In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2016: N0: 1

FIONA M. MILLER
(Police Sergeant)

Appellant

-v-

EMMERSON CARRINGTON

Respondent

JUDGMENT
(In Court[1])

Crown appeal against acquittal-disclosing information likely to prejudice an investigation into money laundering-meaning of "likely to prejudice"-Proceeds of Crime Act 1997, section 47(1)

Date of hearing: November 24, 2016
Date of Judgment: December 2, 2016

Ms Cindy Clarke, Deputy-Director of Public Prosecutions (Litigation), for the Appellant
Mr Allan Doughty, Beesmont Law Limited, for the Respondent

Introductory

1. By an Information dated September 4, 2015, it was charged that the Defendant/Respondent:

[1] The present Judgment was circulated to counsel without a hearing to hand down Judgment.

> "*On the 29th day of November 2013, in the Islands of Bermuda, knowing or suspecting that a police officer was proposing to act in connection with an investigation which was about to be conducted into money laundering, did disclose to another person, namely* [B], *information which was likely to prejudice that proposed investigation.* ***Contrary to Section 47(1) of the Proceeds of Crime Act 1997***. "

2. Both the Defendant and the subject of the investigation in question ("A") were Police Officers. So was the recipient of the information, B, who was the Defendant's lady friend but also A's lady friend at the same time. The Prosecution case opened and closed on November 27, 2015, with evidence being adduced of WhatsApp communications from the Defendant to B in late November 2013, which included the following messages:

> " *I'm not supposed to say anything but r u aware that he's being investigated…Don't wanna scare u but they might come to search ur house at some point…apparently he n [C] using their accounts to send money to ppl in Jamaica from Jamaica drug men here…Just putting u on ur guard…"*

3. A no case to answer submission was made and on December 11, 2015 the Magistrates' Court (Wor. Khamisi Tokunbo) refused the application, ruling *inter alia*:

> "..*That at a minimum, the Defendant suspected that the police were conducting an investigation into money laundering...that he disclosed this to [B] via the WhatsApp chat with her…I also find that a Police investigation had, in fact, commenced and that that disclosure by the Defendant was likely to prejudice that investigation…*"

4. The Defence case opened on February 15, 2016. The Defendant testified that he was an Inspector in the Bermuda Police Force ("BPS") from Barbados. He admitted sending the messages but explained that the previous year he discovered that B was intimately involved with both himself and A, which "*caused disagreements between all of us*". He explained that he heard rumours about A's involvement in corruption earlier in 2013 from other Police Officers and invented some of what he said to B with a view to preventing her from continuing her relationship with A. Two witnesses called by the Defendant confirmed that they as Police Officers were aware of rumours about A being corrupt during the period when the Defendant communicated with B. B herself gave evidence and confirmed that she was aware that A was being investigated before the Defendant's messages, although under cross-examination she admitted that she did not at that point know that it related to money laundering. Under cross-examination, she confirmed being intimately involved with both A and the Defendant

on an "*off and on basis*" and agreed that she had at some juncture told the Defendant that she loved him.

5. On March 8, 2016, the Learned Magistrate delivered the Judgment against which the Appellant appeals acquitting the Defendant.

The Impugned Findings and the Grounds of Appeal

6. The Appellant did not seek to impugn the first main finding of the Magistrates' Court, which was: "*I find as a fact that the defendant did suspect that the police were preparing to act/investigate*." Complaint was made of the following secondary findings:

> "*Having regard to the huge pool of police officers who knew of, were discussing/gossiping about the investigation, including [B], I find that it was highly unlikely that the disclosure by the defendant to her would have been prejudicial to the investigation…*"

7. The Appellant's Notice of Appeal formally complained that the Learned Magistrate:

   (1) erred in law by applying a subjective test to the statutory element of "*likely to prejudice the investigation*"; and

   (2) erred in law in drawing the wrong inferences from B's evidence.

8. However, at the hearing of the appeal, Ms Clarke refined the complaint into an attack on the interpretation the Learned Magistrate placed on the crucial element of the offence ("*likely to prejudice the investigation*"). It was wrong in law, the Deputy – Director contended, to have regard to whether or not as a matter of fact, the effect of the disclosure was not likely to cause actual prejudice, if in fact the nature of the disclosure was such that would potentially cause such prejudice. There was nothing in the Defence case which in legally valid terms undermined the Court's finding at the end of the Prosecution case that the information supplied was likely to prejudice the investigation.

