

IN THE SUPREME COURT OF SEYCHELLES

Reportable
MA 03/2023

REPUBLIC
(rep. by Shireen Denys)

APPLICANT

And

ASHLEY VEL
(rep. by Karine Dick)

1st RESPONDENT

MATHIAS ST. ANGE
(rep. by Samantha Aglae)

2nd RESPONDENT

FRANCIS BARRA
(rep. by Karine Dick)

3rd RESPONDENT

Neutral Citation: *Republic v Ashley Vel & Anor* (MC 03/2023) (01 December 2023).

Before: Vidot J

Summary: Application pursuant section 74(3) of the Anti-Money Laundering and Countering the Financing of Terrorism Act for continued detention moneys seized

Heard: Counsels filed written submissions

Delivered: 01st December 2023

ORDER

Application partially succeeds in that Order is made that some of the cash seized from the 1st and Respondent is detained together with all cash seized from the 2nd Respondent. Some of the cash seized from the 1st Respondent and all cash seized from 3rd Respondent are to be released to them.

RULING

VIDOT J

- [1] This is an application whereby the Applicant prays an Order from this Court for the further detention of cash seized from the Respondents as they were about to leave Seychelles for

Dubai on the 05th October 2023. The Respondents were accosted at the Seychelles International Airport by FCIU Officers and other law enforcement officers and searched, and cash of an amounts in excess of that permissible for a person to take out of Seychelles was found in the possession of each of them The Respondent do not contest the same but state that they could provide to the FCIU proof of ownership of the cash and that the same was not obtained through illegal means or was to be used in connection with criminal activity.

- [2] The Applicant seeks the following from the Court;
- (a) an interim Order providing for the continuing detention of the cash seized until determination of the case;
 - (b) an Order pursuant to section 74(3) of the Anti-Money Laundering and Countering the Financing of Terrorism Act (AMLCFT Act) ordering the continued detention of the cash seized from the Respondents, pursuant to section 74(2) of the AMLCFT Act for a period not exceeding 60 days;
 - (c) for an Order providing for Notice of any such order to be given to the Respondents or any other persons directed by the Court; and
 - (d) such other Orders as the Court might deem fit.
- [3] The grounds on which this application is rooted are spelt out in the application as follows;
- i. During the search carried out on the Respondents at the arrival lounge of the Seychelles International Airport, when they were schedule to fly out to Dubai, a substantial amount of cash was found in their possession;
 - ii. That the same was seized pursuant to section 74(2) of the AMLCFT Act;
 - iii. That the Respondents failed to produce supporting documents to attest to source of cash found and seized pursuant to section 74(2) of the AMLCFT Act. The permissible period for detention of the cash is about to lapse;

- iv. That the investigation by the FCIU is ongoing and as per section 74(3) of the AMLCFT Act, the FCIU requires the court order to continue detaining the cash.
- [4] The application is supported by an affidavit from Constable Mike Botsoie of the FCIU. In the affidavit he explains the circumstances of the search conducted on the Respondents and states that he has reasonable ground to believe that the cash seized amounting to a total of SR137,138.65 represents proceeds of crime or is intended to be used in connection in connection with criminal conduct, namely money laundering. He makes no further averments in respect of such reasonable grounds.
- [5] From searches conducted on the 1st Respondent €1965.00 (amounting to SR29,824.57), US\$2,700.00 (amounting to SR39,008.79/-) all in different denominations, totalling to SR68,833.36 was seized from him. The 1st Respondent also had the sums of SR900/- AED.1,060.00 and €300 in his possession that was not seized. The 1st Respondent explained that he is a salesman for Petit Car Hire and Marvel Car Hire (hereafter “Marvel”) and explained that he was travelling to Dubai for business purposes.
- [6] The 2nd Respondent had in his possession €3,135.00 (based on documentation provided) and US\$2000/- which he stated was for a friend who asked him to purchase spare parts for him. He did not have supporting documents. However documents were subsequently produced.
- [7] The 3rd Respondent was searched and a sum of US\$2,700/-, and AED65 which he claim was not his but belonged from the 1st Respondent were seized. The 3rd Respondent denies that he made such statement
- [8] The 1st Respondent in his affidavit refutes allegations made by the FCIU and states that he produced documents to prove source of fund. It is not disputed by the Republic that following the seizure of the sums, he has produced his bank statement and that of Marvel, but the Applicant states that more time was needed to consider the documents. Actually , his daughter is one of the Directors of Marvel. He states that at the time of search he did not have necessary documentation on him to provide to FCIU. He explained that that he

had UD\$2,700/- in his wallet which was for future medical treatment. He was to travel to Mauritius in July 2023 but had postponed the trip. He has now shown bank statement of cash withdrawal of SR30,000.00 from what he maintains was for such transaction.

