

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO:73/2023

HOLDEN AT NDOLA AND LUSAKA

(CIVIL JURISDICTION)

BETWEEN:



ELVIS HAATILA

1ST APPELLANT

J. YUMBA GENERAL DEALERS

2ND APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

CORAM: Mchenga DJP, Ngulube and Chembe, JJA

On: 19th February 2025 and 24th March 2025

For the Appellants: J. Matarilo, James and Doris Legal Practitioners

For the Respondents: M. Kapambwe-Chitundu, Deputy Chief State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court

Cases referred to:

1. National Director of Public Prosecutions v. RO Cook Properties (Pty) Limited 2004(8) BCLR 844 (SCR)
2. R. v. Ilham Anwoir and Others [2008] EWCA Crim. 1354
3. Assets recovery Agency v. Peter Ouwafemi Olaiwon Civil Suit E.002 of 2022
4. Sydney Mwansa v. The Director of Public

Prosecutions, CAZ Appeal No. 276/2021

5. Khalid Mohammed v. The Attorney General [1982] Z.R. 49
6. The People v. Austin Liato, SCZ Appeal No. 291 of 2014

Legislation referred to:

1. The Forfeiture of Proceeds of Crime Act, No 19 of 2010
2. The Prohibition and Prevention of Money Laundering Act No. 14 of 2001

1.0 INTRODUCTION

- 1.1 This is an appeal against the judgment of the High Court (Lombe-Phiri, J.), ordering the forfeiture of money held in the appellants' bank accounts. The order was made following an application by the Director of Public Prosecutions, launched pursuant to **Section 29 of the Forfeiture of Proceeds of Crime Act.**
- 1.2 The appellants seek to assail that judgment on the ground that the evidence that was laid before the trial court, did not prove that the money in the appellants' bank accounts, was tainted property.
- 1.3 It is also contended that the trial Judge erroneously

placed the onus of proving that forfeited money was not tainted property, on the appellants.

2.0 CASE BEFORE THE TRIAL COURT

- 2.1 In March 2015, the Drug Enforcement Commission seized two bank accounts, one belonging to the 1st appellant and another belonging to the 2nd appellant. In addition, they seized two bank accounts belonging to Double Q Surfaces Mining and Trading Limited.
- 2.2 The bank accounts were seized following a report of 'suspicious transactions' on them, received from the Financial Intelligence Centre.
- 2.3 It was established that between June 2014 and March 2015, a total of US\$471,744.00, was credited into a Double Q Surfaces Mining and Trading Limited's bank account.
- 2.4 The company had two directors, the 1st appellant and Ms. Chau, a Vietnamese national. In addition to being a director for Double Q Surfaces Mining and Trading Limited, Ms. Chau was in control of Troung An Limited, a company operating in Vietnam, and from whom some of the suspect money was remitted.
- 2.5 The source of the other money credited into the

Double Q Surfaces Mining and Trading Limited's bank account, was Lead Design Group, Brilliant Amazing Limited and Albert Limited. These companies are domiciled in Asia.

- 2.6 According to the bank records, the pattern was that once the money was credited into the Double Q Surfaces Mining and Trading Limited's bank account, it was withdrawn by either the 1st appellant or Ms. Chau, as cash or transferred into their accounts.
- 2.7 In addition, some of the money was paid into the 2nd appellant's bank account.
- 2.8 The Drug Enforcement Commission made efforts to contact Ms. Chau, but they were not successful. However, they received information from Interpol that Ms. Chau was on the run as she was wanted by the police in Vietnam, for 'appropriation of property through swindling'
- 2.9 Following the failure of Ms. Chau to avail herself to the Drug Enforcement Commission, the respondent moved the High Court to forfeit the money in the bank accounts that are the subject of this appeal.
- 2.10 In reaction to the respondent's application in the

High Court, the appellants approached the court as interested parties.

2.11 The 1st appellant deposed that Double Q Surfaces Mining and Trading Limited was incorporated for mining and mining related businesses. He also deposed that the money they received was remitted by Ms. Chau from Vietnam and China, and was neither tainted property nor the proceeds of crime.

2.12 As for the 2nd appellant, it was deposed on their behalf that the money they received from Double Q Surfaces Mining and Trading Limited was for services they rendered after being engaged for some consultancy; and there was a contract proving that fact.