9. The appeal raised an important point of construction on the correct interpretation of section 47(1) of the Proceeds of Crime Act 1997 ("the Act"). It was a difficult point which was seemingly not addressed by any previous authorities locally or abroad. Neither counsel nor the Court found it easy, in the course of argument, to clearly frame the appropriate legal question although the broad outlines of the legal question were clear. The Appellant effectively submitted that the primary consideration was whether the information communicated was of a type capable of prejudicing the investigation, viewing the matter at the point of disclosure, without regard to whether it was likely to have any prejudicial effect in fact. The Respondent submitted that the

Prosecution were required to prove that the communication was likely in fact to have some prejudicial effect in terms of actions or potential reactions upon receipt of the communication.

10. Ms Clarke sought not just to clarify the law but also to substitute either (a) a conviction for the acquittal, or (b) a finding of guilt accompanied by a discharge if this Court felt (as I intimated in the course of argument) that despite an error of law occurring a conviction would be a disproportionate result in the peculiar circumstances of the present case. Mr Doughty focussed his oral arguments on demonstrating how far from truly criminal his client's conduct had been and why it was unsurprising that the Learned Magistrate had reached the decision to acquit which he did.

The wider statutory context

11. It is well known that the Act is generally designed to confer strong enforcement powers on the Crown in aid of the broad public policy goal of preventing an inherently difficult to monitor illicit activity: money laundering. An initial flavour of this may be extracted from the Preamble to the Act:

> "*WHEREAS it is expedient to extend the powers of the police and the courts in relation to the tracing and confiscation of the proceeds of drug trafficking; to make new provision in relation to the tracing and confiscation of the proceeds of certain other indictable offences; to make new and amended provision in relation to money laundering; to extend the powers of seizure and forfeiture on import or export of cash suspected of being the proceeds of criminal conduct; and to make connected and consequential provision…"*

12. Part II of the Act (sections 9 to 24) deals with Confiscation Orders. Sections 9 and 10 empower the Court to make such orders where a person has been convicted of a drug trafficking or other relevant offence. Section 12 dealing with assessing the benefits from drug trafficking requires the Court to make "*required assumptions*" which effectively require the offender to establish that assets he has received within the last six years were legitimately acquired. Part III (sections 25-36) deals with Enforcement of Confiscation Orders. The Court is empowered to impose imprisonment in default of compliance with confiscation orders (section 25), to make interim restraint and charging orders (sections 27-30) and to appoint receivers in connection with the realisation of property (sections 31-34). Insolvency powers are also conferred on the Court in relation to individuals and companies (sections 35-36). Part IIIA (sections 36A-36.1Y) regulates civil recovery proceedings enabling the proceeds of crime to be forfeited in the absence of criminal convictions.

13. The powers conferred by the Act are quite intrusive and save for criminal prosecutions the civil standard of proof applies:

"62. *Any question of fact to be decided by a court in proceedings under this Act, except any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act, shall be decided on the balance of probabilities.*"

14. Part IV ("*Information gathering Powers*", sections 37-41) is a central part of the legislative scheme as it equips the law enforcement authorities with the ability to acquire the most important tool for enforcing the Act: information. Powers which interfere with privacy rights in the public interest include the powers conferred on the Supreme Court to make production orders (sections 37-38), issue search warrants (section 39), compel Government Departments to produce information (section 40). Customer information orders are provided for by section 41A-41G, with jurisdiction conferred on both the Magistrates' Court and the Supreme Court. Section 42 provides:

"*(1) Where in relation to an investigation into criminal conduct or a civil recovery investigation—*

(a) a production order has been made, or has been applied for and has not been refused;
(b) a warrant under section 39 has been issued; or
(c) a monitoring order has been made,

a person is guilty of an offence if, knowing or suspecting that the investigation is taking place, he makes any disclosure which is likely to prejudice the investigation or reveal the existence of the monitoring order.

(2)In proceedings against a person for an offence under this section, it is a defence to prove—

(a) that he did not know or suspect that the disclosure was likely to prejudice the investigation or reveal the existence of the monitoring order; or

(b) that he had lawful authority or reasonable excuse for making the disclosure…."

