IN THE COURT OF APPEAL OF SEYCHELLES

THE ATTORNEY GENERAL

APPELLANT

v

LUBOMIR PODLIPNY

RESPONDENT

SCA 32 of 2011

==========

Counsel: Mr B. Galvin, State Counsel for the Appellant
Mr C. Lucas for the Respondent

Date of hearing: 1st April 2014
Date of judgment: 11th April 2014

JUDGMENT

TWOMEY, MATHILDA,.

[1]. The Appellant has appealed against a decision of the Supreme Court in which Renaud J ordered that cash amounting to €100,000 found in the possession of the respondent at Mahé International Airport on 14th March 2009 and forfeited by the Financial Investigative Unit (FIU) be released to the respondent pursuant to section 35(6) of the Anti-Money Laundering Act 2006 as amended by Act 18 of 2008 (AMLA).

[2]. The proceedings in this case were protracted but the facts can be gleaned from the affidavits on record. On the 14th March 2009, the respondent, Lubomir Podlipny, a Czech citizen, arrived in Seychelles. His ticket indicated that he had initially departed Prague en route to Mahé via Paris to stay overnight in Mahé and return to Prague via Paris the following day. He was routinely stopped and checked by customs officials. In the course of a search of his luggage, €100,000 made up 200 x 500 Euro notes were found concealed in his wash bag. The respondent's version is that he had not concealed the money and had volunteered the information about the money to the officials. He had however not declared the money when he entered Seychelles as he is obliged to when the sums exceeds US$10,000 or its equivalent in any currency under section 34A (1) of AMLA. Agents from the FIU and the NDEA (National Drugs Enforcement Agency) were notified and Mr. Podlipny was interviewed at the airport.

[3]. Further searches were undertaken and documents were seized from the respondent. These documents included a plan of land at Takamaka which he wished to purchase, receipt of payment of a deposit he had made to one Martin Vlk and a written agreement for the proposed sale of the land. He was asked where he had obtained the €100, 000. His explanations varied - that he had withdrawn the money six months before from the bank and had kept the money in a family safe, that he had recently obtained money as he had just sold a company and he kept the proceeds from the sale of the business in a safe in his house in Prague or that his father gave him money from the family safe to secure a deposit on the land. He was however unable to explain how some of the money came to be wrapped in bank wrappers which bore 2007 and 2009 date stamps and how and where he had changed the money from Czech koruna to Euro.

[4]. In explaining how he had come to learn about the land for sale in Takamaka, Mahé, Seychelles, he claimed that he had previously seen documentary programmes on Seychelles and earlier in the year in 2009 had met Martin Vlk, a Czech national living in Seychelles at a party. On expressing his interest to Mr. Vlk to purchase land in Seychelles, he had been introduced to another Czech national living in Seychelles, one Jan Poupa. Subsequent to this meeting, he claims that he had a further meeting with Mr. Vlk who had then sent him plans of land belonging to a Mr. and Mrs. Kuehn, Czech and German nationals also living in Seychelles. He had then paid a deposit of €30,000 for the purchase of the land to Mr. Vlk.

[5]. The respondent further confirmed in his affidavit that when asked to explain the provenance of the money in his luggage, he requested that the officers not contact the Czech authorities as he had been recently convicted of attempted tax evasion. Subsequent to the find by the officials and their interview with the respondent, the money was seized pursuant to section 34 (1) of the AMLA which provides that:

> *"(a) A member of the police, or an officer of customs or an immigration officer, notwithstanding that they might be an assets agent may search without warrant a person, his luggage or other property in his immediate vicinity or recently in his possession and any vehicle belonging to him or in which he was to be found or nearby which is reasonably suspected of being connected to him, if the member of the police, or officer has reasonable grounds for suspecting that —*
>
> *(i) the person is importing or exporting, or intends or is about to import or export, or has possession or control of an amount of cash which is not less than the prescribed sum;*
>
> *(ii) the cash represents benefit from criminal conduct or is intended by any person for use in connection with any criminal conduct; and*
>
> *(iii) the cash in excess of the sum prescribed under section 34A was not declared by person when entering or leaving the Republic.*
>
> *(b) The said member of the police or officer may seize, and in accordance with this section, detain any cash (including cash found during a search under subsection (1)(a) if —*

