IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C 0051/2023

BETWEEN

THE KING

and

IVAN AYUSO

Applicant

Before: The Honourable Justice Nigel Pilgrim

Appearances:

Ms. Cheryl-Lynn Vidal S.C, Director of Public Prosecutions, with her
Ms. Shanell Fernandez, Crown Counsel, and Ms. Leni Ysaguirre-McGann,
Director of the Financial Intelligence Unit for the Crown.

Mr. Darrell Bradley and Ms. Kimberly Wallace for the Applicant.

2024: January 22nd and 31st;
March 8th; and
April 9th.

JUDGMENT

MONEY LAUNDERING- ABUSE OF PROCESS-JOINDER-PREDICATE OFFENCE- PROCEEDS OF CRIME-RETROSPECTIVITY

[1] **PILGRIM, J.:** Ivan Ayuso ("the applicant") was indicted for the offence of theft, contrary to section 139(1) of the **Criminal Code**[1], ("the Code") the allegation being that he stole the sum of one million, forty thousand, nine hundred and ninety-seven dollars and sixty-seven cents ($1,040,997.67) from the Government of Belize during the period August 2013 to August 2016. In the same indictment there is a second count for money laundering, contrary to section 3(1)(c) of the **Money Laundering and Terrorism (Prevention) Act**[2], ("the MLTPA") for the use of that exact sum, knowing those monies were the proceeds of crime. The applicant has pleaded not guilty.

[2] The applicant, by his written arguments dated 4th December 2023 and oral arguments of 22nd January 2024, submits that the money laundering count ("the ML count") be stayed as an abuse of process. The applicant contends that it is unfair and prejudicial to try him in relation to the alleged theft and use of the monies stolen because they are all part of the same transaction. He further submits that there is no public interest requiring the use of the MLTPA and relies on the United Kingdom Supreme Court decision of **R v GH**[3].

[3] The Crown in response submits that: (i) the ML count is properly joined pursuant to the provisions of the **Indictable Procedure Act**[4] ("IPA"); (ii) the ML count covers different offending/different acts from the theft count; and (iii) the public interest justifies the ML count.

[4] The Court, ex propio motu, owing to the span of the ML count from 2013-2016, enquired from the parties as to the legal regime covering that count as there were several amendments to the MLTPA over that period. The Crown has submitted that the 2016 iteration of the MLTPA should govern it because that version is retrospective, particularly having regard to the fact that in their view it is procedural. The

[1] Chapter 101 of the Substantive Laws of Belize, Revised Edition, 2020.
[2] Chapter 104 of the Substantive Laws of Belize, Revised Edition, 2020.
[3] [2015] 4 All ER 274.
[4] Chapter 96 of the Substantive Laws of Belize, Revised Edition, 2020.

applicant has argued that the 2016 legislation is not retrospective, and the span of the indictment is abusive.

The law governing this application.

[5] The Court thinks it would be useful to firstly identify the test for the exercise of its discretion to stay proceedings, including a count in an indictment, as an abuse of process. The Court is assisted in that regard by the English Court of Criminal Appeal ("ECCA") decision of **R v Crawley et al**[5], per Sir Brian Leveson P:

> *"17…there are two categories of case in which the court has the power to stay proceedings for abuse of process.* ***These are, first, where the court concludes that the accused can no longer receive a fair hearing;*** *and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system.* ***The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required****. The second limb concerns the integrity of the criminal justice system and applies where the court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.*
>
> *18* ***Furthermore, it is clear from the authorities and beyond argument that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort****.*
>
> *…*
>
> *19* ***The threshold is, therefore, a high one****." (emphasis added)*

[6] These principles were recently re-emphasized by the ECCA in **R v BKR**[6], per Edis LJ:

[5] [2014] 2 Cr. App. R. 16.
[6] [2024] 1WLR 1327.

"52 …The powers of the court to stay a prosecution as an abuse of process are a very important part of the jurisdiction of the criminal courts, but they are limited and a stay is an exceptional remedy. The courts must exercise care and restraint in their use, particularly where the issue is a decision to prosecute a case to trial. That decision is entrusted by Parliament to the CPS and it is, in the ordinary case, no part of the function of a judge to say who should be prosecuted and who should not be."

[7] The House of Lords in **DPP v Humphrys**[7] commented that a judge does not have "any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought".

