter alia, that an indictment or summons shall commence with a statement of the offence charged "and a reference to the section of the law creating the offence". However I am of the view that the provisions of section 131 are not mandatory because its primary object was to lay down requirements concerning the contents of a summons which would have the effect of rendering that summons not open to objection. The opening provision of the section declares that the provisions which follow are to apply to all indictments and summonses and declare that, subject to the provisions of the Act, an indictment or summons which is framed in accordance with the Act shall not be open to objection in respect of its form or content. It does not say that if an indictment or summons does not comply with the provisions it shall be open to objection. The provisions of section 128 remain paramount*

and the purpose of section 131 is merely to render certain indictments and summonses not liable to objection.

An examination of the charges in the present case shows that a reference to section 271 of the Penal Code would not have provided any further practical information than is given in the charge without it. It says that he has been stealing and that means in ordinary language that he has been guilty of theft. It defines the circumstances of the theft. *I cannot see what additional information would have been given to the Appellant if there had been a reference to section 271 with or without references to section 164(1) and section 276. I therefore hold that a reference to section 271 was not necessary in the circumstances of the case."*

(emphasis added)

[142] From the above reasoning of the Court of Appeal of Botswana it is clear that it agreed that all charges pertaining to theft should contain reference to section which declares that theft shall be a crime (general punishment for theft) with a further reference to any other section which deals specifically with a different punishment in certain circumstance (as stealing by persons in public service). Where a charge instead contains only reference to other section which deals specifically with a different punishment for theft and does not refer to general section for theft – this alone is not fatal to validity of the charge as the accused have sufficient information to address the charge.

[143] Therefore, while the 1st Respondent argues that the charge makes it not clear for which offence and in which capacity he is being charged; and further creating duplicity of charge, the reasoning of Botswana Court of Appeal vividly clarifies the issue – the respondent is being charged with the offence of conspiracy to steal which bears higher sentence for reasons that the respondent was allegedly in the capacity of a public servant. Further, the 1st Respondent's submission that the statement of the offence gives punishment for both a charge of theft and a charge of conspiracy to steal or for both is incorrect. The statement of offence clearly states "punishable under section 265 and 381" which is punishment for conspiracy (s. 381) to steal by public servant (s. 265). The statement of offence does not refer to punishment for general offence of theft (s. 260).

[144] This Court is therefore satisfied that Count 1 is not defective for reasons argued by the 1st Respondent, and the Count is in conformity with sections 111 and 114 of the CPC. Based on these findings, the Court is of the opinion that alleged breach of Constitutional rights under Article 19(1) and 19(2)(b) is frivolous and vexatious and does not necessitate referral to Constitutional Court under Article 46(7) at this stage.

Proposed amended Counts 2, 3, 5-9 (Official Corruption)

[145] With regards to Count 2, Official Corruption under section 91 of the Penal Code, the 1st Respondent challenges the drafting of the statement of the offence, in particular that it does not specify under which subsection of section 91 of the Penal Code the charge is brought and existence of offence of 'official corruption'. With regards to the particulars of the offence it is submitted that it is not sufficiently particularized, do not disclose the commission of an offence under section 91, and mentions two different positions of the 1st Respondent has held but fails to state in what capacity he is alleged to have committed the offence. The 1st Respondent adopts the same position for Counts 3, 5-9 for official corruption contrary to section 91 of the Penal Code and supports its submissions with the same arguments as argued in respect of Count 2. The ACCS responds that the particulars make clear what is being alleged; that section 91 of the Penal Code specifically provides that Official Corruption is an offence, with an individual if convicted liable to imprisonment for seven years.

[146] Section 91 of the Penal Code states:

> *"91. Any person who—*
>
> *(a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or*
>
> *(b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for any person employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed,*
>
> *is guilty of a felony, and is liable to imprisonment for seven years.*

[147] Firstly, the 1st Respondent argues that the ACCS has used the marginal notes to create an offence as words "official corruption" is not an offence under our laws as it is not used in section 91 and therefore cannot be used for statement of offence. The 1st Respondent refers to section 7 of the Interpretation and General Provisions Act, which states:

> *"Marginal notes and heading in an Act and references to other Acts in the margin of or at the end of an Act do not form part of the Act and shall be treated as having been inserted for convenience only".*

[148] This is true that "official corruption" does not appear in the wording of section 91, and appears as a marginal note to the section. The heading under Division II - Offences against the administration of lawful authority provides for offences under "Chapter X - Corruption and the abuse of office". However, section 91(a) expressly uses the word 'corruptly' and particulars of offence in Counts 2, 3, 5-9 allege that the 1st Respondent *"corruptly obtained"*.