15. Section 47 is found in the "*Offences*" section of Part V ("*Money Laundering*", sections 42A-49M). The other offences created include concealing or transferring the proceeds of criminal conduct (section 43), assisting another to retain criminal proceeds (section 44), acquiring and possessing or using the proceeds of criminal conduct (section 45). The Part also creates a dizzying array of reporting obligations

for AML/ATF regulated institutions. Part VI creates further seizure powers which are conferred on both the Police and the courts (sections 50-52); Part VII (sections 53-68) deals with external confiscation orders and various supplemental matters.

16. In summary, the scheme of the Act is clearly designed to create a comprehensive and rigorous legislative framework designed to both prohibit money laundering activities and facilitate vigorous and effective enforcement action to investigate such activities, prosecute offenders and seize the proceeds of criminal conduct.

Section 47

17. The provisions of Section 47 ("*Tipping off*") fall to be construed against the background of this wider statutory context:

> "(1) *A person is guilty of an offence if—*
>
> *(a) he knows or suspects that a police officer is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted into money laundering; and*
>
> *(b) he discloses to any other person information or any other matter which is likely to prejudice that investigation or proposed investigation.*
>
> *(2)A person is guilty of an offence if—*
>
> *(a) he knows or suspects that a disclosure has been made to the FIA or to an appropriate person under section 44, 45 or 46; and*
>
> *(b) he discloses to any other person—*
>
> *(i) his knowledge or suspicion that a disclosure or related information has been filed with the FIA; or*
> *(ii) information or any other matter which is likely to prejudice any investigation which might be conducted following such a disclosure.*
>
> *(3)Nothing in subsection (1) or (2) makes it an offence for a professional legal adviser to disclose any information or other matter—*
>
> *(a) to, or to a representative of, a client of his in connection with the giving by the adviser of legal advice to the client; or*
>
> *(b) to any person—*
>
> *(i) in contemplation of, or in connection with, legal proceedings; and*

(ii) for the purpose of those proceedings;

but this subsection does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose.

(4)In proceedings against a person for an offence under subsection (1) or (2)(b)(ii), it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial in the way there mentioned.

(5) No police officer or other person shall be guilty of an offence under this section in respect of anything done by him in the course of acting in accordance with the enforcement, or intended enforcement, of any provision of this Act or of any other statutory provision relating to criminal conduct or the proceeds of criminal conduct.

(6)No person shall be guilty of an offence under this section where he discloses information to a supervisory authority in the course of it carrying out its statutory duties.

(7) For the purposes of this section supervisory authority shall have the same meaning as under section 2 of the Proceeds of Crime (Anti-Money Laundering and Terrorist Financing Supervision and Enforcement) Act 2008."

18. A closely related provision is section 48 which provides:

"(2) *A person guilty of an offence under section 46 or 47 (failure to disclose knowledge or suspicion; tipping off) shall be liable—*

(a) on summary conviction, to imprisonment for three years or a fine of$15,000 or both; or

(b) on conviction on indictment, to imprisonment for ten years or an unlimited fine or both."

19. Ms Clarke contrasted the severity of the penalties for contravening section 47 with the penalties for contravening section 42, which provides:

"*(4) A person who commits an offence under this section shall be liable—*

(a) on summary conviction to imprisonment for two years or a fine of $5,000 or both; and

(b) on conviction on indictment to imprisonment for five years or a fine of $10,000 or both."

20. The gravity of the offence suggests that it is particularly important for the Court to avoid adopting an interpretation which would defeat the object and purpose of section 47 or result in unjustified convictions. Belief in a lawful or reasonable excuse is not a defence under section 47(4) as it is under section 42(2)(b). I should also mention that a very similar offence to that created by section 47 is created by section 36.1X in relation to civil recovery proceedings.

21. Reading section 47 subsections (1) and (4) together and assuming that the ultimate burden of proof rests on the Crown to disprove any defence which the accused bears an evidential onus of raising, the offence of tipping off requires the Crown to prove the following three essential elements of the offence under section 47(1):

    (1) that the accused knew or suspected a Police money laundering investigation had commenced or was about to commence;

    (2) that the accused made a disclosure to another person which was likely to prejudice the investigation or proposed investigation; and

    (3) (where the issue is sufficiently raised by the accused) that the accused knew or suspected that the disclosure was likely to be prejudicial.

