

LEGALFOXES LAW TIMES

INVESTIGATION OF WHITE-COLLAR CRIMES AND ITS EVIDENTIARY VALUE

By P Krishna Arjun

Keywords: Evidence, Crime, Organised, appreciation, wrongful gain.

Abstract:

Crime is the commission or omission of an act forbidden by Law and offence is an act which is mentioned as punishable as per IPC, 1860. Whenever a crime happens it is made punishable as per the provisions of IPC, but before that act is made punishable or guilt of the accused is proved beyond any reasonable doubt, there is a due process of law is to be followed. For all Civil rights violations, the facts have to be proved beyond preponderance.

The procedural laws along are invoked for the trail of both the Civil and Criminal Offences but one act is very common for all of them i.e. the appreciation of the Evidence through the provisions of The Evidence Act, 1872¹. In an Adversarial form of Justice system, the role of Evidence Act has more prominence as the whole trial is based upon the appreciation of the evidence only.

Generally, a crime is committed or a right is violated primarily it may be necessary for survival under given circumstances or to enrich themselves with more wealth. In this process the wrongdoer adopts wrongful means for enriching themselves with wrongful gains. A White Collar Crime is one of such offence where there is no necessity for the accused person but it is done for enriching themselves by adopting wrongful means to make wrongful gains.

*Research Scholar, Faculty of Law, Osmania University, Hyderabad. Email ID: karjun1975@yahoo.com

¹01 Act of the year 1872

The wrongdoer generally a qualified person entrusted with responsibility does the wrongful act whose whereabouts are known only at a later stage and only after a proper audit or scrutiny of his acts. The tracing of the offence becomes even more difficult if white collar crime is conducted in a organised manner, which makes the discovery of the crime more difficult. The organised character of the crime makes it more difficult in tracing of the crime as it is committed by hand in glove of the persons involved in it. So usually the crime is not traced as long there is adequate understanding existing between the wrongdoers. It can only be traced by an unbiased audit of the books and acts of the staff who are professionals in their work and approach.

The appreciation of evidence is another herculean task as most of the evidences are erased or removed due to organised character of the crime. This generally happens as if one of them is caught then there is a higher probability of the others also getting caught is more hence, appreciating and finding of evidences to nail such wrongdoers stands to be the crux.

Introduction

The growth and diversification of businesses have led to an increase in white collar crimes. The term ‘white collar crime’ was first defined by Edwin Hardin Sutherland as crimes committed by persons who hold high societal status and repute in their profession. As the complexity of such crimes has grown over the years and investigations have become refined, we have seen an increase in private professional services offering support to companies and their management in dealing with white collar crimes.²

These support services extend from providing an in-depth analysis of the crime to the management, carrying out forensic investigations into the affairs of the company, including audit and forensic diligence reports and preparing the company for legal proceedings. The need for internal private investigations has also increased as a result of strengthening of laws on compliances and reporting of white collar crimes. The allegations may vary from offences under the Indian Penal Code (such as fraud, cheating, forgery, etc.) to offences under offences under special statutes (such as money laundering, insider trading, corruption, etc.).

The Need for Internal Investigations

² <https://corporate.cyrilamarchandblogs.com/2020/06/for-or-against-forensic-diligence/>

Investigation into a white-collar crime is initiated upon the crime being brought to the attention of the company. One of the ways in which a white-collar crime may be brought to light is by a whistle blower complaint. A whistle blower complaint is usually a concern/issue raised by a person (whether an employee or a third party), who makes disclosures about certain illegal/unethical activities of the company under various statutes.

In cases where a white-collar crime is discovered within a company, it has become a common practice to hire accountants or legal professionals to carry out a forensic investigation into the affairs of the company. These independent investigators remove (or reduce) the possibility of bias and carry out a forensic analysis of the records of the company. In fact, the authors have recently advised the Indian subsidiary of a foreign company where allegations of fraud and siphoning of funds were made against an employee. Basis the detailed forensic investigation report, a criminal complaint before the Economic Offences Wing, and simultaneously a commercial suit was filed before the Bombay High Court. The forensic investigation report allowed the management to strategize on its future course of action and assess the costs that may be involved in pursuing the same.

The purpose of the investigation is to conduct an inquiry into the company and assess the loss suffered, the nature of the offence committed, and whether or not a formal investigation is required. Such professionals conduct an investigation similar to what may be carried out by investigating authorities if an official complaint were to be registered, allowing the company to be ready for official investigations.

The ultimate goal of a forensic investigation is to build from the base and uncover the complete truth about the charges being investigated. One of the major advantages of a private forensic investigation is the fact that it maintains confidentiality of the parties involved, allowing for a company to assess its internal structures, and can even thereafter be used as the basis for an action (or defence) before a legal authority.