[8] The local Court of Appeal in the decision of **DPP v Kevin Flowers**[8] has held that the applicant bears the burden of proof in this application to the standard of a balance of probabilities.

[9] The editors of the **Archbold Criminal Practice 2023**[9] have opined that, "A judge must determine an application to stay proceedings for abuse of process on the material provided by the prosecution and the defence." The applicant has filed no evidence in this application, neither has the Crown, but they are not in any default because as indicated above the burden of proof rests on the applicant. The Crown has indicated that it was not minded to concede to allowing the Court to examine the depositions to consider this application and, in fairness to them, the burden being on the applicant, the Court would not press the issue. The Court, accepting the correctness of the English Divisional Court decision of **R v Chairman, County of London Quarter Sessions. Ex Parte Downes**[10], finds that without the consent of both parties it can only look at the depositions before trial on a motion to a quash a count added to the indictment which the examining magistrate did not consider, otherwise it can only look to the indictment, per Lord Goddard CJ:

"The only ground on which the court can examine the depositions before arraignment is to see whether, if a count is included for which there has not been a committal, the depositions

[7] [1977] AC 1 at p 46.
[8] Criminal Appeal No.32 of 2005 at p 5.
[9] Para 4-103.
[10] [1954] 1 Q.B. 1 at p 6.

or examinations taken before a justice in the presence of the accused disclosed that offence."

[10] The Court interprets the words "before arraignment" in *Downes* to mean before the trial has started and evidence has been led.

[11] The applicant was in fact committed to stand trial for the offence of money laundering, so the power to examine and rely evidentially on the depositions cannot arise. The Court will confine itself in those circumstances to deciding the application based on the consideration of the indictment.

Theft and money laundering

[12] Theft is defined in the Code as follows:

"139(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly."

[13] The ingredients of the offence were outlined by Chief Justice Conteh in the local High Court decision of **Musa v Magistrate Jones**[11]:

"The ingredients of the offence of theft… are:
a) Dishonesty by the accused
b) Appropriation of
c) Property belonging to another
d) With the intention of permanently depriving the owner of it."

[14] Money laundering is defined in the MLTPA, as at the passage of the **Money Laundering and Terrorism (Prevention) (Amendment) Act, 2016** ("the 2016 amendment") as follows, where relevant:

*"3.–(1) A person commits the offence of money laundering if the person **knowing or having reasonable grounds to believe** that **any property** in whole or in part, directly or indirectly, represents **any person's proceeds of crime**–*

[11] Claim No. 155 of 2009 at p 21.

…

*(c) acquires, possesses, **uses** or otherwise deals with that property;*

…

(2) For the purpose of proving a money laundering offence under sub-section (1) it is sufficient to prove that–

(a) the property was derived from conduct of a specific kind or kinds and that conduct is unlawful; or

(b) the circumstances in which the property was handled were such as to give rise to an irresistible inference that the property could only be derived from unlawful conduct.

…

*2(1)…**"property"… includes money**…*

…

"proceeds of crime" has the meaning given in section 2B;

…

2B.–(1) Property is the proceeds of crime if it constitutes a person's benefit from an offence or it represents such a benefit, in whole or part and whether directly or indirectly.

(2) For the purposes of sub-section (1)–

(a) a person benefits from an offence if he obtains property as a result of or in connection with the offence;

…

(d) it is immaterial–

(i) who committed the offence;

(ii) who benefited from the offence; or

(iii) whether the offence occurred before or after the commencement date.

…

2(1)…"offence" means conduct which–

(a) if it occurs in Belize, is unlawful under the criminal law of Belize; or

(b) if it occurs in a country other than Belize–

(i) is unlawful under the criminal law applying in that country: and

(ii) if it occurred in Belize, would be unlawful under the criminal law of Belize;"

…

2(3) Knowledge, intent, purpose, belief or suspicion required as an element of any offence under this Act may be inferred from objective, factual circumstances." (emphasis added)

[15] The provisions of the Code are relevant to the issue of the proof of knowledge:

"7.-(1) The standard test of knowledge is-
Did the person whose conduct is in issue know of the relevant circumstances or have no substantial doubt of their existence?"