3.0 FINDINGS BY THE TRIAL JUDGE

3.1 The trial Judge found that the respondent had placed before her evidence establishing that Ms. Chau was wanted in Vietnam on criminal charges.

3.2 She also found that although the appellants had, pursuant to **Section 30 (b) of the Forfeiture of Proceeds of Crime Act**, approached the court as interested persons, they did not dispute the fact

that Ms. Chau was the source of the money which is the subject of these proceedings.

3.3 The trial Judge found that **Section 30 (b) of the Forfeiture of Proceeds of Crime Act**, placed the onus, on an interested person, to lead evidence that satisfies the court of their interest in the property which is the subject of the forfeiture proceedings.

3.4 Finally, the trial Judge found that the appellants did not lead evidence disassociating themselves from Ms. Chau's criminal activities. Consequently, the appellants had failed to satisfy her that money held in their accounts was not proceeds of crime.

3.5 The trial Judge then proceeded to order the forfeiture of the money held in the seized bank accounts.

4.0 GROUNDS OF APPEAL AND ARGUMENTS BY COUNSEL

4.1 The five grounds in support of this appeal, raise two issues:

- (i) The failure of the respondent to prove that the forfeited money was tainted property; and

(ii) The trial Judge's erroneous placing of the onus of proving that the forfeited money was not tainted property, on the appellants.

4.2 Mr. Matarilo submitted that the evidence before the trial Judge did not establish that the forfeited money was tainted property, as defined in **Section 2 of the Forfeiture of Proceeds of Crime Act.**

4.3 He argued that the evidence before the trial Judge only pointed at the fact that Ms. Chau was being investigated for 'appropriating property through swindling'. In any case, the evidence established that the money came from 4 different sources, with Ms. Chau being only one of those sources.

4.4 He concluded by arguing that there was no evidence that the money that was credited into Double Q Surfaces Mining and Trading Limited's bank account from Troung An Limited or the other companies, was derived from the activities that she was being investigated for.

4.5 Mr. Mataliro referred to the South African case of **National Director of Public Prosecutions v. RO Cook Properties (Pty) Limited¹** and submitted that in the

absence of evidence of 'a reasonable link' between the crimes that Ms. Chau is alleged to have committed and the money that she remitted, the trial Judge should not have found that the money was tainted property.

4.6 As regards the onus of proof, Mr. Mataliro submitted that although the trial Judge correctly found that **Section 30 (b) of the Forfeiture of Proceeds of Crime Act**, placed the onus of proving an interest in tainted property on the person who claims that interest, she erred when she proceeded to find that the appellants had not disproved the fact that the money was not proceeds of crime.

4.7 Mr. Mataliro then submitted that **Section 30 (b) of the Forfeiture of Proceeds of Crime Act**, did not place any onus on the appellants to prove that the money in their bank accounts was not tainted property. It only placed an onus on them, to lead evidence in support of any legitimate interest in property, where they raised such claim.

5.0 SUBMISSIONS BY THE RESPONDENT

- 5.1 On behalf of the respondent, Mrs. Kapambwe-Chitundu submitted that the respondent had discharged the onus placed on them to prove that the forfeited money was tainted property.
- 5.2 She then pointed out that the evidence laid before the trial Judge, did establish that the forfeited money was more probable than not, either directly or indirectly, earned from the criminal activities of Ms. Chau.
- 5.3 Mrs. Kapambwe-Chitundu referred to the English case of **R. v. Ilham Anwoir and Others**² and submitted that the fact that property is a proceed of crime, can be proved by either direct evidence showing that it was derived from specific unlawful conduct or evidence of the circumstances in which property was handled, which gives rise to the irresistible inference that it could only have been derived from criminal conduct.
- 5.4 She submitted that in this case, the evidence placed before the trial Judge laid a basis for suspecting that the forfeited money was connected to various

offences of swindling by Ms. Chau. Those acts amounted to the offence of money laundering under the **Prohibition and Prevention of Money Laundering Act**, and the offence of possession of property reasonably suspected to be proceeds of crime **Forfeiture of Proceeds of Crime Act**.

5.5 In addition, there was no evidence that the money sent to Zambia was from a legitimate source because the money came from companies whose business activities were unknown.

5.6 Mrs. Kapambwe-Chitundu then submitted that this evidence, did prove, on a balance of probability, that the forfeited money was tainted property as the only inference that can be drawn on it, was that it was earned from the commission of serious offences.