22. The first element of the offence was not in issue in the present case but clearly imports the need to consider the subjective state of mind of the accused to some extent in determining what he knew or suspected. The second element is purely objective: was a disclosure made which was likely to prejudice an active or pending investigation? The third element is primarily subjective, even if it will generally be relevant to test the plausibility of a lack of knowledge defence by reference to what a reasonable person the accused's position would have known or suspected. Having demarcated the main ingredients of the offence with broad brush strokes, it is now necessary to turn to the subtle yet substantively important issue raised on the present appeal, which engages both the second and third elements of the offence.

23. What does the term "*likely to prejudice*" mean? Mr Doughty submitted that "likely" simply meant "probable" and required proof of a likelihood of actual prejudice. However, by logical extension, his construction required the Crown to prove likelihood in relation to the second, objective, limb of the offence in a sense which in my judgment would make the provisions of section 47(1) unworkable in many cases. It is helpful to consider a few hypothetical examples which cast doubt on whether Parliament may be deemed to have intended the commission of the offence to depend on a likelihood of prejudice <u>actually resulting</u> from the disclosure:

- G tips off H about a pending money laundering investigation. At his trial he calls B who says the tip off had no effect because he had already been tipped off by C;

- X tips-off Y by email on Monday morning to move money from his local bank account because an application is being made to court later that day for a restraint order. Unbeknown to X, Y is out of cell phone cover on his private jet and does not receive the message until after the restraint order has been obtained. At his trial he calls Y to say that it was impossible for X to have received the tip-off until after the restraint order was obtained;

- D tips-off E that a money laundering investigation in under way and his house might be searched. In fact the Police have no plans to search E's house and never do so although an investigation is in train. D argues at his trial that he should be acquitted because there was in fact no prejudice to the Police investigation.

- I tips-off J in Bermuda on Monday morning that a money laundering investigation has been started by local Police. Earlier that day in London, a newspaper has published a story about Scotland Yard seeking the assistance of Bermuda Police in relation to the same money laundering investigation.

24. These scenarios are each variants of the facts of the present case. However, there is a distinction between the first three scenarios and the fourth. In the first two cases, prejudice might well have been caused but for the intervention of events beyond the control of the accused. In the third case prejudice might not have been caused in the precise way envisaged by the accused, but may well have been caused in other ways. In the fourth scenario, however, it was never objectively possible (let alone probable) that the disclosure would cause any prejudice when it was made, because the information in question had already entered the public domain. In my judgment it is far easier to infer a legislative intention that the conduct of G, X and D should be held to be unlawful than it is in the case of I. It is far from straightforward, however, a to cleanly separate an assessment of what was likely at the point of disclosure from what effect the disclosure subsequently had.

25. In the present case it was argued at trial that (1) most broadly, no prejudice was "likely" because the information disclosed not only did not in actuality result in prejudice, and (2) more narrowly, that the disclosure was never "likely to cause prejudice". This was because, *inter alia*:

(a) the information supplied was so obvious that the target of the investigation would not have been influenced by it;

(b) the information supplied had no effect because the target of the investigation was already aware of the investigation; and

(c) the information supplied had no value because some of it was invented.

26. Ms Clarke submitted that all such matters went to mitigation, but not to proof of the essential elements of the offence. This was perhaps an oversimplification of the proper analysis. It was nevertheless obvious that merely disclosing the existence of the investigation was potentially likely to prejudice it. The value of the specific information given matters not in this regard. the fact that the target of an investigation already knows of it from another source does not mean that a second or third tip-off might prompt him to take evasive action because he did not take initial tip-offs seriously. The Appellant's essentially intuitive argument appeared to me from the outset to be sound as a matter of principle. It construed the conduct which Parliament seeks to prohibit through section 47 as the act of tipping-off (coupled with the requisite intent on the part of the accused, of course) by passing on information which might prejudice an investigation irrespective of the actual results. After all, there are other offences under the Act which prohibit conduct which achieves the practical result of assisting a suspect to retain the benefit of the proceeds of crime, notably section 44. In my judgment construing section 47 in the manner contended for by the Crown is a purposive construction which is entirely consistent with the wider legislative context in which the particular provision is found. However, after more careful scrutiny, it is clear that the same apparently results-focussed argument may potentially be relevant to the prior determination of whether the disclosure was likely (.i.e potentially) to prejudice the investigation at all.

