IN THE KIRIBATI COURT OF APPEAL]
CRIMINAL JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

Criminal Appeal No. 7 of 2017

BETWEEN	THE REPUBLIC	APPELLANT
AND	SUBASH CHANDRA ROY	RESPONDENT

Before: Blanchard JA
Handley JA
Hansen JA

Counsel: *Tewia Tawiita* for appellant
Kiata Kabure for respondent

Date of Hearing: 10 August 2017
Date of Judgment: 16 August 2017

JUDGMENT OF THE COURT

[1] This is an appeal from the acquittal of the respondent, a Bangladeshi national married to a Kiribati woman, on two charges. The first was for carrying on business in TabNorth in 2011 and 2012, contrary to s.18(1) of the *Foreign Investment Act 1985* as amended. The second was for contravening Condition 5 of the respondent's Residency Permit in 2011 and 2012 by unlawfully carrying out his business in TabNorth. Thus both counts depended on the prosecution proving on the criminal onus that the accused carried on a business, and in the case of Count 2, that it was his business.

[2] The prosecution called three witnesses from TabNorth, two of whom (PW1 and PW2) carried on retail businesses on the island and purchased goods

from the respondent for resale through their shops. PW3 acted for the Island Council as a Revenue Collector responsible for receiving licence fees for businesses registered with the Council.

[3] PW1 and PW2 said that they only dealt with the respondent and had no dealings with his wife, and knew nothing about her. The respondent did not tell them that he was acting for her. He delivered the goods they agreed to purchase, and they paid him cash on delivery. PW3 produced copies of the receipts she gave the respondent for the licence fees he paid for the business in 2011 and 2012. They were in the name of Suhag Roy, the respondent's eldest son, and evidenced payment for "Retail Store Licence".

[4] The respondent and his wife gave evidence. He did not challenge the evidence of PW1 and PW2 that he had acted as a travelling salesman during 2011 and 2012 selling goods to other storekeepers on TabNorth and receiving payment. Nor did he challenge the evidence of PW3 that he paid the fees for the renewal of the Council's licence for a retail store. He denied having any proprietary interest in the business which he said belonged to his wife, and said his role was limited to helping her because she had to look after their second child. He said that he also sold goods in the shop.

[5] He was not asked where the money came from to start the business, or about the bank account, or who handled the purchase of its stock in trade. He was not cross examined with a view to establishing that he was contracted to his wife as a paid employee. He said "My wife running the business. I just help her. That's all". He said that the business was "under my wife, but gave the son's name".

[6] The wife gave evidence that because business was slow at the shop at times in 2011 and 2012 she asked her husband to go and sell her merchandise. She said that the business was hers with the business name of Suhag.

[7] The first count under the *Foreign Investment Act* depended on proving that the husband carried on a business on TabNorth during 2011 and 2012. The term "carrying on business" is relevantly defined in s.2 as amended in 2000 as follows:

> **"carrying on an economic activity and includes**
>
> **……**
>
> **(b) administering, managing or otherwise dealing with property, both real and personal as an agent legal personal representative or trustee and whether by an employee, agent or other representative or otherwise;"**

[8] Although the husband acted as a travelling salesman for the business and sold goods to other traders he, and other sales persons, would not ordinarily be described as dealing with the stock they are selling. Moreover para (b) of the definition includes persons who act "by an employee" indicating that an employee who acts on behalf of the employer is not relevantly carrying on the business. In our judgment the Act does not disclose an intention to criminalise the conduct of employees and volunteers who assist in a business, but do not own it and for that reason cannot obtain a licence under the Act.

[9] The trial Judge said that the defence evidence was not rebutted by the prosecution and that "no credible evidence was adduced that the business actually belonged to the accused". He continued "merely selling goods, which was explained, in my view" is not carrying on business for the purposes of this offence. If it were so then a shop assistant or an employee ….. would be regarded as carrying on business. If the legislature wanted 'carrying on business' to have such a wide meaning [it] would have said so by legislation". We agree.

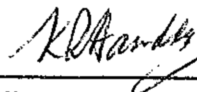
[10] The Republic failed to establish any error of fact or law in the Judge's judgment on the first count.

[11] The second count charged the respondent with an offence under s.23(1)(k) of the *Immigration Ordinance* in that at TabNorth in 2011 and 2012 he "unlawfully carried out his business which contravening clause 5 of the Conditions of his permit" (sic). There can be no doubt that if the respondent had carried out *his* business on TabNorth during those years he would have been in breach of Condition 5 of his residency permit and in contravention of s.23(1)(k) of the Ordinance. However the Judge said:

> **"As regards the second Count ..... I find that this could stand only if the offence in Count 1 has been proved".**

[12] In our judgment this was correct in respect of the second Count as framed and the verdict of acquittal on the second Count cannot be disturbed. The prosecution did not prove that the business was owned by the respondent. The appeal fails on both Counts and must be dismissed.

Blanchard JA



Handley JA

Hansen JA