5.7 As for the onus of proof, Mrs. Kapambwe-Chitundu submitted that the respondent had discharged the onus of proof placed on them by **Sections 31 and 34 of the Forfeiture of the Proceeds of Crime Act**, by adducing evidence raising reasonable suspicion that the money was tainted property.

5.8 She referred to the cases of **Assets recovery Agency**

v. Peter Ouwafemi Olaiwon³ and Sydney Mwansa v. The Director of Public Prosecutions⁴, and submitted that once the respondent had proved on a balance of probability, that the forfeited money was tainted property, the appellants were required to show that the money was not tainted property.

5.9 In addition, the respondents were required to show the legitimacy of their interest in the forfeited money and refute any allegations of their illegality and connection to criminal activity.

5.10 She submitted that this being the case, the trial Judge cannot be faulted for finding that the respondents had laid evidence establishing that the money was tainted property and the appellants had failed to assail it.

5.11 Mrs. Kapambwe-Chitundu concluded by submitting that the trial Judge correctly concluded that the respondent having proved, on a balance of probability, that the forfeited money was tainted property, the appellants bore the onus of proving their interest.

6.0 CONSIDERATION OF APPEAL AND DECISION OF THE COURT

6.1 Provision for non-conviction based forfeiture, which is commonly referred to as 'civil forfeiture', is made in Section 29 of the Forfeiture of the Proceeds of Crime Act. It reads as follows:

'A public prosecutor may apply to a court for an order forfeiting to the State all or any property that is tainted property'

6.2 Section 2 of the Forfeiture of the Proceeds of Crime Act defines 'tainted property', in the following terms:

'tainted property in relation to a serious offence or a foreign serious offence, means—

- (a) any property used in, or in connection with, the commission of the offence;
- (b) property intended to be used in, or in connection with, the commission of the offence; or
- (c) proceeds of the offence;

and when used without reference to a particular offence means tainted property in relation to a serious offence

6.3 In the same provision, a 'serious offence' has been defined as being:

'an offence for which the maximum penalty prescribed by law is death, or imprisonment for not less than twelve months.

6.4 In the case of *Sydney Mwansa v. The Director of Public Prosecutions*⁴, we pointed out that an application for a forfeiture order, launched pursuant to Section 29 of the Forfeiture of the

Proceeds of Crime Act, must establish that the property in issue is tainted property, because it was either realised from the commission of a serious offence or because it was used or was intended to be used, to commit a serious offence.

6.5 **Section 34 of the Forfeiture of the Proceeds of Crime Act**, sets out who has the onus of proving that property is tainted, and it reads as follows:

'The applicant in any proceedings under this Act bears the onus of proving the matters necessary to establish the grounds for making the order applied for'

6.6 In keeping with the decision in **Khalid Mohammed v.**

The Attorney General⁵, on the onus of proof and its implications, a party who moves the court to forfeit any property, must prove that property is tainted property. Where such a party fails to prove that the property is tainted, a forfeiture order should not be granted.

6.7 Since the **Forfeiture of the Proceeds of Crime Act**, placed the onus of proving that there were grounds for forfeiting the money in the accounts, on the respondent, it is our view that the trial Judge's statement that: **'In view of the foregoing I find that**

the interested persons have not satisfied me on the balance of probabilities that the monies held in their respective accounts are not proceeds of crime. I find that the Director of Public Prosecutions has a proper case to succeed on a motion for an order on non-conviction based forfeiture of tainted property', was erroneous.

6.8 This is because it appeared to place the onus on the appellants, to prove that the 'suspect money' was not tainted property.

6.9 Although **Section 30 (b) of the forfeiture of Proceeds of Crime Act** provides that "any person who claims an interest in the property in respect of which the application is made may appear and produce evidence at the hearing of the application", this provision does not place any onus on such a person, to prove that the property in contention is not tainted property.

6.10 All the provision does, is to give a person who wants to contest a forfeiture, the opportunity to be heard. This is by placing before the court, evidence that

impugns an applicant's contention that the property is tainted.

6.11 In some cases, a person contesting an application for forfeiture, may invoke the provisions of **Section 31(2) of the Forfeiture of Proceeds of Crime Act**, and contend that even if the property is tainted, that person has an interest in the property, which interest, was acquired before the property became tainted, or that they were not involved in the criminal activity that tainted the property.

