[2011] UKPC 44
Privy Council Appeal No 0059 of 2010

JUDGMENT

The Director of Public Prosecutions (Appellant) *v* A.A. Bholah (Respondent)

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Brown
Lord Kerr
Lord Wilson
Sir Malachy Higgins

JUDGMENT DELIVERED BY LORD KERR ON

20 December 2011

Heard on 6 October 2011

Appellant	*Respondent*
Geoffrey Cox QC Simon Gledhill Ms Sulakshna Beekarry	Simon Stafford-Michael Ms Rosa Zaffuto
(Instructed by Royds Solicitors)	(Instructed by Blake Lapthorn Solicitors)

LORD KERR:

1. In 2002 an information was lodged against the respondent and another, Mohammed Laffir, before the Intermediate Court of Mauritius. The information charged both with the offence of money laundering under sections 17(1)(b) and 19 of the Economic Crime and Anti-Money Laundering Act 2000 (ECAMLA). It was in the following terms:

> "THAT in or about the month of April in the year two thousand and one, at Delphis Bank Ltd, in the District of Port Louis, 1. AHMUD AZAM BHOLAH, 32 years, residing at Morcellement Antelme, Forest Side and 2. MOHAMMED IRFAN MOHAMMED LAFFIR, 31 years, residing at Boulet Rouge, Riche Mare, Flacq, both Directors at Apparel Exports Ltd., did wilfully and unlawfully transfer from Mauritius property which in whole, directly represents, the proceeds of crime, where the said. 1. Ahmud Azam Bholah and 2. Mohammed Irfan Mohammed Laffir had reasonable grounds to suspect that the property was derived in whole directly or indirectly from a crime.
>
> PARTICULARS OF CHARGE
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> That in or about the month of April 2001, the said 1. Ahmud Azam Bholah and 2. Mohammed Irfan Mohammed Laffir did transfer outside Mauritius a sum of USD 1,822,968.40 from Delphis Bank account no 4170599, operated by them at the Delphis Bank Ltd., Port Louis Branch, which said sum of money are the proceeds of crime."

2. On 21 September 2004 the respondent and Mr Laffir were convicted of the offence. The magistrate found that the respondent had transferred money, which he had reasonable grounds to suspect was the proceeds of crime, from his company bank account to bank accounts outside Mauritius. In the course of the trial the magistrate ruled that, by virtue of section 17(7) of ECAMLA, the prosecution was not required to specify or to prove the particular crime of which it was alleged the money was the proceeds. (ECAMLA has now been replaced by the Financial Intelligence and Anti-Money Laundering Act 2002, section 6(3) of which re-enacts section 17(7) in the same terms). The magistrate held that she was able to infer from the evidence that the monies were the proceeds of criminal activity.

3. The magistrate imposed a fine on both the respondent and Mr Laffir. The latter paid the fine and a preliminary objection that he could not, as a result, pursue an appeal against his conviction was upheld. The respondent did not pay the fine, however, and appealed his conviction to the Supreme Court. On 11 December 2009 that court quashed the conviction on two grounds. First it held that section 17(7) of ECAMLA was repugnant to the fair trial provisions of section 10 of the Constitution. The Supreme Court concluded that section 10(2)(b) of the Constitution required of the prosecution that it particularise and prove the precise offence said to have generated the proceeds of crime. Secondly, the Supreme Court decided that, since the respondent had been deprived of the right to be informed "as soon as reasonably practicable ... and, in detail, of the nature of the offence", and that therefore he had not had adequate time to prepare his defence, his trial had been unfair. The second finding derives from and is dependent on the first but it will be necessary to examine separately the question of what fairness requires even if it is concluded that proof of a specific predicate offence is not required by section 10(2)(b) of the Constitution.

Facts

4. The respondent was a director of Apparel Exports Ltd. This company had an account with Delphis Bank Ltd. On three occasions in 2001, large sums of money were transferred into this account from the account of Mr Jose Maria Martin Nunez, a customer of the ABN Amro Bank (Miami Branch). The transfer came via the Hong Kong and Shanghai Banking Corporation in New York. The money was in turn transferred by both accused to various bank accounts outside Mauritius.