(i) its amount is not less that the prescribed sum and

(ii) he has reasonable grounds for suspecting that it represents benefit from, or is intended by any person to be used in connection with any criminal conduct;

[7]. On 26th March 2009, the appellant applied to the Court for a detention order under section 34(2) of AMLA. These provisions state:

"*(2) Cash seized by virtue of this section shall not be detained for more than 14 days unless its detention beyond 14 days is authorized by an order made by a Judge of the Court and such order shall be made where the judge is satisfied —*

(a) that there are reasonable grounds for the suspicions mentioned in subsection (1) of this section, and

(b) that detention of the cash beyond 14 days is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in the Republic or elsewhere) of criminal proceedings against any person for an offence with which the cash

(3)(a) any order under subsection (2) of this section shall authorize the continued detention of the cash to which it relates for such period not exceeding 12 months beginning with the date of the order, as may be specified in the order, and a judge of the Court, if satisfied as to the matters mentioned in that subsection, may thereafter from time to time, by order authorise the further detention of the cash but so that no period of detention specified in such an order, shall exceed 12 months beginning with the date of the order."

Perera C.J. ordered the detention of the cash for six months adding that the order of detention should be served on the respondent to enable him to show cause if any, against the order.

[8]. There then followed the filing of several Court documents by both parties which may have led to some confusion. Be that as it may, on the 25th September 2009, the respondent chose not to file an application to show cause why the detention order should not be maintained but instead a motion supported by affidavit for the release of the money under section 35(6) of AMLA. On the 19th October 2009, the appellant moved for a further detention of the money and although this is not recorded in the Court proceedings we are informed by counsel that further detention was granted until 26th December 2009 pending hearing of other matters related to the detention of the money. The learned trial judge was under the misapprehension, however, that he had to rule on the original detention orders. This is obvious from the Court proceedings of 19th October 2009 in which he states:

"This case started ex parte in March 2009. I have to put on record that I am tired and fed up of the filing work. Staff at the Registry should be able to file documents properly for the Court to adjudicate. If the file is such that documents are backwards and forwards (sic) *this is misleading to the Court and will cause prejudice to the parties before the Court. Documents must be*

properly filed and in proper sequence... This case is adjourned for the address of Mr. Lucas for the release of the funds and also his argument in support of the notice of motion of the further detention of the fund…"

The Court again sat briefly on the 13th November 2009 and the following is the record of the proceedings:

"Mr. Lucas [for the respondent]: I wish to submit my reply to the submission made by the Attorney General and I think it is to put an end to all the submissions in this case.

Mr. Esparon [for the Attorney General]: I have received the submission, the case therefore is ripe for ruling.

Court: Counsel will be advised of the date for ruling."[verbatim P 13]

Between November 2009 and 1st April 2010, a full four months, until the Court next sat there is no mention of anyone being informed of the date of the delivery of the ruling. It is the appellant's contention that fearful of the detention order lapsing pending the Court's ruling it applied for a forfeiture order on 12th March 2010; the application was supported by the affidavit of the deputy director of the FIU, Liam Hogan.

[9]. Both the application for forfeiture and for release of the money were made pursuant to provisions of section 35 of AMLA and it is important at this stage to bring these provisions to light:

"35 (1) A judge of the Court may order the forfeiture of any cash which has been seized under section 34 of this Act if satisfied, on an application made while the cash is detained under that section, that the cash amounts to not less than the prescribed sum and he has reasonable grounds for suspecting that it directly or indirectly represents any person's benefit from, or is intended by any person for use in connection with any offence.

(2) Any application under this section shall be made, by or on behalf of the Attorney General.

(3) The standard of proof in proceedings on an application under this section shall be that applicable to civil proceedings and an order may be made under this section whether or not proceedings are brought against any person for an offence with which the cash in question may be connected.