[9] In his affidavit, the 2nd Respondent states that after being accosted by FCIU he had produced bank supporting documents in respect of the €3,135/- and he explained that the US\$2000/- was for Mr. Hubert Alphonse who had requested him to make a deposit on an invoice for spares that Mr. Alphonse would later import into the country. He also produced supporting document for that transaction.

[10] Francis Barra on his part states that since the seizing of the cash he has provided the FCIU with several documents that explain the source of funds. These include bank statements and a letter from one Daniel Vadivello that confirmS that he had exchanged US\$2000/- for SR26,400.00. The 3rd Respondent is the owner of F & M Garage. He refutes allegation that he had stated that the money was for the 1st Respondent. He states that he was travelling to Dubai to purchase spare parts and that he had in his possession US\$700.00 and AED65 which was money that he had saved from a previous trip. He avers that in any case the cash that was in his possession fell below SR50,000.00 which the prescribed amount of cash one can leave the country with.

[11] All the Respondents were examined and crossed examined as to the search and seizure of cash in their possession and the source of the cash seized. They more or less reaffirm the averments in their respective affidavits.

[12] The cash was seized from the Respondents pursuant to section 74(2) of the AMLCFT Act which states;

“The officers referred to in subsection (1) may seize, any cash found during a search under subsection (1) if—

(a) it is not less than the prescribed sum, and

(b) he has reasonable grounds for suspecting that it represents proceeds of crime, or is intended by any person to be used in connection with any criminal conduct and shall

have the authority to seek further information from the carrier regarding the origin of the cash and their intended use and also notify the FIU regarding such cash seizure in such form and manner as may be prescribed.” (underline mine)

[13] Section 74(3) provides that;

Cash seized under subsection (2) shall not be detained for more than 14 days unless the detention beyond 14 days is authorised by an order made by a Judge and such order shall be made where the judge is satisfied;

(a) that there are reasonable grounds for the suspicion under subsection (1);

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

After the expiration the Court may make further order that the cash shall continue to be detained for a period not exceeding 12 months. This is provided for under section 74(4) as follows;

(4) An order under subsection (3) shall authorise the continued detention of the cash for such period not exceeding 60 days beginning with the date of the order, as may be specified in the order, and the Judge, may thereafter from time to time, by order, authorise the further detention of the cash but the aggregate period of detention shall not exceed 12 months from the date of the initial order

[14] In the present case the application is for detaining the cash for a period not exceeding 60 days. This Court holds the view upon a reading of section 74(4) if there is necessity to hold the cash beyond that period of 60 days, there needs to be further application to detain for a period of up to 12 months or less.

[15] Section 74(2)(2) clearly states that the officer seizing the cash must have “*reasonable ground for suspecting that it represents proceeds of crime, or is intended by any person to be used in connection with any criminal conduct*”. Such grounds should be well averred in

the application and in particular in the supporting affidavit to the Motion. Counsels for the Respondents relied on **R v Da Silva [2006] EWCA Crim. 164** to establish that the threshold had not been met by the Applicant. In the supporting affidavit to the Application the Applicant has stated that they suspected the cash seized to be "*proceeds of crime or is intended to be used in connection with criminal conduct, namely money laundering.*" As averred this is a suspicion and a suspicion has to be investigated and confirmed or rejected. However, that suspicion must be based on something tangible.

- [16] In **R v Da Silva (supra)** it was established that suspicion or suspicious activity must be "*more than fanciful*" and that a "*vague feeling of unease*" will not be sufficient to constitute suspicion. In **Shah v HSBC Private Bank (UK) Ltd [20172] EWHC 1283** it was said that it was for the bank, as a party asserting suspicion, to establish the primary fact of the suspicion to justify not following Mr. Parvizi's instructions to transfer funds to him. Ms. Dick argues that that translates into the Applicant having to establish suspicious activity and what made Officers of the FCIU suspicious.
- [17] Learned Counsel for the 2nd Respondent quoted **R v Anwoir [2018] EWCA Crim 1354** wherein the court stated that when proving that the property in question is the benefit of a particular or specific act of criminal conduct, the prosecution need to produce a minimum sufficient circumstantial evidence or other evidence from which "*irresistible inference*" can be drawn that the property in question has a criminal origin. i.e there could be no reason but a criminal one. However, Counsel did not address whether such standard applies at investigation stage as in the present Application or at the time the charge is levelled against a respondent.
- [18] I note that the Respondents were accosted by FCIU officers when they were still at the Seybar Restaurant at the airport. They had not yet gone through immigration. I would understand the officers approaching them where still at the bar, if they had reasonable suspicion that money or property the Respondents had in their possession were proceeds of crime or intended to be used for criminal purposes. In his affidavit, Mike Botsoie does not make any such averments and explain the source of such suspicion. In that sense the affidavit is lacking.