[16] The common law, as set out in the House of Lords case of **R v Saik**[12], has assisted in the definition of knowledge, per Lord Nicholls of Birkenhead:

"25…On the ordinary use of language a person cannot "know" whether property is the proceeds of crime unless he participated in the crime. He can only believe this is so, on the basis of what he has been told. Adopting this approach would mean that, so far as section 93C is concerned, equating knowledge with belief in the case of identified property would achieve a measure of symmetry with the requirement of intention in the case of unidentified property. It would mean that in both cases what matters is the conspirator's state of mind: the actual provenance of the property would not be material.
*26 I do not think the latter approach can be accepted. The phrase under consideration ("intend or know") in section 1(2) is a provision of general application to all conspiracies**. In this context the word "know" should be interpreted strictly and not watered down**. **In this context knowledge means true belief**." (emphasis added)*

[17] The Court has derived considerable assistance in interpreting the term "reasonable grounds to believe" in the MLTPA from the Hong Kong Court of Final Appeal decision of **Harjani v HKSAR**[13]. The Hong Kong **Organized and Serious Crimes Ordinance** ("OSCO") contain a provision, section 25(1), which is in pari materia with section 3(1) of the MLTPA. That court opined:

[12] [2007] 1 AC 18 at para 26.
[13] [2020] 1 HKC 103.

"Question 1: What is the meaning of 'having reasonable grounds to believe that any property. . . represents any person's proceeds of an indictable offence' (abbreviated to 'the property is tainted') in s 25(1) of OSCO?

…

26. .. In the interests of clarity…we would reformulate the test as follows:

(i) What facts or circumstances, including those personal to the defendant, were known to the defendant that may have affected his belief as to whether the property was the proceeds of crime ('tainted')?

(ii) Would any reasonable person who shared the defendant's knowledge be bound to believe that the property was tainted?

(iii) If the answer to question (ii) is 'yes' the defendant is guilty. If it is 'no' the defendant is not guilty.

27. ***Thus the first issue that the judge or jury ('the court') must address is what matters the defendant knew of that might have affected his belief as to whether the property was clean or tainted. This question is subjective only in as much as it requires the tribunal to make findings as to the knowledge of the defendant at the time of the relevant transaction. Where the defendant gives evidence of facts and matters that affected his belief about the nature of the property, the court has to decide whether he is, or may be, telling the truth about the existence of these facts and matters****.*

28. ***The second issue is whether any reasonable person who shared the defendant's knowledge would have been bound to believe that the property was tainted. This question is objective. Where the court finds that the defendant was, or may have been, telling the truth about the existence of facts and matters that he claims affected his belief, the court must take those facts and matters into account when answering the question, would any reasonable person with knowledge of those facts and matters have believed that the property was tainted? If the answer to the question is 'yes' the defendant is guilty. If it is 'no' the defendant is not guilty.***

29. Applying these principles in practice will normally be relatively straightforward where the defendant does not give or adduce evidence. The court has first to find what relevant facts or circumstances were known to the defendant and then decide whether those facts or circumstances would have led any reasonable person to believe that the property in question

was tainted. If the answer is 'yes' the defendant will be convicted. When the judge comes to sentence he or she will be likely to do so on the basis that the defendant must also have believed that the property was the proceeds of crime.

30. Difficulty can arise in practice where the defendant gives evidence that he did not believe that the property was tainted. Although the test in law is objective – 'would any reasonable person believe the property was tainted?' – in applying that test the court must give due consideration to the evidence given by the defendant as to what he believed and why. The court has to consider two interrelated questions: (i) is the defendant telling the truth when he says that he did not believe that the property was tainted and (ii) could a reasonable person in the position of the defendant have failed to believe that the property was tainted?

31. Normally the court will give the same answer to each question. If the court concludes that no reasonable person in the position of the defendant could have failed to believe that the property was tainted the court is likely to reject the defendant's assertion that he did not have this belief. Applying the statutory test the defendant will be convicted.

32. Conversely, where the court accepts that the defendant did not believe that the property was tainted, this is likely to be in circumstances where the court has concluded that a reasonable person in the position of the defendant would not necessarily have believed that the property was tainted. Applying the statutory test the defendant will be acquitted.

33. A rare case may arise where the court concludes that any reasonable person in the position of the defendant would have believed that the property was tainted but nonetheless accepts the evidence of the defendant when he says that he did not have this belief. This is only likely to arise in circumstances where it is apparent that the defendant lacks the reasoning abilities of the normal person. In such circumstances, applying the statutory test, the defendant should be convicted but the fact that he did not himself believe that the property was tainted may well be a mitigating factor when he is sentenced.