6.12 In such a case, the onus of leading evidence in support of that claim, rests on the person claiming the interest. This does not in any way affect the onus that the applicant has, in the first place, of proving that the property is tainted.

6.13 In this case, the appellants only challenged the fact that the money was tainted, that being the case, there was no onus on them to prove that it was not tainted. The onus of proving that fact, wholly lay on the respondent.

6.14 We will now deal with the question whether the

respondent did prove that the forfeited money was tainted property.

6.15 Section 31(1) of the Forfeiture of the Proceeds of Crime Act, sets out the standard of proof in civil forfeiture proceedings. It provides as follows:

'Subject to subsection (2), where a public prosecutor applies to the court for an order under this section and the court is satisfied on a balance of probabilities that the property is tainted property, the court may order that the property, or such of the property as is specified by the court in the order, be forfeited to the State'

6.16 At this point, it is necessary to give a recap of the evidence that was laid before the trial Judge.

6.17 Between 1st June 2014 and 31st March 2015, money was remitted from 4 companies in Asia into the account of Double Q Surfaces Mining and Trading Limited. The money was withdrawn by the 1st appellant or Ms. Chau. Some of the money was paid into the 2nd appellants account.

6.18 When Ms. Chau failed to clarify the remittances and transactions on the account, the Drug Enforcement Commission, through Interpol, contacted the police in Vietnam. They sought information on the business

transactions between Truong AN Co. Ltd and Double Q Surfaces Mining and Trading Limited.

6.19 The authorities in China, the source of the other money remitted to Double Q Surfaces Mining and Trading Limited, were also contacted. No response was received from China, but there was a response from Vietnam, in November 2016.

6.20 The relevant parts of the response from the police in Vietnam, on the transactions, was as follows:

'-Director Mr. Nguyen Van Lam, dob:01 Dec 1950

-Shareholders: Mr. Nguyen Van Lam and Ms. Tran Thi Minh Chau

Information about the transactions:

-According to the data base of the Tax office in Ba Ria-Vung Tau, there isn't any business contract between TRUONG AN Co. Ltd and Double Q Surfaces Mining and Trading in Zambia. Therefore, there is no transaction with a view to pay any bill'

6.21 The communication went on to state that;

'-According to Nguyen Van Lam's statement, he is only a nominal director. All business of the company was

run by Tran Thi Minh Chau. He has no ideas about the operations of the Company'

6.22 The communication concluded as follows;

'-At present, Ms. Tran Thi Minh Chau is being wanted by the Vietnamese Police for appropriating property through swindling. Therefore, we haven't got any information regarding to mentioned transactions. We will send you further information when Tran Thi Minh Chau is arrested'

6.23 Can it be said that this evidence did, on a balance of probability, prove that the money in the forfeited accounts was tainted property?

6.24 Mrs. Kapambwe-Chitundu submitted that this evidence proved that the money in the forfeited accounts, was derived from the criminal activities of Ms. Chau. It was, in the circumstances, reasonable to suspect that the money was connected to the swindling and appropriation of property, she also submitted.

6.25 In addition, she submitted that the evidence established that the offences of money laundering and possession of property reasonably suspected to be proceeds of crime, had been committed in Zambia.

6.26 While we have no difficulty in finding that the offence of money laundering under **Section 7 Prohibition and Prevention of Money Laundering Act** and the offence of possession of property reasonably suspected to be proceeds of crime, under **Section 71 of the Forfeiture of Proceeds of Crime Act**, are serious offences for purposes of classifying property as tainted property, the same cannot be said about the offence(s) of 'swindling and appropriation of property' allegedly committed by Ms. Chau, outside the country.

6.27 There was no evidence before the trial Judge of the penalties that those offences attracted in Vietnam, the country where the offences are alleged to have been committed, to warrant their classification as serious offences.

6.28 But probably more important, is the unavailability of evidence proving that any offences were committed in connection with the money that was remitted into to accounts of Double Q Surfaces Mining and Trading Limited.

6.29 There was no evidence, whatsoever, linking the money

remitted from Lead Design Group, Brilliant Amaizing Limited and Albert Limited, to any criminal offence or activity, outside the country.

6.30 As for the money remitted from Truong AN Co. Ltd, it was equally not directly linked to any criminal activity or offence in Vietnam, where it was remitted from. The Interpol communication clearly points at that fact.