[149] The issue in relation to marginal notes were raised by defence counsel in *R v Edmond* (CO 38/2004) [2008] SCSC 117 (28 September 2008) and *R vs Padayachy* (Cr: CO 58.2013) [2014] SCSC 298 (11 August 2014). The defence counsel in both cases relied on decision in *Jules v R* (SCA 11 of 2005) [2006] SCSC 8 (29 November 2006)[5] where the Court of Appeal referred the case back to the Supreme Court for a trial *de novo* with direction that the formal charge be amended so as to bring it in conformity with the exact worDing of relevant section of the Penal Code and a requirement that the appellant plead *de novo* to amended charge. The appellant in that case was charged and convicted for offence of "sexual interference with a child", which was held to be not an offence under our laws, but "a mere marginal notes which do not form part of a statute". The wording of the section actually refers to "act of indecency". The prosecution in that case agreed that marginal notes do not form part of the statute but argued that *"the trial court could proceed to correct the error and convict an accused person if the section is correctly numbered and cited and particulars of offence are duly particularized"* and that *"the Court of Appeal may still correct the error and proceed to hear and determine the appeal"*. In its determination the Court of Appeal referred to the decision of Lord Bridge in the Regina v Ayres [1984] AC 447:

> *"If the statement and particulars of the offence in an indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the indictment could fairly be described that a conviction under that indictment cannot stand. But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed … it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."*

[150] The Court of Appeal stated that the *"immediate issue for our determination, however, is: was the Appellant prejudiced by being convicted on an unknown offence as described in*

[5] https://old.seylii.org/sc/judgment/court-appeal/2006/8

the statement of offence". It noted that in *Ayres* case the court decided that there was no such prejudice. The Court of Appeal stated that where a defect in charge is detected, an amendment to a charge may be made under the CPC and that the trial court had indeed detected the defect but the trial judge nevertheless proceeded with the trial. It was held:

> *"It is our considered view that having so rightly stated, the trial judge should have then taken appropriate steps at an appropriate stage of the trial to effect the necessary amendments to the formal charge. Failure to do so, we consider created prejudice to the Appellant – who was then unrepresented. In situations of that nature, the court is under obligation to see to it that the accused's rights are fully protected. It is he who should understand the precise nature of the offence with which he is charged. At the start of trial, the judge had made an undertaking to assist the accused especially on matters of law. The instant issue is one such matter."*

[151] The Court of Appeal appears to put further emphasis on the fact that the appellant was also unrepresented and the trial court made an undertaking to assist him on matters of law. In *R v Edmond* (CO 38/2004) [2008] SCSC 117 (28 September 2008) the Supreme Court in analysis of *Jules v R* (SCA 11 of 2005) appears to attribute Court of Appeal's decision to appellant being unrepresented:

> *"Although, the Court of Appeal could have dismissed the appeal for those reasons, the Justices of Appeal took into consideration the fact that the accused had been unrepresented . . . In those circumstances, the Court of Appeal thought it fit to refer the case back to this Court for the purpose of amending the charge . . .*
>
> *In the case of Hibonne v R (1976) SLR 44 the charge was laid under the wrong section of the Penal Code, and also the elements of the offence had not been given in the charge. The Court held that the defects did not render the charge bad in law. So also in R v Camille (1972) SLR 35. The accused was charged with criminal trespass contrary to section 294 that he entered upon the property in lawful possession of the complainant, and unlawfully remained there with intent to annoy the complainant. The evidence for the prosecution showed that the accused had unlawfully entered upon the property in the lawful possession of the complainant, with intent to intimidate him. The Court held that the defect in the particulars of the offence did not embarrass or prejudice the accused and had not occasioned a failure of justice.*
>
> *In the case of R v Teong Sun Chuah (1991) Crim L Rev 463, appropriate charges were substituted for inappropriate charges at the end of the prosecution case. The Court held that no injustice was caused to the defendant as the substance of the allegation remained unchanged.*
>
> *The decision of the Court of Appeal in the case of Jules (supra) is not inconsistent with the principles set out in the above cases. However it must be distinguished, as a trial de novo was ordered in view of the peculiar circumstances of that case."*

[152] In *R v Edmond* the prosecution actually sought to amend the count of "sexual interference" to "an act of indecency" in view of the decision by the Court of Appeal in the case of *Jules* (supra) that there is no offence of "sexual interference". The defence

counsel objected to amendment also relying on the case of *Jules* stating that there was no offence called "sexual interference", it is only a marginal note for the offence of "an act of indecency" and that prosecution evidence was that the accused "sexually assaulted" the complainant. The defence counsel therefore argued that should the court allow amendment *"the Court should order that the prosecution recalls the witnesses to support the charge, as otherwise, the accused would be prejudiced and consequently there would be injustice"*. For the reasons cited above, the Supreme Court overruled the objection, amended charge was accepted, and it was ordered that the accused should plead to the amended charge before the trial proceeded.