…

51. … A belief or perception held by the defendant will only be inconsistent with his having reasonable grounds to believe that property is tainted if that belief or perception is itself founded on reasonable grounds. That is why the important question is not merely what beliefs or perceptions the defendant may have had but the grounds advanced by the defendant for holding the alleged beliefs or perceptions." (emphasis added)

[18] The Court is of the view that there is no requirement to establish that the property that is being dealt with is in fact the proceeds of a specific crime. This much is apparent from section 3(2)(b) of the MLTPA which provides that property may be considered as proceeds of any person's crime if it is an irresistible inference from how it was handled that it could only have come from crime. This formulation is taken directly from the ECCA case of **R v Anwoir et al**[14]. Again, the case of *Harjani* is helpful:

> *"83. …the law in the United Kingdom relating to money laundering offences differs in a material aspect from the effect of s 25(1) of OSCO. The relevant offences created by the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 require proof that the property dealt with in fact represents the proceeds of criminal conduct or of drug trafficking, as the case may be, whereas it is not an ingredient of a s 25(1) OSCO offence that the property must be the proceeds of crime. The criminal provenance of the property is not a 'particular fact or circumstance necessary for the commission of the offence': HKSAR v Wong Ping Shui & Anor; OeiHengky Wiryo v HKSAR (No 2); HKSAR v Li Kwok Cheung George; HKSAR v Yeung Ka Sing Carson. Further, as held in Saik, the 'fact or circumstance necessary for the commission of the offence' is 'directed at an element of the actus reus of the offence' and '[a] mental element of the offence is not itself a 'fact or circumstance' for the purposes of the sub-section.' **In the context of s 25(1) of OSCO, the actus reus is the act of dealing with the property whereas '[t]he defendant's mens rea is. . . established if he is shown to know or to have reasonable grounds to believe that 'any property' in whole or in part represents 'any person's proceeds of an indictable offence'**.*
>
> *84. **Accordingly, the law in Hong Kong does not require it to be proved under the reasonable grounds limb of s 25(1) of OSCO that the relevant property dealt with was tainted**." (emphasis added)*

[19] The Court is of the view that the statement of the law in Hong Kong is similarly applicable to Belize.

[14] [2008] 4 All ER 582.

[20] The Court is assisted in its definition of the word "use" in the MLTPA by the Australian Court of Criminal Appeal decision of **R v Rintel**[15] where they considered the definition of that word in the context of legislation permitting the forfeiture of property used in connection with an offence, per Malcolm CJ:

> *"The house was "used" by the respondent for those purposes in the ordinary meaning of the word "used". The ordinary meaning of the verb "to use" is "to employ for a purpose" and the ordinary meaning of "use" is utilization or employment for or with some aim or purpose"…"*

[21] The Court is of the view that having regard to the then existing statute and case law cited above to make out a case of money laundering, on the facts of this particular case, the Crown must establish: (i) the applicant knew, that is, had a true belief that the money he was using was directly or indirectly in whole or in part the proceeds of any person's crime. The Crown could alternatively establish that the applicant was subjectively aware of certain facts and circumstances, and a reasonable person objectively looking at those facts and circumstances would have reason to believe that that money was someone's proceeds of crime. Courts like *Harjani*[16] have pointed out that this often times can only be demonstrated by circumstantial evidence; and (ii) the applicant utilized that money.

Joinder

[22] The IPA provides:

> *"73(1)…any number of counts for any crimes whatever may be joined in the same indictment, and shall be sufficiently distinguished."*

[23] The **Indictment Rules** ("the Rules") made under the IPA, also provide, as amended by the **Indictable Procedure (Amendment) Act, 2022**:

[15] (1991) 52 A Crim R 209 at ps 210–211.
[16] "*38. The prosecution case, not untypically, was founded largely on the adverse conclusions that would reasonably be drawn from the nature of the transactions themselves."*

"4. Charges for any crimes, whether felonies or misdemeanours, may be joined in the same indictment if those charges are found on the same facts, or form or are a part of a series of crimes of the same or a similar character.

…

5.(1A)…more than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission or the victim of the offence."

[24] The Court uses the 2022 IPA amendment in reliance on the principle that procedural amendments are generally regarded to be retrospective, as noted by the editors of **Bennion, Bailey and Norbury on Statutory Interpretation**[17].

