

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side MC 3 / 2016

(arising in CO57 / 2016)

[2017] SCSC 253

REPUBLIC

Applicant

Versus

EDDY TONY D'UNIENVILLE

Respondent

Heard: 22 February 2017

Counsel: Mr. K Karunakaran for the applicant

Mrs. A. Amesbury for the Respondent

Delivered: 14 March 2017

ORDER ON MOTION

Vidot J

[1] The Republic has lodged an Application for Forfeiture of Proceeds of Crime pursuant to Section 153B of the Criminal Procedure Code (“CPC”), requesting that the court makes an Order for forfeiture of moneys seized from the Respondent, Mr. Eddy D’Unienville following a search that was conducted on his person and at his premises. The search was conducted on 29th July 2016, whereby drugs were seized from the Respondent’s residence. The drugs comprised of 43.78 grams of cannabis resin and 2.16 grams of cannabis herbal materials. On the same day the sum of SR4,860/- was recovered from his trouser pocket and SR30,250 and €40 was found hidden behind a bathroom cabinet. The room was identified by the Respondent as being his.

[2] On 04th November 2016, the Respondent was charged with 2 counts namely;

- i. Trafficking in a controlled drug namely cannabis resin. Contrary to section 9 (1)(d)(iii) and punishable under section 7(1) and the Second Schedule of the Misuse of Drugs Act 2016, (hereafter MODA 2016)

That offence gave rise to the rebuttable presumption of having possessed the controlled drug with intent to traffic in the said controlled drug.

- ii. Possession of a controlled drug contrary to section 8(1) and punishable under section 8(1) and the Second Schedule of MODA 2016.

[3] On 09th November 2016, the Respondent pleaded guilty to those counts and on the same day was sentenced respectively as follows;

- i. on the first count to a fine of SR12,000/-, and
- ii. on the second to a fine of SR2,000/-

[4] The Respondent objected to the Application and was granted time to file an affidavit in reply which was duly done. The affidavit is dated on 24th January 2017.

[5] An Order under section 153B (1) is made after a person has been convicted and the court is satisfied that the offender has benefitted from the offence or from the offence taken together with any other offence of which the offender is convicted in the same

proceedings or when the court takes into consideration in determining the sentence of the offender, on application made by the Attorney General not more than 90 days after the conviction of the person. The application was filed within the prescribed period.

[6] Section 153B (3) provides for matters that the court shall consider before making an Order under subsection (1) in respect of any particular property. These include;

- (i) Seriousness of the offence;
- (ii) any hardship that may reasonably be expected to be caused to any person; and
- (iii) any information showing whether the victim of the offence has instituted or intends to institute legal proceedings against the offender in respect of loss or proceedings against the offender in respect of loss of damage sustained in connection with the offence;
- (iv) any other matter that the courts considers appropriate.

The court shall also have regard to any claim of interest made by any person, other than the person convicted of the offence.

In this present case there has been no claim made by any third party and the court considers that based on the testimony adduced both in affidavit and on oath (ii) and (iii) above has no application. As far as seriousness of offence is concerned, despite the offence committed are drug related, I don't consider the same to be overly serious, taking into account that the quantity of drugs seized is relatively minimal and they are class B drugs.

[7] The Republic called Agent Farida Sabury to testify in support of the Application. She had also sworn on affidavit, attached to the application listing the grounds upon which the application is rooted. She referred to the fact that the accused was convicted in Supreme Court case CR57 of 2016, which offences are drugs related and identified in paragraph [1] above. The witness also referred to the manner in which most the money was concealed; under a wash basin in the bathroom in a small cabinet. That arose their suspicion that the money could have been obtained through illegal activities.

- [8] On behalf of the Respondent, Learned counsel, Mrs. A. Amesbury informed court that her client would rely on his affidavit in reply. Nonetheless, he was tendered for cross-examination by the Applicant. In his affidavit, apart from averring that he is habitual drug user, he stated that he has several sources of income and that includes business interest in a boat. He stated that due to the fact that there are many thieves in the Anse Possession area where he resides, he has to hide his money. Under cross-examination, the Respondent stated that as a habitual user, he sometimes purchase SR7000/- to SR8,000/- worth of cannabis due to scarcity of the same. He testified that he works a lot and therefore has good earnings and that therefore, there is no need for him to be involved in drug trafficking.
- [9] In an application of this nature, the Applicant bears the legal burden to satisfy court that prima facie there are reasonable causes to believe that the moneys seized were obtained by illegal means and therefore should be forfeited. In **R v Hunt [1987] AC 352**, it was held that the burden of proof remains on the prosecution. However, following from **Woolmington v DPP [1935] AC 462**, in exceptional circumstances the burden shifts. That may arise from statutory exception and such exceptions may be expressed or implied.
- [10] This court having satisfied itself that the Applicant discharged the legal burden in establishing that there was sufficient cause for the NDEA to believe that the money was unlawfully obtained and is proceeds of crime, called on the Respondent to negate that belief. This court is of the view that Section 153 B of the CPC, by implication shifts the onus of the evidential burden on the Respondent to satisfy court on the balance of probabilities that the money seized was legitimately obtained. In **R v Edwards [1975] QB 27, 59 Cr. App. R 213**, it was held that there are exception to the fundamental rule that the prosecution must prove every element of the offence charged. These include circumstance arising under enactments. **R v Hunt** (supra) provided that a statute can place the burden of proof on the defendant by necessary implication.
- [11] Even if the standard of proof the Respondent has to discharge is a lower standard than that that set in criminal cases, he failed miserably to do that. This is because the

credibility of the Respondent was totally dismantled. Prior to being sentenced in CR57 of 2016, Learned Counsel for the Respondent had in mitigation pleaded for leniency on her client because he had no employment save that sometimes he cleans the beach. This suggested that he had no secured source of income. This totally contradicted the Respondent's affidavit and evidence given on oath. In his affidavit, the Respondent denies having a bank account, thus the reason that he has large sums of cash at his home. However, under cross examination, he stated he has a bank account. The Appellant was boastful that he has considerable earnings from boat charter business and other fishing activities he is engaged in. If that is the case, the mitigation in the case above mentioned was misleading or he was plainly lying. I do not believe that the payslips he produced in support that he is in full time employment of cleaning beaches are genuine. It is all a fabrication. I say this because the Appellant averred that the person who was employing him for beach cleaning has other workers, yet I find that the payslips serial numbers he produced go in sequence, from 6501 to 6515. It makes no sense for the Respondent to aver in his affidavit that the money was concealed because of thieves in his neighbour and yet he chooses not to bank the money. The Respondent could not under any circumstances be believed. He could not even discharge that evidential burden on the balance of probabilities.

[12] Therefore, I am satisfied that the moneys seized are proceeds of crime and grant the application and order that the money be forfeited to the state.

Signed, dated and delivered at Ile Du Port on 14 March 2017

M.Vidot

Judge of the Supreme Court