6.31 However, there was evidence pointing at Ms. Chau, one of the directors of Truong AN Co. Ltd, being investigated for 'fraud'.

6.32 We agree with Mrs. Kapambwe-Chitundu that the fact that property is a proceed of crime, can be proved by either direct evidence showing that it was derived from specific criminal conduct, or that an inference can be drawn from the evidence before the court, that the property in issue, is a proceed of crime.

6.33 However, we must mention that whatever the case, it is not enough to merely show that the property is linked to conduct that was unlawful. The evidence must prove, be it on a balance of probability, the 'serious offence' that was committed as a result of

that unlawful act or conduct, for property that is earned from an unlawful act, which is not a serious offence, is not tainted property, for the purposes of **Section 29 of the Forfeiture of Proceeds of Crime Act**, and cannot be forfeited using that provision.

6.34 Since there is no direct evidence that the money that was remitted from Truong AN Co. Ltd was proceeds of crime, the question to be answered is, can it be inferred, from the evidence that was before the trial Judge, that the money in the forfeited accounts was proceeds of crime?

6.35 The evidence that the respondent relies on is the fact that the Drug Enforcement Commission received information from Vietnam that Ms. Chau was being investigated for appropriating property through swindling and was on the run. That information was in very general terms and provided no details of what she had actually done and when it was done.

6.36 It did not give details of what she did, which amounted to 'appropriating property through swindling'. From the evidence that was before the trial Judge, the appropriated property is unknown

neither is there evidence direct or otherwise, of its link to the money Ms. Chau remitted to Zambia.

6.37 This gap in the evidence, resulted in there being no 'link' in time and circumstances, between the money remitted to Zambia and the offences Ms. Chau was being investigated for.

6.38 It is our view, that in the circumstances, an inference that the money remitted to Zambia by Ms. Chau, between 1st June 2014 and 31st March 2015, was earned from the offences she committed in Vietnam at unknown times but was on the run for in 2016, is not the only reasonable inference that can be drawn, on the evidence that was before the trial Judge.

6.39 In addition, because of the gap in evidence that we have just referred to, it cannot be said that the withdraw of money in Zambia, by the 1st appellant and Ms. Chau, amounted to possession of property reasonably suspected to be proceeds of crime and money laundering.

6.40 In her submission, Mrs. Chitundu-Kapambwe made reference to the fact that the evidence before the trial Judge was sufficient for her to find that it

could reasonably be suspected that the remitted money was earned from criminal activity.

6.41 While a person who is charged with the offence of being in possession of property reasonably suspected to be proceeds of crime under **Section 71 (1) of the Forfeiture of Proceeds of Crime Act**, can be convicted in the absence of evidence proving the commission of a particular offence, in an application under **Section 29 of the Forfeiture of Proceeds of Crime Act**, evidence that only 'raises suspicion' is inadequate to warrant the issuance of a forfeiture order.

6.42 The evidence must prove an identifiable serious offence, and this being the case, the case of **The People v. Austin Liato**⁷, in so far as it espouses the concept of 'reasonable suspicion', is not helpful when considering the nature of evidence required to discharge an applicant's onus under **Section 29 of the Forfeiture of Proceeds of Crime Act**.

6.43 All in all, it is our view that the evidence that was before the trial Judge, did not establish, on a balance of probability, that the money that was

remitted into the appellants' accounts was tainted property.

6.44 This is because it failed to provide any link between the money remitted to Zambia and the fraud investigations against Ms. Chau. The evidence also failed to prove any serious offence that Ms. Chau committed.

7.0 VERDICT

7.1 We find that the trial Judge erred when she held that the appellants had failed to satisfy her that the money in their accounts was not tainted property because they did not have any such onus.

7.2 We also find that the trial Judge erred when she found that the respondent had proved, on a balance of probability, that the money in the accounts was tainted property, because there was no evidence direct or inferable from the circumstances, to warrant that finding.

7.3 We set aside the finding that the evidence did prove that the money remitted into the appellants' accounts was tainted property because there was no evidence to support that finding.

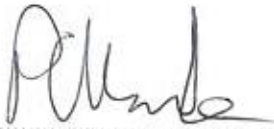
J25

7.4 We allow the appeal and set aside the forfeiture orders.

7.5 Costs are awarded to the appellants, to be agreed and in default, to be taxed.



.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE



.....
Y. Chembe
COURT OF APPEAL JUDGE