[25] In **Coyseme Salam v R**[18] the Court of Appeal accepted the position that there is no duty to try separately counts arising out of the same offending unless there is some special feature of the case that may cause undue prejudice to a defendant.

Analysis

[26] The Court firstly notes that this application is made strictly on the first limb of the abuse of process jurisdiction, trial fairness, in that there has been no allegation of executive or other misconduct giving rise to the prospect that it would be unfair in those circumstances for the applicant to be tried even if a fair trial was still possible.

[27] The Court in considering this application notes, as per *Crawley* and other authorities, that the application to stay proceedings as an abuse of process is an exceptional remedy. The Court also notes, per *Humphrys*, that it is no part of this Court's function to determine the wisdom of charging decisions for money laundering or any other offences, barring some manipulation of the court's process which prejudices the defendant or unconscionable executive or other action which would make it unfair to have the applicant on trial at all. The **Constitution** of Belize, the supreme law of this jurisdiction, at section

[17] Section 7.15.
[18] Criminal Appeal No. 5 of 2002 at paras 28-31.

50(2), has assigned the power to institute and undertake criminal proceedings to the Director of Public Prosecutions and that fact must be respected as noted in *BKR.*

[28] The necessary inference from the counts on the indictment are that the applicant is alleged to have stolen money over a period of time and also used that same money over a period of time. The counts in the indictment arise out of the same course of offending thus consequently there is no issue of misjoinder under the IPA or Rules 4 and 5(1A) of the Rules.

[29] The issue then raised by the applicant is whether he is being vexed by being punished twice for the same act. On a consideration of the indictment alone the answer must be no. The act of money laundering as defined by the MLTPA is separate and apart from the predicate offence in that the proceeds of the theft have been used. The applicant, if proved, would have gone the step further and dealt with dirty money. The law has a compelling interest to prevent any person from enjoying the fruits of any crime, and it should include a crime that they themselves have committed. Money laundering has been described by Conteh CJ locally as "pernicious" and "evil" in **R v Gibson et al**[19].

[30] The Court has found helpful in this regard two authorities, one from England and one from Hong Kong. In the ECCA decision of **R v Roberts**[20] the contention was made as in this case that it was an abuse of process to try that appellant for both a substantive theft offence and a money laundering charge connected to it. The English money laundering provision is of similar width to that in Belize. That court held that it was not an abuse of process, and that the choice of charge was a matter for the prosecution, per Macur LJ:

> *"…we are left with the certain conviction that that which the arguments principally attack relate to the demerits of the widely framed particular offence, as applied without other associated offence of dishonesty and in circumstances which will at least imperil those who would not otherwise have been caught by the offences pursuant to the Theft Act.*
>
> ***This attempt necessarily to undermine the will of Parliament by reference to the unforeseen consequences of the application of the section must, it seems to us, fail at the first fence. This was an offence open to charge by the prosecution, had***

[19] Claim Nos. 306 of 2001 and 310 of 2001.
[20] [2014] EWCA Crim 1475.

previously been charged and the outcome was a matter for the jury and subsequently if the judge considered that it was in any way an over-burdensome charging decision something that he could reflect in the penalty imposed upon conviction. We are sure that the judge's responsibility was to ensure a fair trial. His was not to exercise an additional filter of public interest unless to embark upon an investigation as to whether or not the decision of the prosecution to proceed was such as to amount to an abuse of process. ***We are clear that he could not so find*** *in these circumstances and neither Mr Cameron nor Mr Nathan suggests that he could." (emphasis added)*

[31] In the Hong Kong Court of Appeal decision of **HKSAR v Chan Kim Chung, Nelson**[21] the court considered the issue of predicate offences being sentenced alongside related money laundering charges. They likewise held that the addition of a money laundering count with a predicate offence was a matter for the prosecution and could be dealt with by the court, if viewed as burdensome, as a matter of sentence, per Stock VP:

"[12] ***The problem raised by this ground of appeal stems from the fact that s. 25 of the Organized and Serious Crimes Ordinance, Cap 455 . is broadly drafted so that it is capable of including a wide range of conduct by the perpetrator of the predicate offence some of which is beyond what most people think of as money laundering. This is because the mens rea of the s. 25 offence is concerned only with the state of mind of the defendant in respect of the source of the money***. ***Once he is proven to have the requisite state of mind and "deals" with the property he commits the offence, irrespective of his purpose in dealing with the property.***