(4) Where it appears to the Court on evidence tendered by or on behalf of the Attorney General consisting of or including evidence admissible by virtue of subsection (5) that the cash constitutes directly or indirectly the benefit from criminal conduct or was intended by any person to be used in connection with criminal conduct, the Court shall make an order of forfeiture under this section in respect of the whole or, if appropriate, a specified part of the cash unless it is shown to the satisfaction of the Court on evidence tendered by the respondent or any other person that the cash does not constitute directly or indirectly the benefit from criminal conduct or was not intended by any person to be used in connection with criminal conduct.

(5) Where the Director or Deputy Director of the FIU states in proceedings under this section or section 34 on affidavit or, if the Court so permits or directs, in oral evidence, that he believes, that —

(a) the cash constitutes, directly or indirectly benefit from criminal conduct; or

(b) is intended by any person for use in connection with criminal conduct, then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matters referred to in paragraph (a) or in paragraph (b) or in both paragraphs (a) and (b), as may be appropriate and the Court shall make an order detaining the cash under section 34 or forfeiting the cash under section 35, unless it is shown to the satisfaction of the Court by or behalf of the person from whom it was seized, or a person by or on whose behalf it was being imported or exported that the cash did not constitute, directly or indirectly, benefit from criminal conduct; or was not intended by any person for use in connection with any offence.

(6) On an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, to a Judge of the Court at any time, the judge may order the release of so much of the cash which is detained under section 34(2), as he considers essential to enable the applicant to meet his reasonable living expenses and reasonable legal expenses in connection with the seizure.

(7) When hearing an application under this section, or sections 34 or 34A the Court may make such order as it considers appropriate.

No hearing ever took place, only oral arguments from Counsel were heard on 6th May 2010 at which point Renaud J adjourned the matter for ruling on the motions and applications of the parties on 10th June 2011.

[10]. In his decision, the learned judge found in favour of the respondent's application under section 35 (5) (6) and (7) of AMLA, releasing the funds detained. He also found that the application for a forfeiture order was premature as the Court had not yet ruled on previous applications for detention and/or release of the money. He stated that the statutory time set out in the Act for the appellant to apply for a forfeiture order would only start to run after the Court had delivered its ruling on the application dated 14th March 2009for a detention of the money.

[11]. The appellant has appealed this decision on eleven grounds:

"1. The learned trial judge erred in law in ruling in this matter under section 35(6) of the Act of 2006/2008 in so far as that section is referable only to an application by a relevant person for the release of so much cash which is detained as the Court considers essential for reasonable living and legal expenses and which was not in issue.

2. The learned trial judge erred in law in ruling in this matter without regard to the provisions of section 34(3)(b) of the Act of 2006/2008 which provides that where an application to the Court is made under section 35(1) as was the

situation in this case), cash detained under section 34 shall continue to be so detained until the application is finally determined.

3. The learned trial judge erred in law in ruling in this matter other than on foot of the application of the appellant under section 35(1) of the Act of 2006/2008.

4. The learned trial judge erred in law in permitting and /or not directing a trial of the facts in dispute by viva voce evidence and cross-examination.

5. Further or in the alternative, the learned trial judge erred in law ruling in this matter without making any or adequate account of the belief evidence of the director of the FIU as provided in section 35 (5) of the Act of 2006/2008.

6. Further or in the alternative, the learned trial judge erred in law in ruling in this matter without making any or adequate account of the affidavit of Liam Hogan filed in support of the application for forfeiture under section 35(1) of the Act of 2006/2008.

7. Further or in the alternative, the learned trial judge erred in law in his application of law regarding the respective burdens of proof.

8. Further or in the alternative, the learned trial judge erred in law in regarding the case of Gilligan v Criminal assets Bureau as relevant authority. That case related to freezing orders under the Irish Proceeds of Crime Act 1996 and is not relevant to the seizure and subsequent detention and forfeiture of cash in the circumstances described in section 34(1) (a) (i) of the Act of 2006 and 2008.

9. Further or in the alternative, the learned trial judge erred in law in that he attached no, or no proper significance to the affidavit evidence in the proceedings as to whether or not the sum of €100,000 in question represented benefit from criminal conduct or was intended by any person for use in connection with any criminal conduct.

10. Further or in the alternative, the learned trial judge erred in law in finding that the cash in question was not intended for use in criminal conduct namely an offence under the Immoveable Property (Transfer Restriction) Act.