Evidentiary Value of Forensic Reports

While forensic diligence reports are often vital in understanding facts and culpability of a company and its officers/ employees, questions often arise as regards the admissibility of such

independently obtained evidence before a court or legal authority. Such forensic reports may be admissible as expert evidence.

Sections 45 to 51 of the Indian Evidence Act, 1872 (**Evidence Act**) lay down the provisions relating to expert evidence and third-party witnesses, under which a forensic expert would fall. Section 45 allows the judge to appoint an expert having specialised knowledge, experience or skill in foreign law, science, art, handwriting or finger impression to assist the court in reaching a judgment based on the facts presented before it. The words 'science' and 'art' have been construed broadly under Section 45 to expand its applicability, and the opinion of accountants, etc., have also been included under Section 45.³

Section 45 is applicable to both criminal and civil cases. It must be noted that while a forensic expert is not expressly mentioned in the fields covered under Section 45, the evidence given by the forensic expert, regarding the private investigation is usually examined under the said section of the Evidence Act, and is generally admissible in Court. In fact, the reliance on such reports during formal legal proceedings is only rising, since it provides structure and focus during the proceeding.

Forensic reports, however, are not the be-all-end-all in legal proceedings, especially those of a criminal nature. The cardinal rule of the law of evidence is that the best evidence must be produced before the court, which implies that primary evidence will be given importance over secondary evidence. An expert witness is sometimes an exception to the same to assist the court in reaching its decision.

While the evidence given by an expert witness is not binding on the court and will not supersede the evidence provided by an eyewitness⁴ (and must generally be corroborated), it is not a rule of law that all expert opinions must be corroborated for them to be admissible by the court.⁵ Additionally, it has been held that a court cannot form its opinion solely on the basis of expert opinion as it is not regarded as conclusive proof.⁶

³ *Basudeo Gir v State*, AIR 1959 Pat 534

⁴ *Forest Range Officer v P. Mohammad Ali*, 1993 SCR (3) 497

⁵ *Murari Lal v State of M.P.*, (1980) 1 SCC 704

⁶ *Chennadi Jalapathi Reddy v. Baddam Pratapa Reddy*, (2019) 14 SCC 220

It is also important to note that during an internal investigation, the private investigator may become privy to sensitive personal data or information of persons (**SPDI**), including financial records, health information, etc. Currently, such data is protected under the Information Technology Act, 2000 (**IT Act**) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (**IT Rules**). The IT Act and IT Rules prescribe the procedures required to safeguard such SPDI and the penalties for unauthorised usage of such SPDI.

Another aspect that is relevant to the decision to conduct a forensic diligence is that a report once commissioned, becomes a record of the company/entity. There may be instances where such a report is available, which points to an infraction, however, no action is taken. In such a scenario, if the report is found during official investigations, the management (or persons who were aware of the contents of the report) may become culpable in the offence as well.

A relevant factor in determining the evidentiary value of a forensic report in such a situation can be found under Section 126 of the Evidence Act, which provides for attorney-client privilege. If a company has engaged the services of a legal counsel for the purposes of conducting an internal investigation, the same shall be protected under Section 126. This protection also covers all documents, reports, etc., that may have been drafted by the legal counsel during their engagement and continues after termination thereof. In a 2003 judgment, the Bombay High Court observed that documents drafted in anticipation of litigation “*for the purpose of seeking legal advice and for use in the anticipated litigation*” are covered under the protection of Section 126.⁷

This privilege extends to all documents and data perused by the advocate, all communication and correspondence between the parties and all documents and reports drafted by the investigator. In the event that the company decides to pursue legal action, following the results of the private investigation, it will have to agree to waive its right to attorney-client privilege so that the said expert may be examined as a witness before the court and that the report made by the expert may also be relied upon.

⁷ *Larsen & Toubro Limited v. Prime Displays (P) Ltd., Abiz Business (P) Ltd. and Everest Media Ltd., (2003) 105(1) BomLR 189*

Conclusion

Internal investigations have become a fairly common method of assessing the allegations before a formal complaint is filed. It allows the company to properly assess the allegations made and the reality behind the same. In cases where the internal investigation is conducted by a lawyer, Section 126 of the Evidence act ensures that confidentiality is maintained due to attorney-client privilege.

While the opinion of an expert is not binding and its probative value would depend on the corroborative evidence available, the same is increasingly becoming a reliable tool to prosecute or defend an allegation of white-collar crimes, especially when justified along with efficient investigative practices.