[13] What most people understand as money laundering, however, is where the proceeds of crime are dealt with for a specific purpose, namely, to create distance between the crime and the profits it generates so that no link between the two can be detected. This, necessarily, involves acts of dealing with the proceeds of crime but the acts of dealing are directed at a particular end and may involve multiple "dealings" designed to create a number of layers between the crime and the profits it has generated. By a process of transferring the

[21] [2012] HKCU 363.

money between accounts, both domestic and international, converting the monetary profits into other forms of property or washing the money through legitimate businesses, a series of layers are created that conceal the origin of the criminal proceeds and that they are in fact the proceeds of crime. This renders detection of the crime and the recovery of its proceeds the more difficult. This we shall refer to as a dealing with the proceeds for a money laundering purpose.

[14] When money laundering in this sense takes place then it should be separately charged because it represents a course of criminal activity that is clearly additional to the criminal acts that make up the predicate offence. In such a case, the money laundering offence is entirely freestanding and does not give rise to the issue presented in the instant case.

[15] The present issue may arise in any course of criminal activity that is composed of a number of acts each of which constitutes a separate criminal offence. Perhaps the most obvious example is the offence of conspiracy to defraud. The overt acts committed in carrying out such a conspiracy may include forgery, false accounting, theft, obtaining property by deception or more. However these substantive offences will not be charged in order to reflect the criminality of the offenders, for this is achieved by charging the conspiracy. Substantive offences might be laid by the prosecutor but that will be for other prosecutorial reasons; often to prevent a complete acquittal where the prosecutor envisages difficulties in proving that there was a conspiracy or that a particular accused was a coconspirator.

*[16] Because of the breadth of s. 25 it is likewise likely that on many occasions the criminal activity underlying a predicate offence that has generated proceeds of crime will include an act by one of the participants in that offence that constitutes a dealing, under s. 25, with those proceeds. As in the conspiracy to defraud example, there may be quite proper reasons why the prosecutor might want to charge the s. 25 offence other than for the purpose of revealing to the court the full extent of the accused's criminality. But where no such reasons are present then the prosecutor should consider whether such a charge is needed. **It will only be needed in order to reflect the full culpability of the accused and to enable the court to sentence for that culpability.** In other words, in the absence of a prosecutorial reason for laying a s. 25 charge, in the situation where the s. 25 conduct was not a dealing for a money laundering purpose, the court will not usually need to have before it a s. 25*

charge in order to be able to punish appropriately the offender's conduct. Where a court finds itself faced with a predicate offender against whom the prosecution has also laid a s. 25 offence, the prudent course for the trial judge is to enquire from the prosecutor at the outset what additional culpability the s. 25 offence is laid to meet.

[17] ***These considerations lead naturally to the approach which a court should adopt in sentencing an offender who is guilty both of the predicate offence and a connected s. 25 offence. The question for the purpose of sentence of the s. 25 offence must always be whether its commission adds anything to the culpability disclosed by commission of the predicate offence. If it does, then that extra culpability must be reflected in the overall sentence imposed. If, however, the s. 25 offence adds nothing, then an effective additional sentence for the s. 25 offence should not be imposed, for doing so would in effect be to punish the offender twice the same conduct.*** *This is an echo of decisions in other jurisdictions: see, for example, R v Greaves and others [2011] 1 Cr App R (S) 72; and R v Thorn [2009] NSWCCA 294. It also reflects a fundamental principle which applies generally to sentencing for more than one offence: see HKSAR v Ngai Yiu Ching CACC 107 of 2011, 3 October 2011, unreported.*

[18] Where the s. 25 offence adds nothing to the culpability of the conduct involved in the primary offence, it will be appropriate either to say that "no separate penalty" is imposed for the s. 25 offence or to impose a sentence for the s. 25 offence but order it to run concurrently with that imposed for the predicate offence.