27. As the main argument relied upon by the Respondent was that the natural and ordinary meaning of the word "likely" was "probable", it is therefore necessary to consider with more precision whether it is possible in a criminal statute to construe the word "likely" as meaning anything other than probable. Mr Doughty relied on the High Court of Australia's holding that the word in the statutory phrase "likely to cause death" meant "probable and not possible": *Boughey-v-The Queen* [1986] HCA 29. However, Gibbs CJ prefaced this conclusion (at paragraph 4) with the following words: "*It is trite to say that the meaning of a word will be influenced by the context in which it appears.*" On further analysis it is in fact clear that the term "likely" is frequently used in a sense connoting a propensity for leading to a particular result, even if the fact that such a result has in fact occurred is relied upon as evidence of

such a propensity. For instance in *Hammond-v-DPP* [2004]EWHC 69 (Admin), May LJ described the elements of a public order offence in the following way:

> "*10. It was accordingly necessary for the prosecution to prove that the sign which Mr Hammond was displaying was threatening, abusive or insulting and that it was within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. They also had to establish that Mr Hammond was aware that the sign might be threatening, abusive or insulting. Reading what the sign says and looking at the photograph of it, it is evident that it was not a threatening sign and the case has not been put on the basis that it was abusive. It is, however, put on the basis that this was an insulting sign and that more than one person was likely to be caused harassment, alarm or at least distress; the evidence of that being that several people, in fact, were…*"

28. More apposite still is the following holding as to the meaning of the words "*likely to result in physical injury*" in a criminal statute by the English court of Appeal in *R-v-Szczerba* [2002] EWCA Crim 440 :

> "*23. We also take the view, in the light of our construction of the phrase to which we shall shortly come, that the appellant's conduct, in the present case, was 'likely to lead to physical injury" (compare Cochrane and Connors , to which we have referred and R v Newsome [1997] 2 Cr App R(S) 69). The appellant threatened the victim with a walking stick, his fist and a screwdriver and he knocked the spectacles off her face. All of those activities, in our judgment, gave rise to more than a mere risk of injury. He also put his hands round her throat, for some 2 minutes and applied pressure. That assault, on a 71 year old lady was, in our judgment, likely to lead to marks on the neck, and could very well have led to cardiac arrest or vagal inhibition.*
>
> *24. In our judgment, although the mere risk of injury is insufficient to give rise to a violent offence, it does not have to be shown that injury was "a necessary or probable consequence" (see Cochrane page 712). <u>Conduct which could very well lead to injury is in our judgment properly characterised as likely so to lead</u>. It is to be noted that the words of the statute are not 'likely to cause injury,' but "likely to lead to injury". Mr Fitzgerald, rightly points out that the*

statute here under consideration is a criminal one and therefore, he submits, it should be construed in a narrow way: it is on that basis that he proffers his preferred interpretation, based on probability.

25. The other matter for consideration, however, when assessing the intention of Parliament, is that the legislature were here clearly concerned with effects on victims and with protecting the public. Words take their meaning from their context. Protection of the public was one of the matters which was relevant to the decision of their Lordship's House in the case of Re: H [1996] AC 563 whether meaning of "likely to suffer significant harm" in section 31 of the Children's Act 1989 was considered. In our judgment, some support for the conclusion which we have reached, as to the meaning of "likely to lead to" is to be found in the speech of Lord Nicholls of Birkenhead in that case at 585 A-F." [Emphasis added]

29. More recent persuasive authority which follows the same vein is *Wallis-v-Bristol Water Plc* [2009] EWHC 3432 Admin. The relevant offence used the more restrictive words "*likely to cause contamination*". Nevertheless, Tugendhat J concluded:

> "*18. In my judgment, 'likely' in these regulations is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm to public health in the particular case. This interpretation does not offend against any principle of the criminal law. Parkin v Norman does not require that in all penal measures the court must take care to see that 'likely'• is not treated as if it meant 'liable'•. As the court said in that case, the court's task is to construe the words of the section in light of the Act as a whole.*"

30. Extracting the principles from the above analysis in parallel legal contexts and applying them to the construction of section 47 of the Proceeds of Crime Act 1997, the Legislature here may be said to have been clearly concerned with preventing money laundering and nullifying the negative effects on the efficacy of investigations if tipping-off were to occur. On this basis, "*likely to prejudice*", the words used in section 47 (not "likely to cause prejudice") may fairly be construed as meaning "could very well prejudice". It is also significant that that the broad and fluid term,

"*prejudice*", which can be moulded to fit the requirements of an infinite variety of legal and factual contexts, is used.