[153] In *R vs Padayachy* (Cr: CO 58.2013) [2014] SCSC 298 (11 August 2014) defence counsel also relied on decision of *Jules* although seeking acquittal of the accused. Counsel argued that the drafter of a count *"has blindly followed the wording on the marginal note and, as in the Jules case, there is a fundamental error and both accused should be acquitted"*. The Court rejected this submission as the wording of the marginal note was similar to wording of the section and the difference was "minor and in no way misleading" therefore no prejudice was caused to the accused. The Supreme Court held:

> *"In the present matter A2 and A4 are charged under section 219 of the penal code. The drafter has a choice. He may allege that the offence, with intent, was to [1] maim any person, [2] disfigure any person, [3] disable any person, [4] do some grievous harm to any person or [5] resist or prevent the lawful arrest or detention of any person. In this case the drafter elected option [4] "to do some grievous harm to any person". This option is followed on in subsection [1] where the option selected was "unlawfully do any grievous harm to any person by any means whatever".*
>
> *The margin note to section 219 reads "Acts intended to cause grievous harm or prevent arrest". The words "to prevent arrest" are not included in the statement of offence in Count 2.*
>
> *I now look at Count 2. The words "to cause grievous harm" are used. The words in section 219 and 219[a] are "to do some grievous harm or to do any grievous harm". The drafter of the present statement of charge has used the words "to cause" rather than the words "to do". Mrs Amesbury would argue that when the words "to cause" are used this is a non-existent offence. I refer to paragraphs 6 and 7 of the Jules judgment and the words of Lord Bridge. I quote from the second sentence in paragraph 6 – ""But if the statement and particulars of offence can be seen to fairly relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question is whether a conviction on that indictment can properly be affirmed……. it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant". I apply the above rationale to the present matter and the reasoning in paragraph 7. This charge uses the wording "to cause grievous harm" not "to do grievous harm". The difference in wording in the statement and particulars of offence is*

minor and in no way misleading. It has not prejudiced or embarrassed A2 or A4. I find that there is no material defect in Count 2. I reject the submission by Mrs Amesbury on this point. Count 2 will continue as against A2 and A4."

[154] Analysis of the above decisions illustrate that imperative point that the court considers among others is whether amendment of a charge will cause prejudice to the accused. Further it is observed that not every defect in the charge will cause the court to determine that the charge is null and void.

[155] The High Court of Malawi in *R v Kambalame* (Criminal Cause 108 of 2002) 2003 MWHC 6 (19 January 2003)[6] demonstrated a more liberal approach in relation to marginal notes being used in the statement of offence. The Court stated that marginal notes can actually clarify the charge:

> *". . .* ***The drafting of offences under these sections, especially where the defendant is indicted with so many counts, must be differentiated so that the accused knows from the very beginning that he faces three different offences. This will be achieved by using the words in the marginal notes. I say this while appreciating the status of marginal notes.*** *To this end I am aware of the instructive dictum of Jere,J., as he then was, in Republic vs.Ali Umali White 8 MLR 340 @ 342 lines 2-9 when he said:*
>
> *"…In other sections, marginal notes are used to comply with the provisions of section 126 of the Criminal Procedure and Evidence Code…This practice must be used with care…"*
>
> *In the instant case the marginal notes, if read with the provisions of sections 24, 25 and 29 of the CPA properly and clearly describe the offences. By not using the marginal notes the charges preferred against the defendant, in counts two; four; and six; have been wrongly described. Indeed, as noted earlier, the statements of offence as drafted leaves one thinking that there is no difference in the offences that were allegedly committed by the defendant.*
>
> *If we follow the marginal notes, the statement of offence for the offence under section 25(1) of the CPA ought to have been 'corrupt use of official powers' and not 'corruption by a public officer'. The use of the words 'corruption by a public officer' is suitable for the offence provided for in section 24(1) of the CPA. With regard to the offence under Section 29(1) of the CPA the statement of offence should not be the same as the one used in respect of Sections 24(1) and 25(1) of the CPA. The use of the relevant marginal note to Section 29 of the said CPA might be of assistance."*
>
> (emphasis added)

[156] Reverting to the issue before this Court, in Counts for "official corruption" contrary to section 91 of the Penal Code, on the one hand, particulars of the offence clarify that the accused is being charged with corruptly obtaining property specified in the counts while being employed in the public service. That appears to be an offence under section 91(a)

[6] https://malawilii.org/akn/mw/judgment/mwhc/2003/6/eng@2003-01-19

of the Penal Code. Firstly, as rightfully argued by the 1st Respondent the statement of the offence does not specify under which subsection, (a) or (b), of section 91 the 1st Respondent is being charged. Secondly, the ACCS drafted the charge following wording of the marginal note instead of section 91. The word 'corruptly' though is referred to under section 91(a).