[19] In the normal course of events the use of an account to conceal the proceeds of a crime, to disguise them, or transfer them or remove them, or the conversion of the proceeds into some other form of property, so as to facilitate the crime's commission or render its detection more difficult will constitute material additional culpability. Conversely, where the s. 25 offence evidences no more than the mere obtaining of funds already reflected in the predicate offence, it is unlikely – unless the prosecutor is able to show otherwise – that additional culpability is demonstrated. In this latter regard, we recognize that it may be said that the mere deposit of illicit funds into a bank or other financial institution itself taints the integrity of the system, and that by its sentence the court should strive to deter any misuse of Hong Kong's banks and financial institution by those who have profited from crimes. But that is not a basis upon which the respondent has invited the court to act nor is that an

approach adopted elsewhere. Whether the use by an offender of Hong Kong's banking and financial system for a non-money laundering purpose, such as to enable the crime to be more easily or effectively committed, should be regarded, without more, as adding to an offender's culpability is a consideration which may have to be visited at some future point." (emphasis added)

[32] The Court takes from *Nelson* that though a court may in their discretion ask the Crown to consider the addition of a money laundering count when it adds little to the charging of the predicate it is ultimately a matter for the Crown. The Crown in this case has submitted that the ML count is included because of the "grand scale" of the offending in the case, and it is nigh impossible for the Court to differ from that characterization both in terms of the sum and the time span of the indictment.

[33] The cumulative effect of these authorities would have led the editors of the **Blackstone Criminal Practice 2024** to opine:

"B21.30

…The courts have made statements discouraging the use of money laundering charges in cases that might more accurately be described as ones of handling (Wilkinson v DPP [2006] EWHC 3012 (Admin); GH [2015] UKSC 24, at [49]) but the choice of charge where there is an overlap is ultimately that of the prosecutor (see Roberts [2014] EWCA Crim 1475 and the commentary at [2015] Crim LR 458)…"

[34] The Court notes in relation to the English Supreme Court decision of *GH* that the ratio of that decision was that for culpability to attach for money laundering the property must be tainted at the time it is dealt with. The offer of guidance regarding charging practice is strictly obiter dicta. Though the Supreme Court suggested that a court should use their powers to discourage such a practice they offered little by way of suggestion of what power could be used, saying, "it is unnecessary to consider what power the court might have…[22]" It is however clear from the case of *Roberts* that it is not the nuclear weapon of staying the count as an abuse of process. The *Roberts* and *Nelson* approach is to this Court's mind a logical, practical and constitutionally appropriate one by treating money laundering counts tacked onto predicate

[22] Para 49.

counts in the same indictment as a matter of sentencing where it can consider it in the context of the Caribbean Court of Justice decision of **Linton Pompey v DPP**[23]'s guidance on the issue of the totality principle and concurrent sentences.

[35] In short it is clear to the Court that the instant ML count is not misjoined nor is it an abuse of process.

The Retrospectivity Issue

[36] The Court observed, as noted in the preliminaries of this judgment, that there were several amendments to the MLTPA during the span of this indictment from 2013-2016. The 2013 version of the MLTPA contains a definition of "proceeds of crime", which is an element of the offence of money laundering, tied to the commission of "serious crime" which were offences with a penalty of more than 1 year imprisonment[24]. The 2014 version[25] of the MLTPA contains a defence to the charge of money laundering, which would affect culpability for that offence. The 2016 version[26] of the MLTPA changed the elements of money laundering again by changing the meaning of proceeds of crime and deleting the concept of tying it to "serious crime" being an offence with a penalty of more than 1 year imprisonment to the more liberal "offence" which is any criminal offence, among other changes. The Court notes that the penalty for money laundering at section 4 of the MLTPA however remained the same from 2013 to 2016.

[37] The Court notes that penal laws are not generally to be applied retrospectively as can be gleaned from section 65(c) of the **Interpretation Act**[27]:

> *"65. The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provisions in question is reasonably possible, namely,*
>
> *…*
>
> *(c) that, in the absence of any express indication to the contrary, a construction which would exclude retrospective effect is to be preferred to a construction which would not."*

[23] [2020] CCJ 7 (AJ) GY at paras 17-35.
[24] **Money Laundering and Terrorism (Prevention) (Amendment) Act, 2013**, section 2.
[25] **Money Laundering and Terrorism (Prevention) (Amendment) Act, 2014,** section 4.
[26] **Money Laundering and Terrorism (Prevention) (Amendment) Act, 2016**, sections 2-4.
[27] Chapter 1 of the Substantive Laws of Belize Revised Edition, 2020.