11. Further or in the alternative, the learned trial judge erred in law in that he failed to attribute any appropriate significance to the following undisputed facts established:

1. The respondent Lubomir Podlipny is a convict having been convicted of criminal conduct in the Czech Republic,

2. He was sentenced to a term of imprisonment for six years to commence on 12 March 2009,

3. On the 14th March 2009being unlawfully at large he arrived in Seychelles in possession of € 100,000 in cash, in large denominations.

4. The respondent Lubomir Podlipny benefitted from tax offences of which he had been convicted.

5. The respondent Lubomir Podlipny remains unlawfully at large while seeking relief from the Courts of Seychelles."

[12]. Grounds 1, 2, 3 and 6 refer to the fact that the respondent made his application for release of the funds that had been seized under section 35 (6) of AMLA. It must be noted from the pleadings filed, that the original application had been made under section 36 (6) and then amended with leave of the Court to section 35 (5) (6) and (7). None of these provisions are applicable for the release of money as pleaded by the respondent. The Honourable Attorney General has withdrawn ground 1 but we continue to be puzzled by the order made by the learned judge for the release of the money by the respondent under section 35 (6) which is clearly wrong. An order under section 35 (6) does not release the whole of the detained money but releases so much money as the Court considers "essential to enable the applicant to meet his reasonable living expenses and reasonable legal expenses in connection with the seizure." The learned trial judge in his decision ordered the release of all the money under section 35(6) of AMLA stating that the application for release "has merit and is sustainable in law." Counsel, Mr. Lucas concedes that this was misconceived. Release of the money could have been applied for under section 34 (5) of AMLA which provides:

> *"At any time while cash is detained by virtue of the foregoing provisions of this section a Judge of the Court may direct the release of all or part of it, if satisfied on an application made by the person from whom it is seized or a person by or on whose benefit it was being imported or exported, that there are longer, any such grounds for the detention of all or part of the cash, as are mentioned in subsection(1) of this section."*

No such application was ever filed and therefore could not have been entertained by the trial judge.

[13]. **I**t is also clear that the trial judge misunderstood the purport of the provisions of the Act in relation to the application for detention orders and forfeiture orders under AMLA. We have perused his judgment and the following finding by him is to say the least, puzzling:

> *"It is my considered judgement that even time has overtaken the procedure in this matter, the granting or not of the application of the seizure and detention of the cash of the Respondent in March 2009 at the International Airport is not academic as it is a stage in the statutory process.*
>
> *It must be borne in mind that Court had ordered that the initial 6 months of time and also the further 3 months extension based on an ex parte basis. The Court now having heard the parties has to adjudicate whether the seizure and detention of the cash was justified.*
>
> *The continued holding of the cash by the applicant is deemed legal as it is legally held by the applicant at the instance of the Court pending its ruling. The matter being sub-judicae, I therefore hold the statutory time set out in AMLA for the applicant to*

enter an application for forfeiture order will only start to run again after the Court has delivered its ruling on the application made on 14th March 2009.

The application for a forfeiture order entered by the applicant on 12th March 2010hasbeen made, I believe, through abundance of caution in order to ensure that it cannot be found to be out of time in terms of the Act. This is well recognised but the Court will not entertain it unless it has disposed of the original application. The respondent will have to be given an opportunity to respond to the application for a forfeiture order.

It is now my considered ruling that the application for the forfeiture order will remain valid on record after this Court has delivered its ruling on the original application of 14th March 2009 and the application of the respondent for the release of the cash. Depending on the outcome, the application for a forfeiture order will either become ineffectual or it will be accordingly processed and the respondent will be given time to respond thereto before the Court adjudicates thereon.

Having now disposed of the contentious matter of the application for a forfeiture order, this Court will proceed to adjudicate, firstly on the original application of the applicant for seizure and detention of the cash in issue and secondly on the application of the respondent for the return of the cash."

This is an unfortunate misapprehension of the provisions of AMLA. The learned trial judge therefore laboured under the misapprehension that AMLA provided for interlocutory hearings followed by substantive hearings of detention applications. That is not the case. We have before in similar cases under the Proceeds of Crime Act (POCA) commented on the fact that interlocutory proceedings under these two pieces of legislation does not indicate that the proceedings and rulings are interim. They can in fact be the final proceedings between the applicant and the respondent (*FIU v Mares Corp 92011) SLR 404,407*). They are interlocutory only insofar as they are intermediate proceedings between seizure and forfeiture.