[157] This Court is of the view that the charges for "official corruption" as currently drafted are defective. Further, current charge sheet (following the first amendment which was not objected to) contains 2 counts of official corruption, while proposed amended charge sheet seeks to bring 5 additional counts with the same wording of statement of the offence. It is the view of this Court that to allow the 1st Respondent to proceed on trial upon those charges may cause prejudice to the 1st Respondent (2nd Respondent is not charged with these counts). However, *"not every defect and irregularity in a charge makes a charge bad in law to the extent of rendering the ensuing proceedings a nullity"* (see *R v Emmanuel & Anor* (CO 85/2003) [2006] SCSC 70 (18 October 2006); *Republic v Scholes and Another* (46 of 2009) [2009] SCSC 140 (29 October 2009)). I do not find charges in relation to "official corruption" to be null and void as argued by the 1st Respondent, but I find them to be defective. Following the reasoning in *Jules (supra)* the ACCS is at liberty to amend the charges in relation to 'official corruption' in light of the provisions of section 91 of the Penal Code and to bring THEM in conformity with sections 111 and 114. The charges should then be put to the 1st Respondent for his plea to be taken.

[158] Therefore, proposed amended Counts 2, 3, 5-9 cannot be accepted and current Counts 2, 5 are stuck out from the current charge sheet for being defective.

[159] Counts are not null and void, but defective and can be amended by the ACCS, therefore, the Court is of the opinion that alleged breach of Constitutional rights under Article 19(1) and 19(2)(b) in relation to Counts 2, 3, 5-9 is frivolous and vexatious and does not necessitate referral to Constitutional Court under Article 46(7) at this stage.

Count 4

[160] It is submitted that Count 4 for conspiracy to launder money, contrary to section 3(1)(a) and 3(2)(a) of the Anti-Money Laundering Act 1996 and punishable under section 3(3) of

the same Act is contrary to Article 19(1) and (2) and do not conform to section 111 and 114 of the CPC.

[161] The 1st Respondent submitted that firstly, there is no offence of conspiracy to launder; secondly it is not clear whether the charge is for two counts of money laundering or one; the drafting manner of the charge amount to splitting of charges leading to duplication of conviction. It is further submitted that it is clear that more than one offence is being charged in Count 4, namely money laundering under section 3(1)(a) and the same offence albeit different ways of doing so under 3(2) of the AML 1996. Consequently, charging the 1st Respondent with the two offences under the one count makes the charge duplicitous. The 1st Respondent also submits that the particulars of the offence is not sufficient and clear enough to enable him and his counsel to adequately prepare his defence. Further, issue of multiplicity of charge was argued.

[162] The ACCS responded that section 3(2)(a) of the AML 1996 specifically refers to 'conspires' and makes it an offence to conspire to commit offence of money laundering. Count 4 addresses the subsequent, separate money laundering of part of the proceeds of the 50 million, together with the other funds transferred from the SMB to Karimjee and Jivanjee in the United Kingdom

[163] Count 4 states:

STATEMENT OF OFFENCE

CONSPIRACY TO LAUNDER MONEY, contrary to section 3(1)(a) and 3(2)(a) of the Anti-Money Laundering Act 1996 and punishable under s.3(3) of the same Act.

PARTICULARS OF OFFENCE

MUKESH VALABHJI *of Morne Blanc, Mahe, Seychelles, between 1st January 2002 and 31st December 2004, agreed with LATIF KARIMJEE and persons unknown, to engage, directly or indirectly, in transaction's that involved money that was the proceeds of a crime, namely USD 16,180,000, or part thereof, knowing that the money was derived or realized, directly or indirectly, from unlawful activity.*

[164] Sections 3(1)(a) and 3(2)(a) of the Anti-Money Laundering Act 1996 state:

3.(1) A person who –

(a) engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of a crime;

…

Knowing or having reasonable grounds for knowing that the money or the other property is derived or realized, directly or indirectly, from any unlawful activity, commits the offence of money laundering.