[38] This is consistent with the principles of the common law as noted in the *Bennion*[28]:

> *"The essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. We believe that the nature of law is such that '… those who have arranged their affairs … in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset'."*[29]

[39] Section 2B of the MLTPA deals with the definition of the proceeds of crime, which is an element of the offence of money laundering. Subsection (2)(d) offers further clarification of what can or cannot be those proceeds including at (d)(iii) proceeds from a crime which "occurred before or after the commencement date". This is a scenario which in the Court's view means that if property is used after the commencement date from an "old crime" pre-commencement section 2B(d)(iii) would apply. It is not retrospective in the sense that it would not cover use of dirty money before the commencement of the 2016 amendment.

[40] This analysis is supported by a decision from the High Court of Namibia, **Teckla Nandjila Lameck et al v The President Of The Republic Of Namibia et al**[30] which this Court finds extremely instructive. Namibia had in their money laundering legislation the terms "unlawful activities" and "proceeds of unlawful activities" which are similar to "proceeds of crime" in section 2B(d)(iii) in Belize. That Court held that provision to not be retrospective, per Smuts J:

> *"[42] The definition of "unlawful activity" contained in s 1(1) of the Act is in the following terms:*
>
> *"unlawful activity" means any conduct which constitutes an offence or which contravenes any law* ***whether that conduct occurred before or after the commencement of this Act*** *and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia."*
>
> *[43] The definition of "proceeds of unlawful activities" is stated to mean:*

[28] Section 7.16.
[29] Section 7.13.
[30] Case No.: A 54/2011.

any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, ***at any time before or after the commencement of this Act****, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity."*

…

[48] ***Despite the wording of the definitions in question, it would not seem to me that the money laundering offences created in ss4 and 6 operate retrospectively, as contended by the applicants. These sections in my view criminalise only current conduct****…****The current conduct contemplated by those sections relate to the acquisition, possession, importation and exporting use of proceeds of unlawful activities****. That is what is criminalised in those sections and not any conduct committed prior to the coming into operation of POCA****. The offences created by these sections thus concern conduct after POCA came into force. That is in my view the clear meaning of the sections.***

[49] ***What is thus criminalised is the current possession, acquisition and use of the proceeds of unlawful activities and not the original conduct which rendered those proceeds as unlawful****. That conduct could have occurred before POCA came into force. But it is the subsequent possession, use or acquisition after POCA came into force which is criminalised by POCA. An accused would thus not be charged with the underlying (and prior) unlawful activity or activities which gave rise to the proceeds. What is hit by the sections is the subsequent use, possession or acquisition of those proceeds after POCA came into operation****. This would not in my view mean that these offences operate retrospectively. Their operation is on the contrary prospective.****"*
(emphasis added)

[41] The editors of the English text, **Smith, Owen and Bodnar on Asset Recovery, Criminal Confiscation, and Civil Recovery** have opined in the context of their legislative provisions, the Proceeds of Crime Act ("POCA"), which are similar to Belize:

"[I.3.113]

"It is immaterial who carried out the conduct, who benefited from it and whether the conduct occurred before or after the passing of POCA. ***This does not make the money laundering offences in Pt 7 of POCA retrospective. However where after the commencement date of the POCA money laundering offences (23 February 2003) a person uses property which was originally obtained from a criminal source prior to the commencement of the Act in such circumstances offences under POCA are committed****." (emphasis added)*

[42] The Court cannot accept the Crown's argument that section 2B(d)(iii) of the MLTPA is retrospective on a plain reading of the section. The Court cannot accept that it is a procedural amendment giving rise to a presumption in favour of retrospectivity. The legislative amendments over 2013-16 changed the elements of the offence of money laundering. This is clearly not procedural as it affects a person's liability to be convicted of the offence of money laundering over the different amendments.

[43] The Court, however, owing to the fact that it is only considering the indictment and not the depositions cannot say at this stage when the monies allegedly stolen were in fact used and, in that regard, cannot say that the span of the indictment is inappropriate and in any event that is an issue that can be dealt with fairly at the stage of a no-case submission, or the Crown may wish to amend the ML count. What is beyond doubt is that there are adequate tools in the trial process to address this issue without resort to the nuclear weapon of a stay.

DISPOSITION

[44] The Court for the reasons given above dismisses the application to stay the money laundering count in the indictment as an abuse of process.

Nigel Pilgrim
High Court Judge
Dated 9th April 2024