

IN THE SUPREME COURT OF SEYCHELLES

Miscellaneous Cause No. 87 of 2012

[2013] SCSC

The Financial Intelligence Unit

Applicant

versus

Richard Battin

First Respondent

and

Terrence Belle

Second Respondent

Heard: 11 March 2013

Counsel: Barry Galvin for applicant

Delivered: 06 May 2013

INTERLOCUTORY RULING

Egonda-Ntende CJ

1. This is an application under section 4 of the Proceeds of Crime [Civil Confiscation] Act hereinafter referred to as POCA seeking an interlocutory order restraining the respondents from dealing with the sum of US\$12,160 that was seized from the second respondent at Seychelles International Airport on 2nd August 2012. The applicant seeks a further order under section 8 to appoint a receiver for this sum of money until further orders of this court. The hearing of this application proceeded *ex parte* as the respondents did not appear in spite of service upon them.
2. The applicant is a statutory organization created under the Anti Money Laundering Act. The first respondent is a Seychellois citizen currently in the Republic of Kenya facing charges of drug trafficking. The second respondent is a brother of a co-accused of the first respondent in the proceedings in Kenya, and is presumably resident in Seychelles.
3. The affidavit of Mr Nichol Fanchette is quite short and its averments shall be set out

in full.

'1. I am an agent of the NDEA duly appointed under the National Drugs Enforcement Agency Act, 2008. I make this affidavit from fact within my own knowledge save where otherwise appears and where so appearing I believe the same to be true.

2. I, say that on 2nd August 2012 I proceeded to the Seychelles International Airport after receiving information that a person namely Terrence Belle was travelling to Kenya with a large sum of money in his possession. At around 1315hrs I proceeded to the check in counter where I saw a male who later identified himself to me as Terrence Belle. I approached him and invited him to the NDEA office at the airport for questioning. He agreed. I was in the company of agent Jimmy Adelaide.

3. I asked Terrence Belle if he had any money on him. He told me he had 12,000 US Dollars. He removed his wallet from his trouser's pocket and he handed to me some US dollars in cash. There was 12,160 US dollars in cash which was in the following denominations; 121 notes of 100 USD, 1 note of 50 USD and 1 note of 10 USD. I informed Terrence Belle that I would be keeping this money in my possession for further investigations. I invited him to the NDEA Station at New Port. At the Station I handed over the amount of 12,160 USD to P/Sgt Johny Malvina for further formalities.'

4. The other evidence is the evidence of statutory belief of Mr Liam Hogan who summarised the grounds for his statutory belief in paragraph 14 of his affidavit which I set out below.

'14. (a) That the first respondent and second respondent's sister namely Latifa Onezime have been apprehended on July 31st 2012 in possession of 3.71 kilos of heroin and are detained in custody and on bail respectively.

(b) That there is confidential information which I accept is reliable, that the first respondent is actively and extensively involved in trafficking of heroin.

(c) That the first respondent has travelled frequently to Kenya and has incurred considerable expenses despite any visible means of income at the material time.

(d) that as per the financial profile having no visible means of income at the material time, the first respondent has accumulated substantial assets, have been able to purchase a number of vehicle and a plot of land, and owns the said cash of US\$12,160.00.

(e) that despite having no visible means of income the first respondent has not sought social welfare payment.

(f) The circumstances of which the said sum of US\$12,160.00 was located namely the confidential information that the money was to be exported, the fact that an attempt was made to export the money pursuant to section 34(a) (1) of the Anti-Money Laundering 2006

as inserted by the Anti-Money Laundering Act, 2011, and also contributes to the offence of money laundering contrary to section 3 of the said AML Acts.’

5. Paragraph 10 of the affidavit of Mr Hogan is also set out below.

‘10. I beg to refer to the affidavit of Nichol Franchette an NDEA Agent sworn herein. I say as appears therefrom that the confidential information turned out to be correct and the said Terrence Belle was intercepted at Seychelles Airport on 2nd August 2012 he was found to be carrying US\$12,160.00 in cash. I am informed and believe that the said Terrence Belle explained his possession of the dollars that around the 2nd August 2012 he received a call from a man he knew as Ally, He was told to come to Providence at a garage to collect some money to bring to Kenya. No money was given to him as apparently he had not purchased a ticket to Kenya. He then used his money to purchase a ticket to Kenya. He returned and met the said Ally again and he was given an envelope in which there was cash to the value of US\$12,160 for him to give to Latifa Onezime. I say that notwithstanding the provisions of section 34 (a) (1) of the Anti-Money Laundering Acts 2006/2011 the said Terrance Belle did not declare the possession of the said money. He was apprehended by an NDEA officer on the basis of confidential information received as described above. He was searched and the said sum located on him was seized. I say that the said funds remain in the possession of the NDEA. I also say that these funds are in the “possession and control” of the Respondents herein within the meaning of that phrase as applied to section 20 (a) of the Act.”