(2) A person who –

(a) aids, abets, counsels, incites, procures or conspires with another person to commit the offence of money laundering;

…

Commits the offence of money laundering.

[165] Both subsections 3(1)(a) and 3(2)(a) create an offence of money laundering, with subsection 3(2)(a) expressly referring to an element of offence of conspiring. Upon perusal of section 3 as a whole, it is clear that section 3(1) outlines the elements of the offence of money laundering and subsection 3(2) relates to aiding, abetting, conspiring, enabling and attempting, among other elements, to commit an offence of money laundering. Further, offence of conspiring to commit money laundering is an offence of 'money laundering' under subsection 3(2). It is apparent that the particulars of offence in the count was drafted with reference to section 3(1)(a) read together with section 3(2)(a), albeit instead of expressly referring to word conspired the drafter used "agreed". Statement of offence refers to conspiracy to launder money.

[166] In *Dubois & Ors v Republic* (SCA 7 of 2014) [2017] SCCA 6 (21 April 2017) the following was held regarding duplicity of charge (and affirmed in *Samson v The Republic* (SCA CR 15 of 2021) [2023] SCCA 7 (26 April 2023):

*[10] The Appellants' sole ground of appeal against conviction is that: "the Appellants were prejudiced in their defence as the counts were duplicitous "an indictment may contain more than one count, but each count must allege only one offence, so that the defendant can know precisely what offences he or she is accused of". **That each count must allege only one offence is a correct statement of the law of what has come to be known as the rule against duplicity, i.e. no one count of the indictment should charge the defendant with having committed two or more separate offences.** Where a count is bad on its face for duplicity, the defence should move to quash it before the accused are arraigned.*

. . .

*[11] In count 1, the appellants have been charged under section 16(6)(c) of the NDEA Act which reads as follows: "A person who delays, obstructs, impedes, interferes with, resists or delays an NDEA agent or any person lawfully accompanying or assisting an NDEA agent in the exercise or performance of his powers or duties or attempts or conspires, is guilty of an offence". The punishment for the said offence is to be found in section section 17(3) of the NDEA Act . . .. **Thus we find that by whichever acts the offence is committed it is deemed as one offence.** . . . According to the prosecution*

evidence the Appellants had committed all the acts particularised in count 1 and thus the prosecution was perfectly entitled to refer to all the acts the Appellants had committed in count 1 and thus there is no ambiguity in count 1 and we therefore fail to see how the Appellants could have been prejudiced as a result of the way count 1 has been framed. ***In fact the Appellants must consider themselves fortunate that the prosecution had not decided to have separate counts for delaying, obstructing, interfering, resisting*** *the NDEA agents or attempting to prevent the NDEA agents to perform their duties.*

. . .

[14] Rules pertaining to framing of charges are to be found in section 114 of the Criminal Procedure Code . . .

[15] Commenting on an identical provision in the Indictment Rules 1971 of UK, it is stated in Blackstone's Criminal Practice 2010 D 11.49: "What is required, therefore, is a correct assessment of whether a statutory provision ***is creating one offence that may be committed in a number of alternative ways, or is creating several separate offences. If the former, these statutory alternatives may be particularised as alternatives in one count; if the latter, the rule against duplicity applies and each alternative the prosecution wish to put before the jury must go into a separate count".*** *In Naismith (1961) 1 WLR 952, Ashworth J, in determining whether an allegation that N had 'caused grievous bodily harm, to H with intent to do him grievous bodily harm, or to maim, disfigure or disable him' was bad for duplicity had said: "It seems to this court that the proposition with which [counsel for the crown] started his argument is the right approach. That approach is to keep in mind the distinction between a section creating two or more offences and a section creating one offence but providing that the offence may be committed in more than one way…..so far as the intents specified in section 18 are concerned,* ***they are variations of method rather than creation of separate offences in themselves. It is probably true to say that the species of assault mentioned in that section, of which there are three, are each in themselves different offences, that is to say, wounding, causing grievous bodily harm and shooting, but that difference does not affect the result of this case in the least because the only act or species of assault alleged was causing grievous bodily harm****". Lord Widgery CJ in Jemmison V Priddle [1972] 1 QB 489 said:* ***"I agree ….that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act"****. In a similar vein, Lord Diplock had said: "Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century, to charge them, in a single count of an indictment". Blackstone's Criminal Practice 2010"at D 11.44 states: "In summary, the conclusion in DPP V Marriman (1973) AC 584 was that a count is not to be held bad on its face for duplicity merely because its words are logically capable of being construed as more than one criminal act. This applies whether a count is against one accused or several."*