5. The defence did not dispute that the sums from Mr Nunez's accounts had in fact been transferred into that of Apparel Exports account at the Delphis Bank. Evidence was led by the prosecution to the effect that there had been forgery of Mr Nunez's account and that the Miami Branch of ABN-AMRO had filed a suspicious activity report with the branch of the U.S. Government concerned with investigations of financial crimes. This had happened after Mr Nunez had indicated that he had not authorised the bank transfers. Although these transfers purported to have been authorised by Mr Nunez, a comparison between the signatures on the transfer documents and his original bank signature card led the magistrate to conclude that Mr Nunez had not signed the transfers.

Statutory framework

6. Money laundering offences were provided for in section 17 of ECAMLA. In its material parts, section 17(1) provided:

"(1) Any person who …

(b) receives, possesses, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime, where he suspects or has reasonable grounds for suspecting that the property is derived or realized, in whole or in part, directly or indirectly from any crime, shall commit an offence."

7. Section 17(7) of ECAMLA provided:

"In any proceedings against a person for an offence under this section, it shall be sufficient to aver in the information that the property is, in whole or in part, directly or indirectly the proceeds of a crime, *without specifying any particular crime*, and the Court, having regard to all the evidence, may reasonably infer that the proceeds were, in whole or in part, directly or indirectly, the proceeds of a crime" (emphasis supplied)

8. The necessary contents of the information are provided for in section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act as follows:

"The description in the information of any offence in the words of the law creating such offence, with the material circumstances of the offence charged, shall be sufficient."

9. Section 10(2)(b) of the Constitution provides:

"Every person who is charged with a criminal offence …

(b) shall be informed as soon as reasonably practicable, in a language that he understands, and in detail, of the nature of the offence;"

The case for the appellant

10. The appellant submits that it is unnecessary to specify a predicate crime. Section 10(2)(b) of the Constitution entitles the alleged offender to be informed of the detail of the charge but the actus reus of the charge under section 17(1)(b) can be the transfer of property which represented the proceeds of criminal activity generally. It need not be proved that it had been generated by a particular crime. It was accepted that if a specific crime is known to have produced the illicit proceeds and this forms the basis of the prosecution's case, fairness may require that the offender be informed of this but the nature of the information depends on how the case is to be presented. If

the prosecution does not aver that the unlawful proceeds were obtained from an individual crime or a particular species of criminal activity, it is not required to identify a predicate offence.

11. Counsel for the appellant argued that section 17(7) was a proportionate restriction on the right of an accused to receive information about the charge against him. While section 10 of the Constitution recognises as absolute the right to a trial which is fair in an overall sense, individual elements of the trial designed to secure that outcome need not be protected in absolute terms. They may be subject to proportionate qualification in the public interest. Section 17(7) was just such a restriction. It was necessary in order to suppress the crime of money laundering which, by its very nature, was one where the particular criminal activity that produced the illegal proceeds was not always easy to identify. Indeed, the very purpose of money laundering is to conceal the provenance of illegally acquired wealth. It can be notoriously difficult to gather evidence of the specific criminal origin of the laundered property. This was particularly the case in Mauritius where money laundering may be the product of predicate offences committed abroad.

12. The DPP claims, therefore, that the respondent received a fully fair trial before the magistrate. He was given particulars of the criminal conduct from which the funds in his company bank account were produced. He was told that there had been a fraud on the bank account of Mr Nunez. It was made clear that the prosecution case was that Mr Nunez's signature had been forged. The respondent had been interviewed about these allegations and had made a statement after caution in which he claimed that the transactions were authentic. There could be no question, therefore, the appellant argues, that the respondent was other than fully aware of what was being alleged as to the nature of the criminal conduct which produced the unlawful proceeds.

The respondent's case

13. The respondent claims that the Constitution of Mauritius affords any defendant to a criminal charge the absolute right to particulars of the crime with which he is charged. These particulars require to be sufficiently detailed to enable the accused person to understand the nature of the offence that he faces. It is, says the respondent, unnecessary and wrong in law to draw any distinction between substantive and predicate offences. Both are covered by section 10 of the Constitution and they should not be subject to different rules.

The decision of the Supreme Court

14. The Supreme Court recorded the essential argument of counsel for the prosecution in the following passage of its judgment:

> "[Counsel's] contention was … that, since the *"predicate offence"* (i.e. the crime that generated the proceeds which became the subject matter of the money laundering offence) is not an element of the money laundering offence, it need not be averred and therefore the need for particulars thereof does not arise."