[14]. Unfortunately, the trial judge was all at sea on other matters as well. Firstly, there was no issue of seizure of money before the learned judge. Seizure of the money was made by the FIU with written authorisation of Chief Superintendent M. Bastienne under section 34(1) of AMLA (supra). Seizure is therefore not subject to legal scrutiny by a judge. The provisions of AMLA make it clear that the Attorney General must apply for a section 34 detention order within 14 days of the seizure of money. In this case the money were seized at the airport on 14th March 2009 pursuant to section 34 (1) of AMLA. The provisions allow this seizure to remain in place for fourteen days after which time a detention application must be made before the Court. This was duly done on 27th March 2009 pursuant to section 34(2) of AMLA (supra) and the order for detention of the money for six months was granted by Perera C.J. A further detention of the money was also granted on 26th October 2009. There was therefore no outstanding application for the detention of money before Renaud J. The only matters before him were an application for release of the funds erroneously made under section 35 (5) (6) (7)of AMLA and the application for a forfeiture order for the money being detained. We have already dealt with the application for the release of funds under the wrong provisions of the law. We now have to deal with the application for the forfeiture order.

[15]. We consulted counsel to ascertain their views as to how we should proceed since we were of the view that the matter of forfeiture had not been dealt with properly or at all and the affidavits in respect of the application revealed contested issues. It would have been preferable in this case to allow the evidence of each side to be tested in open Court so as to come to a determination on the evidence. In *Mares* (supra) we observed

> *"The affidavits filed before the Court clearly showed contested matters which could not have been resolved even by the judicious appraisal of the averments contained in the affidavits. In [our] view no trial of the issues had taken place and the trial judge hastily moved to summary judgment. This matter could only have been resolved by a proper trial of the issues bearing in mind the different evidentiary burdens."*

We continue to be of the view that where there is a contested application for detention or forfeiture of money or goods the matter should proceed to a hearing.

[16]. We cannot second guess what would have happened if the learned trial judge had addressed himself properly both to the law and the facts in this case. He laboured under the false apprehension that he was considering the detention orders. He also incorrectly granted an order for release of the funds under the wrong provision of the law. He did not consider the application for a forfeiture order as he deemed it premature. We have given the matter much thought in terms of remitting this case for rehearing of the application for a forfeiture order. We are mindful however that this matter first came before the Court in March 2009. We are here five years later and Counsel for both parties have urged us in the interests of justice to expedite this matter by resolving it on the affidavits filed before us. We are wont to weigh evidence at this remove and do so exceptionally on this occasion. We are comforted in our decision by the fact that the only evidence before the court was the affidavits of the parties. Further, in *Beeharry v R*(2012) *SLR 71* we stated:

> *"Whilst we do not generally interfere in the perceptive function of the judge, the appellate Court is as well off as the trial judge in the exercise of its evaluative function." (77)*

This is indeed a case where we are more or less in the same position as the trial judge in terms of evaluating the evidence so far adduced.

[17]. The application for the forfeiture order was made under section 35 of AMLA (supra). It must be noted that the money detained prior to the application for a forfeiture order by operation of section 34(4) (b) of AMLA (supra) continued to be detained until the Court disposed of the application for forfeiture. Grounds number 4, 5, 6, 7, 8, 9, 10 and 11concern the procedure to be adopted by the Court in cases where the Court has to deal with contested applications made under AMLA for detention or forfeiture of money. In this context, there are close parallels between AMLA and the Proceeds of Crime (Civil Confiscation) Act 2008 (POCA). Both Acts contain provisions relating to belief evidence (section 35 (5) AMLA, section 9 of POCA) of the director and deputy director of the FIU and states that if the Court is satisfied that there are reasonable grounds for the belief evidence it has to make the detention or forfeiture order:

> *"unless it is shown to the satisfaction of the Court by or behalf of the person from whom it was seized, or a person by or on whose behalf it was being imported or*

exported that the cash did not constitute, directly or indirectly, benefit from criminal conduct; or was not intended by any person for use in connection with any offence."