[17] ***If several offences had been committed in the course of an incident the prosecution is at liberty to charge the offender with all such offences and for a Court to convict such offender with a multiplicity of offences. However where the same act constitutes separate offences under different laws a Court should not impose multiple terms of imprisonment on the offender for the same act.***

(emphasis added)

[167] In *Van Wyk v Commercial Bank of Namibia Limited* (SA12/04 , SA12/04) [2005] NASC 2 (22 April 2005)[7] it was further held the following:

> *"It is a settled principle of law that a number of offences may be joined in the same indictment if those offences are founded on the same facts or form or are a part of a series of offences of similar character. . . . What is forbidden in law in the framing of charges is the inclusion of more than one distinct offence in one count. That is called duplicity and a charge is said to be bad if it is duplicitous …"*

[168] Therefore, the Court needs to determine whether section 3 of the AML 1996 creates one offence or separate offences.

[169] As already noted, section 3(1) and 3(2) both create an offence of money laundering where subsection (1) outlines the elements of the offence of money laundering and subsection (2) relates to conspiring to commit an offence of money laundering. Therefore, it can be argued that the 1st Respondent is being charged for conspiracy to launder money, which is a singular offence of money laundering under section 3(2) involving several elements of the offence – conspiring (s. 3(2)(a)) to commit offence of money laundering (s.3(1)(a)) which the ACCS will have to prove during the trial. Therefore, the section can be interpreted as referring to variation of methods of committing an offence of money laundering rather than creating two separate offences.

[170] On the other hand, say for instance during the trial the ACCS will fail to prove the element of conspiracy (section 3(2)(a)), but succeeds in proving elements of offence of money laundering (section 3(1)(a)). Would the ACCS be able to argue and/or was it their intention in drafting the charge in such a way that in case conspiracy is not proven, the 1st Respondent may still be convicted of money laundering under section 3(1)(a)? If the answer is positive, in my view the charges should have been drafted in the alternative.

[171] In the case already mentioned above, *Ndubiwa v The State* (supra), the Court of Appeal of Botswana had substantially addressed the doctrine of duplicity and its application. It did not find the duplicity and explained reasons for not following dictum of another judgment on duplicity in *The State v Bori Nkwe* (1974-75) BLR 63. In *Bori Nkwe* the charge was under section 277 (stealing the property of an employer **or** property which came into the possession of the accused on account of his employers by a clerk or

[7] https://www.saflii.org/cgi-bin/disp.pl?file=na/cases/NASC/2005/2.html&query=splitting%20near%20charge%20near%20duplicity%20near%20multiplicity

servant). It was argued that reference to both elements created duplicity. Aguda C.J. stated:

> *"Section 277 of the Penal Code creates an offence of stealing with enhanced punishment. . . . It is clear that an offence under this section is not disclosed unless the charge against the property stolen "is the property of his employers or it alleges that such property came into his possession on account of his employment.*
>
> *I wish to* ***stress that the charge must allege one or the other of these things if punishment is sought under that section. If the charge alleges both together then it will be bad for duplicity****. It is quite clear I believe that to be able to sustain the allegations made on the charge sheet, and in turn those must have disclosed(sic) an offence under the Section of the Penal Code under which the charge is laid."*

[172] In *Bori Nkwe* convictions under section 277 were set aside as the court reasoned that there was duplicity of the charges and the failure by the prosecutor to prove the commission of the offence under 277. However, there were also allegations of stealing sufficient to justify a conviction of theft simpliciter under section 271 (conviction of three years) and the accused was found guilty under this section and the sentence remained unchanged. Referring to this case, the Court in *Ndubiwa v The State* reasoned that it was *"clear therefore that the learned Judge did not regard the element of "duplicity" in the charge as sufficiently material to justify a finding that the proceedings were a nullity"*.

[173] The Court in *Ndubiwa v The State* analyzed the charge with similar wording and whether it is duplicitous:

> *". . . An accused person charged with both alternatives in the same count is entitled to complain that the charge does not clearly set out the offence he is alleged to have committed to enable him to meet it.* ***But where the charge, as in this case, is made out in a manner which does not disclose any inconsistency, then whether it contains elements of two or more alternative methods of committing the offence, the charge should not be dismissed as duplicitous.*** *Here section 276 of the Code which permits increased punishment makes such punishment possible if the property belongs to the State (employer) or comes into the possession of the accused by virtue of his employment. Cases of this type of offence may occur where the property stolen belongs to the employer. Cases may also occur where it does not, but is brought within the ambit of the increased penalty section because the accused stolen property which came into his possession by virtue of his employment. It may, for example, be property which the accused received on behalf of the employer from a third person for safe-keeping. The ownership of the property in the two examples lies in different persons. As theft of the property whether laid in the employer or the third person is covered by section 276, an accused person, charged in the case where the ownership lies in different persons on both legs, may in a situation be entitled to ask what the prosecution is alleging that he did; and the prosecution in charging him with stealing property belonging to different persons may be held not to have given him particulars with sufficient clarity to enable him to meet the charge.*