15. That argument was roundly rejected. The Supreme Court said of it:

> "This reasoning appears to us, however, to be fundamentally flawed. The offence under section 17(1)(b) of ECAMLA with which the accused stood charged was the transfer of property - money - which represented the proceeds of a crime where he had reasonable grounds to suspect that the money was derived from a crime. The elements of the offence were accordingly (1) the transfer of the money by the accused (2) the fact that that money represented the proceeds of a crime and (3) circumstances showing that the accused had reasonable grounds to suspect that the money was derived from a crime.
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> …
>
> Since it was an element of the offence that the money was the proceeds of a crime, the accused had a right under section 10(2)(b) of our Constitution to have that element particularised by a statement as to what that crime consisted of, such as to enable him to prepare his defence ad in particular to consider how to rebut the prosecution evidence that the money was the proceeds of such a crime."

16. The Supreme Court therefore held that section 17(7) of ECAMLA was repugnant to section 10(2)(b) of the Constitution, in so far as it provided that, in an information under that section, it was not necessary to specify the particular crime from which the property had been generated. Consequently the section was of no effect and, since adequate particulars of the predicate offence had not been given, the respondent's conviction was quashed. In so holding, the Supreme Court accepted the argument of the respondent that he was debarred from asking for particulars of the offence by virtue of the wording of section 17(7) which purported to deny him a right conferred by section 10(2)(b).

Discussion

17. Dispensing with a requirement to identify and prove a predicate offence is by no means an unusual approach to the problems of proof that money laundering offences can present. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 Council of Europe Treaty Series, No 198 (the Warsaw Convention) provides in article 9(6) that each of the parties to the Convention:

> "… shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property … originated from a predicate offence, without it being necessary to establish precisely which offence."

18. In *Hurnam v The State* [2005] UKPC 49, para 4 Lord Bingham, delivering the opinion of the Board, said this about Chapter II of the Constitution of Mauritius (which includes section 10):

> "...Chapter II of the Constitution reflects the values of, and is in part derived from, the European Convention: *Neeyamuthkhan v Director of Public Prosecutions* [1999] SCJ 284(a); *Deelchand v Director of Public Prosecutions* [2005] SCJ 215, para 4.14; *Rangasamy v Director of Public Prosecutions* (Record No 90845, 7 November 2005, unreported). It is indeed noteworthy that the European Convention was extended to Mauritius while it was still a Crown Colony, before it became independent under the 1968 Constitution: see European Commission of Human Rights, Documents and Decisions (1955-1957), p 47. Thus the rights guaranteed to the people of Mauritius under the European Convention were rights which, on independence, "have existed and shall continue to exist" within the terms of section 3. This is a matter of some significance: while Mauritius is no longer a party to the European Convention or bound by its terms, the Strasbourg jurisprudence gives persuasive guidance on the content of the rights which the people have enjoyed and should continue to enjoy."

19. A Council of Europe Convention on money laundering, while not of the same status as the European Convention on Human Rights and Fundamental Freedoms, provides similar persuasive guidance on the content of rights which the people of Mauritius should be held to enjoy. At the very least, it informs the approach that should be taken to resolving the tension between, on the one hand, the protection of an individual's rights in relation to proof of guilt of the offence of money laundering and,

on the other, the need to ensure, in the interests of society as a whole, that unrealistic barriers to the proof of the offence are not erected.

20. The approach commended by the Warsaw Convention is mirrored in Australia and New Zealand. In Australia anti-money laundering provisions are set out in Division 400 of the Criminal Code Act 1995. Sections 400.3 to 400.8 make it an offence to deal with money or property that is either the proceeds of, or may become an instrument of, crime. A person deals with money or other property if they: receive, possess, conceal or dispose of money or other property; import into or export from Australia money or property; or engage in banking transactions relating to money or other property *and* the money or other property is the proceeds of crime or could become an instrument of crime. Section 400.13 provides:

> "Proof of other offences is not required
>
> (1) To avoid doubt, it is not necessary, in order to prove for the purposes of this Division that money or property is proceeds of crime, to establish:
>
> (a) a particular offence was committed in relation to the money or property; or
>
> (b) a particular person committed an offence in relation to the money or property"

21. Similarly in New Zealand section 243(5) of the Crimes Act 1961 provides:

> "(5) In any prosecution for [a money laundering] offence …
>
> (a) it is not necessary for the prosecution to prove that the accused knew or believed that the property was the proceeds of a particular serious offence or a particular class of serious offence"

22. In respect of predecessor provisions in the same terms as these the Court of Appeal in New Zealand has held that the prosecution was not required to prove a specific predicate offence – *R v Allison* [2006] 1 NZLR 721.