31. Buttressed by the above analysis, I can more confidently conclude that the two English authorities relied upon by the Appellant are highly persuasive and should be followed. As to the meaning of "likely", Ms Clarke astutely referred the Court to one passage (concerning parole) in the judgment of Munby J *R (on the application of Alan Lord)-v- The Secretary of State for the Home Department* [2003] EWHC 2073 (Admin):

> "*100. In my judgment 'likely' in section 29(1) connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.*"

32. The only authority she could identify touching upon prejudicing an investigation in the proceeds of crime context (which my own researches have not been able to improve upon in any way) was *R-v-Kishor Doshi* [2011] EWCA Crim 1975. This case concerned the UK counterpart to our own section 42, but nothing turns for present purposes on the distinction between the related offences of prejudicing an investigation and tipping-off. The Deputy-Director submitted that the following *dictum* in *Doshi* illustrates the point that the degree of actual prejudice caused by the disclosure in question goes to the gravity of the offence and is not an essential element which must be proved:

> "*13. Counsel on behalf of the appellant submits that the prosecution did not point to any actual prejudice caused by the appellant's actions, nor was there any contention by the prosecution that the appellant's relationship with Bewick was generally corrupt. A report from Durham Prison by a doctor, dated 30th June of this year, states that the appellant's various medical conditions are in fact being managed perfectly satisfactorily in the normal way and that the appellant is compliant with treatment. Nevertheless, says Mr Rutter, both the 18 month prison sentence and the six year disqualification are excessive.*"

33. In *Doshi*, the appellant tax advisor admitted informing his client about a production order but denied knowing that it related to an ongoing investigation. He went to trial on this issue alone and, apparently, his legal advisors did not consider that the question of whether any actual prejudice had been caused was relevant to anything more than sentence. This is, admittedly, very indirect support for the proposition that potential prejudice is all that needs to be proved. This case does provide valuable support nonetheless. Experience teaches that intuitive and/or instinctive assumptions about how a statutory provision should be interpreted are often entirely consistent with a more fully articulated reasoned analysis. It is, or ought to be, self-evident that informing the target of a covert investigation, directly or indirectly, that he is under investigation is inherently prejudicial. As remarked in '*Millington and Sutherland Williams on the Proceeds of Crime*', Third Edition, at paragraph 21.93:

> "*If a person was to disclose to the subject of an investigation the fact that law enforcement authorities had commenced an enquiry…this could seriously prejudice the outcome of the enquiry. Accordingly, the legislation has been framed in such a way that such disclosures can themselves give rise to criminal charges.*"[2]

34. I therefore find that the "likely to prejudice" element of the tipping-off offence created by section 47 of the Act merely requires the Prosecution to prove that the disclosure might very well have prejudiced the investigation, without regard to whether, for reasons not known to the accused, actual prejudice was not in fact likely. The crucial conduct which the statute prohibits is (1) making a disclosure about a money laundering investigation which the accused knows or suspects has started or is about to start, a disclosure which (2) objectively viewed at the time when the disclosure is made, may well prejudice the investigation, while (3) knowing or suspecting that the disclosure might very well be prejudicial. Clearly, each case ultimately falls to be determined on its own facts and the approach to construing section 47 which I have adopted is significantly shaped by the particular nuances of the issue in controversy in the present case.

35. I nevertheless tentatively suggest one broad interpretative and legal policy consideration. What impact the disclosure actually happens to cause, provided those essential elements of the offence are established, will almost invariably only be relevant not to guilt or innocence, but to the gravity of the offence. In my judgment it would be inconsistent with the manifest purpose of section 47 for persons properly charged with contravening the section to be able to escape liability based on fortuitous happenings after they have made a disclosure which, when made, might well have

[2] Section 333 of the Proceeds of Crime Act 2002 (UK) creates a somewhat different type of offence with the "tipping-off" label. Section 342 ("*Prejudicing an investigation*") is more similar to the Bermudian "tipping-off" provision. The UK penalties are substantially less in both cases.

prejudiced an investigation. That does not exclude the possibility that what impact the disclosure was actually likely to have in all the circumstances of a particular case may form a legitimate basis for testing the validity of the Prosecution's contention that the disclosure in objective terms had a potentially prejudicial effect. It would be inappropriate to construe a penal provision with such severe penalties as creating liability for wholly abstract cases of prejudice.