"Duplicity" is a term used in England and described in Archbold 43rd Edition paragraph 1.57 as follows:

> *"The indictment must not be double; that is to say, no one count of the indictment should charge with having committed two or more separate offences. The rule though simple to state is sometimes difficult to apply."*

The authors then proceed to discuss a number of authorities covering different aspects of the notion of duplicity showing that it is riddled with problems and different views and uncertainties. *In my view it would not be to the advantage of the jurisprudence of Botswana to become involved in the same questions which have been raised and debated in England and the results of which are set out in the pages of Archbold containing paragraph 1.57.*

But that is not the case here. The charge did state that the property belonged to the State. That is true. It also added that this property came into the accused person's possession by virtue of his employment. In fact, that is also true. There is nothing inconsistent about the statement cast in this form*. The accused person cannot complain that the charge prejudices or embarrasses him in his defence. The worst that can be said of the insertion of the words "**which came into his possession by virtue of his employment" in the charge is that it is surplusage which does not add to or detract from the minimum information required for the accused to make his defence**. In the circumstances, I think it would be wrong to apply a doctrine of duplicity which depends not so much on the substance of the meaning of the charge but on a technical or mechanical operation of a set of rules to it. That is why, with regret, I would not follow the dictum of my learned Brother, Aguda, J. in The State vs. Borie Nkwe in this case."*

(emphasis added)

[174] Duplicity of charge occurs when a single count charges more than one offence; and multiplicity occurs when accused is charged for the same act more than once. In relation to Count 4, multiplicity could have occurred if the ACCS would have charged the 1st Respondent in respect of the transaction involving USD16,180,000 in two separate counts (and not in the alternative), first count being under section 3(1)(a) for money laundering and second count being under section 3(2)(a) for money laundering involving element of conspiracy. Drafting the indictment in such way could have led to attempt of double conviction for the same act. This is not the situation with the current proposed amended charges. The charge comes under one count of conspiracy to launder money.

[175] Duplicity of charge would have occurred if the ACCS was charging the 1st Respondent with two different offences under Count 4. Unlike the charges for conspiracy to commit felony under the Penal Code for instance, where both sections need to be mentioned in the Count (conspiracy section and specific felony section), it is the view of this Court that under section 3 of the AML 1996, reference to section 3(2)(a) alleging conspiracy to commit money laundering would be sufficient and the way Count 4 is drafted specifying

both sections 3(1)(a) and 3(2)(a) is drafted in a duplicitous manner. It is however, not null and void and the defect can be corrected.

[176] Therefore, this Court is of the view that Count 4 is not in conformity with section 111 and 114 of the CPC. It does not provide sufficient information for the accused to make his defence, and may cause prejudice to the 1st Respondent. Existing count 4 is stuck out from the current charge sheet for being defective. The Count, however, is not null and void and the ACCS may amend it to be in conformity with sections 111 and 114 of the CPC. Therefore, the Court is of the opinion that alleged breach of Constitutional rights under Article 19(1) and 19(2) is frivolous and vexatious and does not necessitate referral to Constitutional Court under Article 46(7) at this stage.

Counts 10, 11, 14, 16, 18 and 22

[177] The main contention regarding these Counts is in relation to Anti-Money Laundering Acts 1996 and 2006 being repealed and up to the 18th May 2022 there was no retrospective/retroactive application under the ACA and the AMLCFT 2020 and there was no powers for the ACCS under the ACA to prosecute offences under the repealed AML 1996 and 2006. As already noted, the said issue is before the Constitution Court in CP 9 of 2022. Since there are no other contentions in relation to these charges specifically (save for those already discussed), the proposed amended Counts 10, 11, 14, 16, 18 and 22 may be allowed subject to the Constitutional Court decision.

Issued raised by the 2nd Respondent

[178] With regards to the 2nd Respondent, the Court has already addressed the issue in relation to alleged breach of right to be tried within a reasonable time amounting to an abuse of process and contrary to the Constitutional right. The issues of the ACCS' jurisdiction and authority, and alleged defective affidavit have also been discussed.