23. In England and Wales proof of a specific predicate offence is not required, although there has been debate in some of the authorities in this area as to whether it is

necessary to adduce evidence of the class or type of criminal conduct that is alleged to have generated the property dealt with by the accused. In *Director of the Assets Recovery Agency* v *Szepietowski* [2008] Lloyd's Rep FC 10, (a civil recovery case) Moore Bick LJ, having cited the judgment of Sullivan J in *Director of the Assets Recovery Agency* v *Green* [2005] EWHC 3168 said this at para. 102:

> "The judge [Sullivan J] made the point that in ordinary civil proceedings fraud and illegality must be specifically pleaded with reasonable particularity and went on to express the view in para 25 that it would be surprising if a claimant in civil proceedings who had to allege criminal conduct as a necessary part of his claim was not required to give the respondent and the court at least some particulars of what that conduct was said to be. He concluded that Parliament had deliberately steered a careful course between requiring the Director to prove the commission of a specific criminal offence or offences by a particular individual or individuals and allowing her to make wholly unparticularised allegations of 'unlawful conduct' of the kind that would require a respondent to justify his lifestyle. I agree. It seems to me that it is essential if there is to be a fair trial that the respondent should know the case against him in sufficient detail to enable him to prepare properly to meet it."

24. By contrast in *R v Gabriel (Note)* [2007] 1 WLR 2272 para 26 (a case under section 329(1)(c) of the Proceeds of Crime Act 2002 (POCA)), Gage LJ suggested that it was no more than "a sensible practice" for the prosecution either to give particulars to the accused of the facts that it relies on to show that the property was the proceeds of crime or to refer to those facts in opening the case to the jury.

25. In *R v Craig* [2008] Lloyd's Rep FC 358, [2007] EWCA Crim 2913, the suggestion that the Crown must precisely establish at least one allegation of criminal conduct was rejected. The court held that the mens rea of the offence was that the offender knew or suspected that the property represented a person's benefit from criminal conduct.

26. In *R v W (N)* [2009] 1 WLR 965 Laws LJ reviewed the civil recovery cases and *R v Gabriel* and concluded that there should not be any difference of approach between prosecutions under the Proceeds of Crime Act 2002 POCA and applications by the Director of the Recovery Agency. At para 38 he said:

> "In short, we do not consider that Parliament can have intended a state of affairs in which, in any given instance, no particulars whatever need be given or proved of a cardinal element in the case, namely the criminal

conduct relied on. It is a requirement, to use Sullivan J's expression, of elementary fairness."

27. The Court of Appeal addressed this question again in the case of *R v Anwoir* [2009] 1 WLR 980. It held that the decision in *R v W (N)* should not be taken as prescribing that it was always necessary to give particulars and prove the general type or class of the predicate offending. At para 21, Latham LJ said this:

> "We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, (a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or (b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime."

28. If there is a difference of view to be found in these decisions as to whether in England and Wales identification and proof of the species of criminal activity are invariably required for POCA prosecutions or civil recovery purposes, it is not necessary to resolve it here. The principal significance of these decisions for the present appeal is that common to all of them is the determination that proof of a specific offence is not required. And this despite the fact that there is no equivalent provision to section 17(7) of ECAMLA in POCA.

29. The conclusion that it is not necessary to prove a specific offence was based on a consideration of the combined effect of sections 329(1)(c) and 340(3) of POCA. Section 329(1)(c) provides:

> "(1) A person commits an offence if he . . . (c) has possession of criminal property."

And section 340(3) provides:

> "(3) Property is criminal property if
>
> (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit."

30. So suspicion that the property represents a benefit deriving from criminal conduct is sufficient. And the analogy that can be drawn between section 340(3) and suspicion that "property is derived or realized, in whole or in part, directly or indirectly from any crime" under section 17(1) of ECAMLA is plain. None of the decisions as to the requirements of POCA suggested that the fact that criminal activity had generated the property was an "element" which demanded identification and proof of a specific crime or crimes. "Criminal conduct" in section 340(3)(a) of POCA may reasonably be equated in this context with "any crime" in section 17(1) of ECAMLA. Both are non-specific descriptions of criminal activity. As Gage LJ put it in *Craig* at para 27, "the statutory definition of criminal property is non-specific as to the way in which it became criminal property". Likewise, the way in which property is derived or realised from any crime is non-specific. It does not need to be shown that a particular offence or offences generated the property said to be the proceeds of crime.