[19] I also note that at the time they were approached and subsequently searched the Respondents had not gone through immigration nor approach any Customs Officer to make a declaration. They should have been allowed to enter the departure area and if no declaration of the cash is made, the officers would have acted. Again, I state if they were approached at the point they were, the affidavit of Officer Botsoie should have been more explicit in qualifying any suspicion that the FCIU had. For example, if the Respondents had connection with people involved or suspected of involvement in criminality, I believe that the suspicion should not be vague and fanciful. Nonetheless, I do not disregard the fact that the absence necessary documentation in their possession, it is more probable than not they would not have declared to the customs officers of cash above the prescribed amount in their possession. It is only a person with relevant documentation that would have approached such officers.

[20] Counsel for the second Respondent has also pleaded to Court not to consider the table of currency seized attached to the affidavit of Officer Botsoie as it offends section 170 of the Seychelles Code of Civil Procedure (SCCP) which states “[A]ffidavits shall be confined to such facts that the witness is able on his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, which the ground thereof, may be admitted.” Reference was also made to sections 168 to 171 of the SCCP. Section 168 reads;

[T]he court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing, on such conditions as that court thinks reasonable:

Provided that where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.”

[21] The contention of Learned Counsel is that the list was not prepared by officer Botsoie and therefore cannot be considered as part of the affidavit. I agree with Counsel. Furthermore, the person who prepared the list did not sign the list. However, even if I were to disregard that list, the amount seized is specified in Officer Botsoie’s affidavit.

- [22] However, even if I hold that Officers of the FCIU needed to have reasonable grounds for seizing the property and that such grounds were not adequately averred in the affidavit of Officer Botsoie, I find that any failure on the part of the Respondents to produce relevant documentation to the source of funds could be tantamount as reason enough for the FCIU to conclude that such sums were intended to be used in connection with criminal conduct. Save for the second Respondents, the other Respondents argued that they did not have necessary relevant documents with them when they were stopped and searched. When the case was first called before the Court, all relevant documents were not available. However, when the case was argued before Court, the Respondents had furnished various documents to the FCIU. I consider some of these documents to be legitimate. Therefore, where there is no issue in respect of a document, such sums should be returned forthwith to the respective Respondent.
- [23] A sum in foreign currency (US\$ and Euros) the equivalent to SR68,833.36 was taken from the 1st Respondent. The sum of US\$2,200 which was given to him by his daughter to purchase spares should be returned to him forthwith. He has provided bank statement to show that the amount was withdrawn from the account of Marvel. Mr. Vel has also furnished his bank statement to show that he withdrew the sum of SR30,000.00 on 30th June 2023 and 01st July 2023. He testified that he exchanged that amount at a Bureau de Change for forex and that he was supposed to use it for medical purposes in Mauritius in July 2023 but he had postponed that trip and still had the sum in his wallet. He states that he purchased foreign currency from Union Exchange, Nouvobanq and Al Salam but failed to produce receipts of the same. I had recommended that the FCIU seeks a warrant on these financial institution to check the veracity of such averment. The 1st Respondent can too recover copy of receipts from them and once they produce such receipts sums equivalent should be returned to him. In the meantime, I extent the detention of that money up to 18th December 2023, when the 60 days for detention of the cash shall expire, unless the Republic files application for further detention or seizure of the cash .
- [24] The sum of US\$2,000/- was seized from the 2nd Respondent. He stated that the cash belonged to Hubert Alphonse who had asked that he makes payment on an invoice for him. The Invoice for spare parts from Parts Gallery Auto Spare Parts was produced. I do not

doubt its authenticity. Mr. Alphonse gave evidence confirming ownership of the US\$2,000/-. Several vehicle rental forms for vehicles from Bosco Cars were produced. The forms are from July to October 2023. Mr. Alphonse runs Bosco Cars. The forms were to attest that since Bosco Cars was renting vehicles and receiving foreign currency, Mr. Alphonse collected the US\$2,000/- he handed to the 2nd Respondent from car rentals. However, on the rental forms it is not stated whether the payments were made in cash or by card. I note nonetheless that all payments were made in Euros and not United States Dollars. The 2nd Respondent needed to show how he came about to be in possession of United State Dollars. Therefore, I extend the detention of the cash up to 18 December 2023, where again unless further proceedings for detention or seizure is filed the cash shall be returned to the second Respondent.

[25] As regards moneys seized from the 3rd Respondent, the Applicant has not satisfied Court of compelling reasonable suspicion as to the source of funds exists that mandates its continued detention. He has produced sufficient documentation to establish the source of fund. Mr. Vadivello's letter explaining that he had exchanged the sum of SR26,000.00 for US\$2000/- states that he is available to answer any additional question that the FCIU may have, but it does not appear that they have approached him. Furthermore, there is no averment that Mr. Vadivello is involved in criminal activity. There is no averment stating that he is under investigation. Therefore, moneys seized from the 3rd Respondent be released to him forthwith.

Signed, dated and delivered at Ile du Port on 01 December 2023



Vidot J