36. Establishing that, objectively viewed, the disclosure might well prejudice an investigation must mean prejudice in real world terms. In the last of the four scenarios considered above, therefore, I would be entitled to be acquitted on the hypothetical facts assumed:

- I tips-off J in Bermuda on Monday morning that a money laundering investigation has been started by local Police. Earlier that day in London, a newspaper has published a story about Scotland Yard seeking the assistance of Bermuda Police in relation to the same money laundering investigation. I is charged of contravening section 47 of the Proceeds of Crime Act 1997. He is entitled to be acquitted because when the impugned disclosure was made, it was not objectively likely to prejudice the relevant investigation.

37. It would obviously be an abuse of process to prosecute a 'tipper-offer' in a variety of circumstances where no prejudice could conceivably be caused because, for instance, the target of the investigation has already been arrested when the impugned 'disclosure' is made. On the other hand, it should not matter to the guilt of an accused person who makes a disclosure which might have prejudiced an investigation at the time when it was made that due to fortuity the potential prejudice was vitiated by subsequent events.

Merits of appeal

38. One can now return to the impugned decision of the Magistrates' Court. The Learned Magistrate did not have the benefit of full submissions on the questions considered above. The submissions on the likely to prejudice issue which were made can be concisely stated as follows:

(a) Prosecution: Inspector Simons testified that the disclosure was made when a covert investigation was pending and the home of B (the recipient of A's message) could have been searched as a matter of standard procedure. He

also testified that tipping can generally prejudice an investigation by resulting in the removal of the target of the search. The charge was proved;

(b) Defence: "*Likely to prejudice…this means probable-i.e. 51% or more*". The investigation was the "*worst kept police secret*" and could not be said to prejudice the investigation if, as B testified, C (the target of the investigation) already knew.

39. The Learned Magistrate correctly identified two key issues arising for his determination:

> "*1) Did the defendant know or suspect that a police officer (the police) was proposing to act in connection with an investigation which was about to be conducted into money laundering?; and*
>
> *2) Did the defendant disclose information to* [B] *which was likely to prejudice that proposed investigation.*"

40. He resolved the first question in favour of the Prosecution and the second question in favour of the Defence. It was not on this basis necessary for him to proceed to consider the third potential element, namely whether the Defendant knew or suspected that the disclosure was likely to be prejudicial. He found as a fact that it was not likely to be prejudicial. In reaching that finding, however, I find that the Learned Magistrate erred in law by applying the wrong legal test. He can only have accepted the Defence submission that the Prosecution had to establish that prejudice was probable and not just possible because his crucial factual findings focussed on the likely ultimate impact of the disclosure rather than its potential prejudice. Two key findings were:

(1) C, the target of the investigation, knew about the investigation already although B, the recipient of the disclosure did not previously know it related to money laundering;

(2) B was unlikely to retain any incriminating information at her property because as a Police Officer, she would have been aware of the risk of a search.

41. These two key inferential findings are unsupportable and inconsistent because one can only determine what property is incriminating if one has some idea of what an

investigation is about. If B was unaware of a money laundering investigation, she would have had no reason be anxious about retaining financial records or phone records, for instance. But more importantly than that, these findings are based on a view of the law which imposes too high a burden on the Prosecution in terms of proving the "likely to prejudice limb" of the offence constituted by section 47 of the Act. All the Prosecution needed to prove was that the disclosure might well have prejudiced the investigation, and such a finding was clearly justified by a combination of:

(a) the evidence of Inspector Simons to the effect that an investigation was pending when the disclosure was made and that B's residence might have been searched;

(b) the content of the disclosure, which encouraged B to be prepared for a search; and

(c) the evidence of B herself that prior to the disclosure she had no idea the investigation related to a suspected money laundering offence.

42. The Appellant has accordingly succeeded in demonstrating an error of law which undermines the central finding made by the Magistrates' Court in acquitting the Respondent to the present appeal.