31. The Supreme Court dealt with the decision in *R v W (N)* in the following passage of its judgment:

"Useful comparison can also be made with English law. Counsel for the respondent very fairly referred us to certain dicta from the judgment of the Court of Appeal (Criminal Division) in [*R v W (N)* [2009] 1 WLR 965 which, he fairly conceded, went somehow contrary to his submissions. In that case the defendant faced 33 counts charging different offences of money laundering and in order to bring home any of these offences the Crown had to prove that the funds involved constituted *"criminal property"* within the meaning of section 340 of the Proceeds of Crime Act 2002. That section defined criminal property as property which, inter alia, constituted a person's benefit from "criminal conduct" which was itself defined as conduct which constituted an offence in any part of the United Kingdom or would constitute an offence there if it occurred there. The appellate court upheld the Crown Court Judge's ruling, on a submission of no case to answer, that it was not sufficient for the Crown to show, by reference to the large sums involved and the defendant's want of any apparent means of substance, as well as other relevant evidence, that the money in question could have no lawful origin: It was incumbent on the Crown to show what particular criminal conduct, or at least what type of criminal conduct, had generated the benefit which the alleged criminal property represented."

32. What this discussion neglects to acknowledge, however, is that the underlying premise of the Court of Appeal's decision was that a specific crime did not need to be proved. The decision in that case was concerned with the question whether particulars of the type of criminal activity (if that was known) should be supplied, not with whether the Crown had an obligation to identify and prove a particular crime. The decision in *R v W (N)* lends no support, therefore, to the Supreme Court's conclusion that "the element of the offence" that the money was the proceeds of a crime required of the prosecution that it should provide a statement as to what that crime consisted of.

33. The Board has therefore concluded that proof of a specific offence was not required in order to establish guilt under section 17(1) of ECAMLA. It is sufficient for the purposes of that subsection that it be shown that the property possessed, concealed, disguised, or transferred etc represented the proceeds of any crime – in other words any criminal activity – and that it is not required of the prosecution to establish that it was the result of a particular crime or crimes. In light of this conclusion it follows that a failure to identify and prove a specific offence as the means by which the unlawful proceeds were produced is not a breach of section 10(2)(b) of the Constitution. In the Board's view, that section requires that the nature of the offence of which the accused person must be informed is *that with which he is charged*, in this case the offence of money laundering. Proof of a particular predicate crime is not an essential "element" of the offence of money laundering.

34. The decisions in the English cases are informative beyond their firm conclusion that proof of a specific predicate offence is not required, however. They are unanimous, in the Board's view, in suggesting that where it is possible to give particulars of the nature of the criminal activity that has generated the illicit proceeds, this should be done. Some of the cases appear to suggest that this is an indispensable requirement; others that it is merely required where it is feasible. All are agreed, however, that where it is possible to give the accused notice of the type of criminal activity that produced the illegal proceeds, fairness demands that this information should be supplied.

35. Section 17(7) of ECAMLA did not preclude a request for particulars of the type of criminal activity which was said to have produced the illegal property. The Supreme Court's conclusion that a request for particulars could not be made was founded on its opinion that a specific predicate crime had to be identified and proved in order to meet the requirements of section 10(2)(b) of the Constitution. There is nothing in section 17(7) or its successor which contraindicates a request for particulars of the type of criminal activity that is alleged to have been the source of the criminal property nor is there anything in that provision which would relieve the prosecution of its obligation, in the interests of fairness, of supplying it, if it was able to do so.

36. In this case the particulars supplied in the information that was lodged against the respondent and his co-accused were less than wholly informative about the nature of the criminal activity involved and it may well be that, in their unvarnished form, they did not fulfil the requirements of section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act. But any deficiency in that regard was more than cured by the way in which the proceedings were conducted and by the interviews of the respondent before trial. He and his legal advisers cannot have been in any doubt that the nature of the criminal activity alleged to have produced the proceeds of crime was the illegal procuring of the transfer of funds from Mr Nunez's account to the company account of the respondent. There can be no question therefore that the respondent and his legal representatives were not fully alerted to the case that he had to meet in relation to the charge of money laundering. In the Board's judgment no unfairness in the manner in which the respondent was required to meet that charge can be detected.

Conclusions

37. The Board has concluded that the appeal must be allowed and the decision of the magistrate restored.