IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A), A.Fernando (J.A), M. Twomey (J.A)]

Civil Appeal SCA01/2014

(Appeal from Supreme Court Decision281/2013)

DJS Capital Limited — 1st Appellant

JN Capital Limited — 2nd Appellant

Versus

The Financial Intelligence Unit — Respondent

Heard: 14 April 2016

Counsel: Philippe Boullé for the Appellants
Barry Galvin of the Respondent

Delivered: 22 April 2016

JUDGMENT

M. Twomey (J.A)

[1] This interlocutory appeal is brought against a decision by Karunakaran J in relation to an application made by the Respondents pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008 (POCA).

[2] The Appellants' summarised grounds of appeal are that:

1. The learned judge did not properly address the issue of belief evidence.

2. The phrase "the said property was acquired in or all in part with or in connection with property that directly or indirectly constitutes benefit from criminal conduct" is a failed process of adjudication.

3. The learned judge did not consider the fact that the Appellant had used the POCA provisions to hold on to the Appellants funds since it had failed after 280 days of investigation to back up its accusations against the Appellants under the provisions of AMLA.

4. Calling the Appellants to adduce evidence to rebut the affidavit evidence was procedurally erroneous.

[3] For the purpose of the present case it is important to note that the procedural rules in POCA proceedings were explored and established by the Court of Appeal in similar cases (vide *FIU v Mares Corps* (2011) SLR 404, *FIU v Sentry Global Securities Ltd.* (2012) SLR 331, *FIU v Cyber Space Ltd* (2013) SLR 97).

[4] In 2016, after this appeal had been lodged, new procedural rules under POCA (vide S.I. 12/2016) came into effect. For educational and sensitization purposes it is useful to bring the new Rule 12(1) of POCA Rules 2016 to light. It provides:

"For the avoidance of doubt, no independent appeal shall lie from a direction given by the Court under these Rules in a pending matter."

Hence, the present appeal might not have been permitted under these provisions.

[5] Be that as it may we have to consider the present appeal, the proceedings of which, in our view reflect poorly on the Court below in terms of the procedure followed. It should never be repeated.

[6] However, it must also be noted that although the provisions of POCA have been in force since 2008 and those of AMLA since 2006, there is a singular refusal by both judges and legal practitioners to familiarise themselves with the provisions of the Acts and the relationship between the two statutes.

[7] Simply put, AMLA creates offences by providing that it is an offence for a person to do a number of things in relation to property which is either wholly or partly the proceeds of

crime or any other criminal activity when the person knows or believes such property is the proceeds of crime.

[8] Conversely, the regime of POCA does not concern criminal law but rather civil law. In both *Hackl v FIU* (2010) SLR 98 and *AG v Podlipny* (2011) SLR 176, we were at pains to point out this fact. We can only reiterate that it is not the person who is dealt with in those proceedings but rather property in their possession or control. The provisions therefore trigger a process *in rem*.

[9] POCA provides for the civil forfeiture of property where there is belief that the property is the proceeds of crime. In the POCA process, the belief of the applicant that property is the proceeds of crime is admissible as evidence, provided that the court is satisfied that there are reasonable grounds for the belief. The initial hearing is ex parte (a section 3 application), but there is provision for a full interlocutory hearing after thirty days (a section 4 application) where the respondent has an opportunity to show the Supreme Court, on the balance of probabilities, that the property is not the proceeds of crime.

[10] There is therefore no criminal conviction necessary. As we said in *Clive Lawry Allisop v R* (FIU) (unreported), CA 24/2010:

[Since POCA provisions]are 'standalone proceedings,' it is clear that in order to make an application under sections 3, 4 or 5 of POCCCA there is no need for the applicant to prove the commission of a predicate crime."

[11] In clearer terms in *Hackl v FIU* (2010) SLR 98 we cited the South African case of *Simon Prophet v National Director of Public Prosecutions* CCT 56/05 which explained that:

"Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner."

[12] Under a section 4 application, the Financial Intelligence Unit (FIU) must only persuade the Supreme Court on the balance of probabilities that the property for which the order is sought is the proceeds of crime and is worth SR50, 000 or more. If the Supreme Court is

so persuaded, on the basis of the evidence of the applicant, it must grant the order, unless the respondent to the application satisfies the Court that it is not proceeds of crime.

[13] In other words, once the applicant establishes proof that the property is the proceeds of crime, the burden of proof shifts to the respondent to show that it is not. There is also a general safeguard whereby the Court must not make the order if it is satisfied that there would be a serious risk of injustice.

[14] In this particular case an interlocutory order pursuant to section 4 of POCA was applied for on 29th November 2013by the FIU, prohibiting the Appellants or any other person from disposing or dealing with the whole or any part of specified property, namely USD 141,987.27 in account number xxx [account number withheld for security purposes] in the name of the first Appellant and USD476, 482.93 in the name of the 2nd Appellant in account number xxx [account number withheld for security purposes] together with any interest accruing, both accounts at BMI Offshore Bank Seychelles.

[15] It also applied for an order pursuant to section 8 of POCA appointing a Receiver of the property.