Findings: disposition of appeal

43. Section 19 of the Criminal Appeal Act 1952 provides as follows:

> "(1) *The Supreme Court, in determining an appeal under section 4 by an appellant (being an informant) against any decision in law which led a court of summary jurisdiction to dismiss an information, shall allow the appeal if it appears to the Supreme Court that the dismissal of the information should be set aside on the ground of a wrong decision in law; and in any other case shall dismiss the appeal.*
>
> *(2)The Supreme Court, on allowing an appeal as aforesaid, may set aside the dismissal of the information and may remit the matter to a court of summary jurisdiction with a direction to that court to convict the respondent or otherwise to proceed in accordance with law; and the court of summary jurisdiction shall govern itself accordingly.*"

44. Should the dismissal of the Information be set aside? If so, should the Magistrates' Court be directed to convict, bind over or retry the Respondent? Identifying errors of

law on an appeal under 4 of the Criminal Appeal Act does not automatically guarantee remittal to the Magistrates' Court with a direction to convict or retry.

45. In another case in which Ms Clarke appeared for the same Informant and succeeded in clarifying the law, *Fiona Miller (Police Sergeant)-v- Jeca O'Mara* [2014] Bda LR 25, I approached the issue of what formal Order to make with the following considerations in mind:

> "*33. The difficult question, it has to be said, is whether or not it can be said that these errors actually resulted in the acquittal. The question of the rationale behind the restrictive terms of section 4 was explained by Ground CJ in the Burrows case as being the rule against double jeopardy. And, as I stated earlier, he expressed the view that there must be a direct causative link between the error and the acquittal.*
>
> *34. In all the circumstances of the present case, I am unable to find with any conviction that the errors of the law of which the Crown complain were in fact responsible for the acquittal. In the sense that, if the Learned Senior Magistrate had directed himself correctly, he would likely have reached a different result. And for these reasons, despite having found that there was considerable legal merit to the appeal, I would dismiss the appeal*."

46. In the present case a similar but also somewhat different difficulty arises. It is clear that the acquittal rests on a view of the law which should have resulted in a finding that one essential element of the offence charged was proved. However, as a result of the finding the Magistrates' Court did reach, no finding at all was made on another related but distinct element of the offence. Is it open to this Court to conclude that if the Magistrates' Court had (as it should) found that the disclosure was likely to prejudice the investigation, then a finding that the Respondent knew or suspected that such a result was likely inevitably follows? Ultimately, I resolve this finely balanced question in favour of the Respondent, freely confessing that while Ms Clarke has swayed my head on the law, Mr Doughty has swayed my heart on the facts.

47. As disgracefully unprofessional as the Respondent's behaviour undoubtedly was, his ultimate defence (if all other things were decided against him) was that he committed what his counsel described in closing as an "indiscretion" and that he should be given the benefit of the doubt. There was credible evidence before the Court that the disclosure was motivated by love and not corruption. It is impossible to safely conclude that, had the Learned Magistrate proceeded to consider whether the Respondent knew or suspected that his disclosure was likely to prejudice the investigation that he would have declined to give him the benefit of the doubt. As the Respondent stated under cross-examination, he was trying to get B to leave A and he was playing the role of "*sort of her knight in shining armour with no facts*…" Indeed, a trier of facts would have to have a heart of stone to conclude that a senior Police Officer should be found guilty of a career-ending offence based on such unusual facts.

This Court is in no position to make primary factual findings on an issue which was never directly addressed in argument or in the decision of the Magistrates' Court.

48. For the avoidance of doubt I should add that had I felt bound to set aside the dismissal of the Information, I would have remitted the matter to the Magistrates' Court with a direction that a finding that the charge was proved be entered but that the Respondent should be given an absolute discharge. The reasons for this should be obvious. The unusual mitigating factors are so strong that if the offence charged had been proved, a criminal conviction would have been a disproportionate way of dealing with the offender in all the circumstances of the present case.

49. The present case is, in effect, a test case on section 47 of the Proceeds of Crime Act 1997. Nothing in this Judgment should be taken as suggesting that this Court does not appreciate the importance of protecting the integrity of money laundering investigations and enforcing the highest standards of probity within the Bermuda Police Service.

Conclusion

50. For the above reasons, the appeal is dismissed, although the important point of law raised has been resolved in favour of the Appellant.

Dated this 2nd day of December, 2016 _____
IAN RC KAWALEY CJ