[179] In relation to specific objections to particular, individual charges, the 2nd Respondent argued that charges do not conform to section 111 and 114 of the CPC as it is not clear whether she is being charged *"as an individual or as a public servant"* with further ambiguity as to why she, being one amongst a number of directors is being solely charged. It was further submitted that particulars of the offence does not specify the acts

allegedly committed; not sufficiently particularized for her to understand the nature of the accusations against her to prepare the defence.

[180] Firstly, neither the existing charge sheet nor the proposed amendment one refers to the 2nd Respondent's capacity being "public servant". The 2nd Respondent is being charged in her individual capacity in proposed Counts 12, 15, 17, 20, 23 and in her capacity as director of the company in proposed Counts 13, 19, 21. The question of why other directors are not being charged bears no relevance to the issue before the Court's determination, namely whether charges can be amended under section 187 and whether they are in conformity with sections 111 and 114 of the CPC.

[181] Under the proposed amended charges the 2nd Respondent is being charged with offences of money laundering. Count 12 and 13 relate to *"money from Kan Kim Sun and Jarck Enterprise Pte"* and allege offence of money laundering contrary to section 3(1)(b) of the AML 1996. Particulars of the offence allege that she *"received money that was proceeds of a crime"*. Particulars specify relevant dates and two different account numbers.

[182] Counts 15, 17 and 19 relate to transfers from Brent International. The 2nd Respondent is being charged with money laundering contrary to section 3(1)(c) of the AML 2006 in these three counts. The Particulars allege that she *"acquired"* a bank credit representing funds *"which she knew or had reasons to believe was property which was the proceeds of crime"*. Count 15 and 17 particulars specify different periods and different amounts.

[183] Counts 20 and 21 relate to money acquired from Kan Kim Sun and Jarck Enterprise Pte after 2008. The 2nd Respondent is being charged for money laundering contrary to section 3(1)(c) of the AML 2006 as amended by the AML (Amendment) Act 2008. The particulars of both counts refer to period after 2008 and allege that the 2nd Respondent *"acquired"* property *"knowing or believing that the property was or represented the benefit from criminal conduct, or being reckless as to whether the property was or represented such benefit"*. Bank accounts and the sums differ in Counts 20 and 21.

[184] Count 23 is in relation to transfers of money from Golden Phoenix and CFH Investments Ltd, charging the 2nd Respondent with money laundering contrary to 3(1)(c) of the AML 2006 as amended by the AML (Amendment) Act 2008, alleging that she *"acquired"* property *"knowing or believing that the property was or represented the benefit from*

criminal conduct, or being reckless as to whether the property was or represented such benefit".

[185] The 2nd Respondent does expand on the arguments that particulars of offence does not specify the acts allegedly committed and are not sufficiently particularized. Perusal of the counts makes it clear that acts allegedly committed are 'receiving' and 'acquiring' particularized money, funds, property; particulars of the offence further state other elements of the offence contrary to relevant provisions of AML Acts. This Court finds that the Counts against the 2nd Respondent are in conformity with section 111 and 114 and amendment of the charges will not cause injustice in relation to the 2nd Respondent.

FINAL DETERMINATION

[186] Based on the above analysis and for the reasons stated, the Court orders as follows

1) The trial in CR 114 of 2021 is stayed pending the determination of the Constitutional Court in CP 9 of 2022;

2) Leave to proceed with counts for offences of money laundering against 1st Respondent (Counts 10; 11; 14; 16; 18; and 22) is subject to the determination of the Constitutional Court in CP 9 of 2022;

3) Leave to proceed with counts for offences of money laundering against 2nd Respondent (Counts 12; 13; 15; 17; 19; 20; 21; and 23), being under the same legislation as challenged by the 1st Respondent in CP 9 of 2022 is subject to the determination of the Constitutional Court;

4) Leave to proceed is given to the ACCS to file amended count 1;

5) Leave is not given to the ACCS to proceed to file the amended charges and to add the additional charges for official corruption (Counts 2-3; 5-9) . Leave is not given to proceed to file amended count 4. The ACCS is at liberty to correct the defects in the said charges and file them anew.

6) Counts from the existing charge sheet for official corruption, Counts 2 and 5; and conspiracy to launder money contrary to section 3(1)(a) and 3(2)(a), Count 4 are stuck out for being defective for reasons mention in this Ruling.

The ACCS is at liberty to correct the defects in the said charges and file them anew.

7) The existing charges, which have not been struck off, shall remain on the Court's record until the determination of the Constitutional Court in CP 9 of 2022; and the filing of the charges for which leave has been granted together with the corrected amended and additional charges.

Signed, dated and delivered at Ile du Port on the 22nd of April 2024

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Govinden CJ