[16] Its application was supported by the affidavit of its Deputy Director Liam Hogan (since deceased). Attached to his affidavit were a number of Exhibits, namely LHM1 – LHM4.

[17] This affidavit contained what is known in these types of proceedings as the *belief evidence* of Mr. Hogan as permitted by section 9 of POCA, made on the basis of what he described as credible and reliable information that had been made to him.

[18] The gist of his averments are to the effect that the Appellants were both Seychellois International Business Companies respectively holding the bank accounts specified in paragraph 6 supra and that the sole director and beneficial owner of the companies was one Rishi Navani.

[19] A suspicious transaction report on the Appellants' accounts was received by the Respondent triggering preliminary investigations. After enquiries were made, it was impossible to verify if Mr. Navani resided or was domiciled in India or the USA although he had produced an American passport.

[20] An examination of the accounts disclosed that between 10th October 2011 and 6th November 2012, USD 976,169 were received into the 1st Appellant's account and USD2, 115,833.00 were received into the 2ndAppellant's account. The FIU, exercising its statutory powers under section 10(8) of AMLA, issued a requirement for information to the Appellants relating to these accounts.

[21] As a result of the requirement for information the Appellant provided information namely documentation to explain the provenance of the funds, namely: bank statements, invoices and consultancy agreement between Matrix Partners India Management incorporated in Mauritius and the Appellants.

[22] The payments out of the 1st Appellant's account noted as dividends had been used *inter alia* for the following purposes: school fees amounting to USD 104,687.00, USD 500.025.00 for a "G. Navani home purchase". In total, another USD 2,115,833 was paid for the benefit of Rishi Navani from the 2nd Appellant's account.

[23] Mr. Hogan deponed that as Mr. Navani is the only shareholder of the two companies, this may amount to taxable income to him but the Appellants despite several requests, had not provided any information in relation to the tax domicile of the two Appellants or that of their beneficial owner, Rishi Navani.

[24] The statutory belief of the Respondent's deputy director was that the said property constitutes directly or indirectly benefit from criminal conduct, namely tax fraud.

[25] On the first occasion the case was called on 11th December 2013, no counter affidavits or answer in relation to Mr. Hogan's affidavit had been filed by the Appellants nor did they apply to the court to file any. Instead, an unprecedented full blown hearing took place with evidence and accusations from the bar, regrettably with little or no intervention from the Court. We make no comment in regard to these accusations save to state that they were inappropriate, unethical and inexcusable. We hope they will not be repeated.

[26] Before the section 4 application had been brought, the monies in the Appellants' accounts had been frozen under a direction of the FIU pursuant to section 10(4) of AMLA. The Appellants had applied on 13th August 2013 to set aside this freezing order. That

application was supported by the affidavit of Rishi Navani in which he stated that he had provided information as requested to the Respondent, namely that the primary source of the revenue of the Appellant companies were advisory fees under a contract with Matrix India, a company licensed in Mauritius managing venture capital funds.

[27] In this appeal, Mr. Boullé for the Appellants submits that the application to set aside the freezing order issued under section 10(4) of AMLA had never been heard. Mr. Galvin's submission is that the freezing order made in respect of the Appellants' accounts on the direction of the FIU under AMLA has been overtaken by the section 3 and section 4 applications under POCA.

[28] We agree with Mr. Galvin's submission given the statutory scheme of AMLA and POCA and dismiss the Appellants' vigorous assertions which are to the effect that the POCA proceedings were brought to circumvent the fact that the FIU could not obtain proof after a year to bring a criminal prosecution against the Appellants under AMLA.

[29] Since the constitutionality of the provisions of AMLA and POCA are not being challenged and the proceedings undertaken by the Respondent do not breach the provisions of AMLA and POCA we need make no further comment on this issue apart from stating that this ground of appeal has no merit and is dismissed.

[30] Karunakaran J then proceeded to consider the section 4 application. There was before him only the affidavit containing the belief evidence of the FIU. As we have stated (supra paragraph 25) no affidavit from the Appellants had been filed under these proceedings. There was no application by the Appellants to apply the affidavit already filed in the AMLA proceedings to the POCA proceedings. Instead, Mr. Boull*é* proceeded to energetically comment on the behaviour of the FIU generally and in relation to the AMLA proceedings, an approach he also availed of in the present appeal.

[31] Evidence from the Bar is no evidence at all. Moreover we are not persuaded by rhetoric and emotion especially when these are not grounded in evidence. We also note that this appeal only raised procedural issues. Any comment on whether tax evasion or fraud is a

criminal activity or not is not within the purview of this appeal and is therefore disregarded by this Court.

[32] Karunakaran J seems to have been similarly unimpressed by the Appellants' emotive arguments and ruled:

I find that belief evidence [of the FIU] adduced through affidavit are based on reasonable grounds and hence I find them admissible in evidence.

[33] There then lamentably followed another full blown hearing as to what procedure should then be followed, the court misleading itself with ample help from the Appellants' Counsel. And yet so much ink need not have been spilt, nor voices raised or minds exercised. Mr. Galvin for the Respondents did try to point both Court and Counsel to the provisions in POCA but to no avail. Instead Counsel for the Appellants then indicated that he wished to appeal the interlocutory decision and there and then applied for leave to appeal.