6. The other affidavit evidence available in this case is the affidavit of Mr Brendan Burke which speaks to information being available that the first respondent is involved in drug trafficking in Seychelles.
7. Mr Barry Galvin, learned counsel for the applicant, submitted that this was a straight forward case in which the second respondent was arrested while about to board a flight to Kenya with a sum of US\$12,160.00 which had not been declared in accordance with the Anti Money Laundering Act. Mr Galvin did not specify any particular section of that Act. He prayed that a section 4 order be made in respect of the said sum of money and that a receiver be appointed for it.
8. Under a section 4 application it must appear to the Court on evidence, including evidence admissible by virtue of section 8,

‘tendered by the applicant, that –
(a) a person is in possession or control of --
(i) specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct; or
(ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes, benefit from criminal conduct;’

9. One must examine the evidence adduced in this case and determine if it shows, on the appropriate burden of proof for cases of this nature, that the sum in question was in possession of second respondent, that it belonged to the first respondent and the said funds constitute directly or indirectly benefit from criminal conduct or were acquired wholly or in part, in connection with property that directly or indirectly constituted benefit from criminal conduct.

10. In doing so I take guidance from the Court of Appeal of Seychelles’ decision in The Financial Intelligence Unit v Cyber Space Ltd SCA No. 21 of 2011 in which the Twomey, JA, stated,

‘The present application was contested. The Court should have followed the procedures as indicated in POCA and on established precedent. It should have considered whether there was evidence for the reasonable belief of Mr Liam Hogan. If it so concluded, it should have then ruled on whether there was prima facie case made out. The whole thrust of the POCA legislation, as can be gleaned from a reading of section 4 is for the judge hearing the application to test the belief evidence of the applicant to see if a prima facie case is made out before shifting the burden of proof onto the respondent and to determine if the burden of proof shifted onto the respondent has been satisfied.’

11. In this particular case the hearing was *ex parte* and in that sense not contested.

Nevertheless the decision to be made by this court must still be made on the evidence adduced by the applicant and not by default. The applicant must, by evidence, establish the *prima facie* case essential for the court to shift the evidentiary burden of proof to the other side, even in the absence of the respondent to refute the same. If the evidence falls short on the merits of the application at that stage the application will fail.

12. The evidence that must be considered includes the belief evidence of Mr Hogan in accordance with section 8 of POCA. The court must be satisfied that there are

reasonable grounds for the belief of the Director or deputy Director of the Applicant. This imports an objective standard as far as the court is concerned in order to be so satisfied. The grounds provided as giving rise to the belief of the deputy Director fall short in providing a connection between the money impounded from the second respondent and its alleged ownership by the first respondent. Those grounds as summarized above may point to the fact that the first respondent leads a life revolving around criminal activity but fall short of providing a basis to conclude that the sum of US\$12,160.00 that was in possession of the second respondent belongs to the first respondent.

13. Much has been made of the allegation that the second respondent had gone to the airport, was about to board a flight to Kenya and failed to declare the sums of money he had in accordance with the Anti Money Laundering Act. No mention is made at which point such a declaration must be made. The officer that 'arrested' and questioned the second respondent states that he found him at the check in counter. He asked him to follow him into the NDEA office. There is no evidence that the second respondent had checked in on any flight. Much less that he had gone through Immigration and or Customs and failed to declare what he was in possession of. The respondent on being questioned admitted that he had money on him which he handed over to the agent questioning him. There was no search of his person as alleged by Mr Hogan. The applicant has exaggerated at least in the address of counsel the circumstances surrounding the seizure of the money in question and conduct of the second respondent.

14. There has been no link established between the money in question and the first respondent. It may be true that the first respondent has a profile consistent with criminal activity and or drug trafficking in particular. Nevertheless a link still has to be made between the money found in possession of the second respondent and the first respondent.

15. Apart from the affidavit evidence of the initial arresting officer who seized the funds in question after the said funds were handed over by the second respondent no evidence has been provided by any officer who interviewed the second respondent about particulars of that money, who it belonged to and where he was taking it or

where it had been obtained from. Confidential information provided stated that the money was to be delivered to Onezime, a sister of the second respondent. Even if this was to be the case must it be assumed that it belonged to the first respondent? I find no evidence available to reach that conclusion.

16. In the result I decline to grant this application.

Signed, dated and delivered at Victoria this 6th day of May 2013

FMS Egonda-Ntende
Chief Justice