The standard of evidence in this case is on a balance of probability. We shall proceed purely on this basis.

[18]. The respondent arrived for a 24 hour visit of Seychelles with luggage in which €100,000 was found. He gave different accounts of how he came to be in possession of the money. He filed an affidavit in which he extensively sets out his account of events prior and during his short time in Seychelles which is rehearsed at paragraphs 2- 5 above. The FIU has produced correspondence from Interpol which states that an arrest warrant had been issued on 31 July 2009 for the respondent as he had evaded a prison sentence of 6 years for "tax fraud (para. 148 of the Czech Penal Code" and that according to

"criminal records in our respective databases, Podlipny was between 1998 and 2006 prosecuted-suspected for criminal offenses like theft, embezzlement, curtailment of taxes, fees and similar mandatory duties, restriction of personal freedom, extortion, violation of domestic freedom, damaging of another's property, robbery fraud on a creditor etc." (sic)

His Counsel, Mr. Lucas submitted that Interpol was attempting to vilify his client and urged the court to only take into account the fact that the respondent has only been convicted of tax fraud and that he had finally submitted himself to the authorities to serve his sentence. We have no evidence to that effect. We cannot overlook the correspondence from Interpol. In any case we are not overly troubled by the fact that the respondent may have one or several convictions. Our only concern is whether the money currently being detained is money obtained from a legitimate source. The fact that he has been convicted of an offence involving money and is now serving a jail term for it makes the appellant's statutory belief convincing.

[19]. The respondent has also produced an agreement for the sale of land dated 12th March 2009 in Prague which is mysteriously called a 'loan contract' in which the respondent and his brother Marek Podlipny:

"Article I- hereby loan Ing. Martin Vlk the amount of €105,800 [and] Ing Martin Vlk undertakes to use the loaned amount for the advance of the purchase price" of land at Takamaka."

Article II- The debtor confirms with his signature the receipt of the stated amount and undertakes to use the loaned amount as the advance for the purchase price for the plot of land specified in details i the Agreement...

Article IV-Even if the contracting parties will be aware that it not legally enforceable; they hereby undertake to fulfil this agreement (sic)."

The provisions of this agreement produced by the respondent himself contradicts his averment in his affidavit he had only paid the sum of €30,000 to Mr. Vlk . In any case, the respondent has never brought any evidence to confirm that Mr. Vlk was acting for the owners of the land, Mr. and Mrs. Kuehnl. This, in our view clearly indicates that the agreement was a sham and there was no intention to go through normal channels to seek

government sanction for the purchase of land as is necessary for non-Seychellois or purchase land at all.

[20]. Further, the respondent in order to satisfy the court that the money being detained did not constitute benefit from criminal conduct, produced an extract of his bank account and a share transfer agreement. In our view, these only compound matters for the respondent and support the belief evidence of the appellant. Both the account extract and the share transfer agreement contain information which reveal irreconcilable differences with the respondent's averment that the money seized had originated from proceeds of the sale of his shares in Nordigas. The share transfer agreement is between Marek Polipny, whom the respondent states is his brother, and one Zdenek Vacek. The agreement also states that Marek Polipny is "the only lawful owner of 22 pieces of the common shares of Nordigas" (our emphasis). Not only does the agreement fall short of showing that such a transfer was actually executed but it concerned third parties to the matter before this Court. Further, the transfer agreement which is dated 28h December 2005 states that:

> *"This agreement enters into force and effect on the date of its signing by both parties to the agreement"*

Yet the money obtained from the shares was according to the account statement he has produced deposited in varying amounts between the 11 November 2005 and 16 December 2005 i.e. before the alleged share transfer took place. We are therefore unable to agree with the respondent that the money seized from him at the airport was indeed money obtained from the sale of shares of belonging to him. Ultimately, that is the only issue: it matters not a jot how much money one has deposited in one's account, what is important is to show that the money deposited was not derived from criminal conduct.