[34] Leave was granted, hence this appeal- while the matter in the court below was suspended for another two years.

[35] A ground of this appeal is indeed about belief evidence and its effect. We have stated on countless occasions that belief evidence is a statutory concept defined by section 9 of POCA. It is neither a subset of opinion evidence nor expert evidence as Counsel for the Appellants has submitted it is.

[36] Rather it is a type of evidence defined and provided for specifically in relation to proceeds of crime cases. Section 9 of POCA provides that if after investigations have been made by the FIU, its Director or Deputy Director is of the belief that

(a) the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct; or

(b) the respondent is in possession or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and

(c) the value of the property or as the case may be the total value of the property referred to in both paragraphs (a) and (b) is not less than R50, 000,

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 of the value of the property (our emphasis).

[37] Further, section 9(2) of POCA provides that such belief evidence cannot be made:

except after reasonable enquiries and investigations and on the basis of credible and reliable information that he has reasonable grounds for suspecting —

(a) the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct; or

(*b) the respondent is in possession or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct, and that the value of the property or as the case may be the total value of the property referred to in subsection (1) (a) and (b) is not less than R50, 000.*

[38] Hence the regime of this type of evidence is clearly distinguishable from other evidence commonly brought under common law. This ground of appeal has also no merit and is rejected.

[39] The Appellants have also submitted that the phrase *the said property was acquired in whole or in part with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct* is a failed process of adjudication.

[40] We do not follow this argument. In his submissions, Counsel for the Appellants states that the provision is vague and general and does not provide a proper process of adjudication. It would appear that the provision is being impugned on grounds of unconstitutionality for vagueness. If that is so, then the Appellants should have brought a

constitutional petition. He did not do so but instead appealed on imprecise grounds. Like mathematics, law allows for “no hypocrisy and no vagueness” (after Stendhal).We hold this ground of appeal to be so vague as to be meaningless. It is dismissed.

[41] The final ground of appeal relates to the consequences of the trial judge admitting the belief evidence of the Respondent. Both Counsel for the Appellant and the trial judge misunderstood the provisions of POCA on this score. The trial judge was under the impression that the Respondent had to adduce evidence in addition to its belief evidence before he could decide whether there was a prima facie case. He was also under the impression, as was Counsel for the Appellants, that if the Appellants were to submit evidence the Respondents would have no further right to challenge the evidence. He proposed to fix the case for hearing. Mr. Boullé for the Appellant submitted it would be faster to bring an interlocutory appeal against the order admitting the belief evidence and applied for leave to do so. As we have already stated, leave was granted.

[42] And yet again a reading of section 4 of POCA would have guided them as to the correct procedure. The belief evidence of the Respondent had been admitted and therefore constituted prima facie evidence. The Appellants had not filed and to date have still not filed any counter affidavit or brought any evidence to counter the Respondent’s belief evidence. Once the belief evidence had been admitted, the Court had to make the order pursuant to section 4 unless it was satisfied there was a serious risk of injustice to the Appellants or other persons. In this regard the provisions of section 4 are clear by the use of the imperative *shall*.

[43] The Appellants would continue to have a right to apply to discharge the order at any time after its making if they could satisfy the Court that the property was not benefit of crime or criminal conduct or that it causes injustice to them (vide section 4 (3) POCA).

[44] This ground of appeal also fails and the appeal is dismissed in its entirety.

[45] In the circumstances, as the belief evidence of the Respondent was rightly admitted by the trial judge we now proceed to make the following orders:

1. In pursuance of section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008, we prohibit the Appellants or any other person having notice of the making of this order from disposing of or otherwise dealing with the whole or any part of the property standing to credit in Account Number xxx [account number withheld for security purposes] in the sum of USD 142,987.27 or diminishing its value in the name of DJS Capital Limited at BMI Offshore Bank, Seychelles.

2. We prohibit the Appellants or any other person having notice of the making of this order from disposing of or otherwise dealing with the whole or any part of the property standing to credit in Account Number xxx [account number withheld for security purposes] in the sum of USD 476,482.93 or diminishing its value in the name of JN Capital Limited at BMI Offshore Bank, Seychelles.

3. Thereafter an order pursuant to section 8 of the Proceeds of Crime (Civil Confiscation) Act 2008, appointing Thomas Anthony Quilter, the Director of the FIU as the Receiver of the specified properties and to hold the same in interest bearing accounts in BMI Offshore Bank Seychelles.

4. That the Receiver be entitled to appoint agents or Counsel, or any other person considered by him to be necessary, and pay the costs and expenses of same and his own costs and expenses as they shall arise from time to time out of the funds he shall receive under this order.

5. That the present order remain valid until a disposal order is made pursuant to section 5 of the Proceeds of Crime (Civil Confiscation) Act 2008.

6. That the Appellants pay the costs of the proceedings below and this appeal.

[46] While these interlocutory orders are in force, the Appellants are at liberty to apply to discharge or vary these orders pursuant to section 4 of POCA.

M. Twomey (J.A)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on22 April 2016