[21]. There is also the matter of the bank note wrappers. Presumably the wrappers indicate the date on which the respondent's money was changed from Czech krona to Euro. The wrappers have 2 stamps. One bears the date of 30 October 2007 perforated into the wrapper by a counting machine. There is also a date presumably stamped by the bank of 16 February 2009 when the money was issued to the respondent. Yet, the respondent has produced a bank document confirming the withdrawal of €100,000 on 15 October 2008 from his account, four months before the date stamped on the bank note wrappers. This discrepancy makes it unlikely that the money seized for the respondent and which were bundled in these wrappers was indeed the same money withdrawn from the bank in 2008.

[22]. Finally, the appellant's affidavits state that the FIU were given a password by the respondent to access the information on his laptop. The information from the laptop was copied to a standalone hard drive but on entering the password it immediately attacked and destroyed all the information on the drive. The respondent has not contested these averments in his affidavit and we therefore accept the evidence of the appellant that the password given was a 'duress password" deliberately given by the respondent to impede the investigation, behaviour not consistent with someone who has nothing to hide.

[23]. This is a case where the respondent has in fact made the case for the appellant both in his actions and in the documents he has produced. Section 35(5) of AMLA permits a forfeiture order to be made solely on the belief evidence of the Director or Deputy Director of the FIU. In *FIU v Sentry Global Securities and ors (2012) SLR 331* in relation to the

provisions of section 9 of POCA which is analogous to section 35 (5) of AMLA, we stated that when the provisions are relied, on the following guidelines should be followed:

> *"1. On an application by the designated officer of FIU, if it appears to the Court on prima facie evidence (or reasonable belief evidence) of the designated officer of the FIU that the property is the benefit of criminal conduct and the respondent neither appears nor contests the application, the Court must make the order.*
>
> *2. Where, in response to the prima facie evidence or belief evidence the respondent engages in the court process, be it by filing an affidavit or by leading direct evidence and is able to show to the satisfaction of the court (on a balance of probabilities) that the specific property is not wholly or partly directly or indirectly the benefit of criminal conduct, the Court shall not make an order under section 4 of POCA.*
>
> *3. Where the Court is not satisfied that the respondent has adduced evidence on a balance of probability that the property is not the proceeds of crime then the Court shall make the interlocutory order…" (339)*

An application for a forfeiture order under section 35(5) of AMLA follows the same procedure and is characterised by the same shift in the burden of proof. The burden of proof in section 35 (5) is neither one of a criminal case of 'beyond reasonable doubt' nor that of a civil matter 'on a balance of probability'. It is the same burden of proof as contained in sections 3 and 4 of POCA which we described in *Sentry Global* (supra):

> *"All that is necessary is "a reasonable belief" that the property has been obtained or derived from criminal conduct by the designated officer of the FIU. That belief pertains to the designated officer and hence involves a subjective element. It is therefore only prima facie evidence or belief evidence. No criminal offence need be proved, nor mens rea be shown... As long as there are reasonable grounds for the belief by the applicant that the property is the proceeds of crime it is sufficient evidence to result in the granting of the order."*

Once the appellant has produced prima facie evidence or reasonable belief evidence, the burden of proof shifts onto the respondent who has, on a balance of probability, to prove that the money detained does not constitute directly or indirectly the benefit of criminal conduct or was not intended to be used in connection with criminal conduct. Even then, the statutory belief of the appellant is not conclusive of the matter and can be counteracted by the evidence produced by the respondent. In this case, the evidence of the respondent did not counteract that of the appellant but rather bolstered it. It is our view that the respondent has therefore failed to satisfy the Court that the money seized from him did not constitute benefit from, criminal conduct or was not intended to be used in connection with criminal conduct.

[24]. For these reasons, we allow the appeal. We quash the order of dismissal pronounced by the learned judge and substitute in its place our own in the circumstances.

> 1. We order the forfeiture by the Republic of Seychelles of the sum of €100, 000 presently detained, pursuant to section 35(1) of the Anti-Money Laundering Act 2006 as amended by the Anti-Money Laundering (Amendment Act 2008).
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> 2. Costs are awarded to the appellant.

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M.TWOMEY	**S. DOMAH**	**A. FERNANDO**
JUSTICE OF APPEAL	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated this 11th April 2014, Ile du Port, Mahé, Seychelles.