

JUDGMENT

THE STATE

- APPLICANT

AND

MOHAMED OSMAN SESAY (ALIAS ASSASSIN)

- 1st RESPONDENT

DENNIS JONES

V.T.Biandioma Esq for the State

S. Nicol Esq for the Respondent

JUDGMENT DELIVERED THIS 21ST DAY OF DECEMBER 2020
BY HON. JUSTICE COSMOTINA JARRETT J.

INTRODUCTION

1. The 1st Respondent herein was tried in the High Court of Sierra Leone on an 8 count indictment by Hon Justice M.M. Samba J. A. then, Hon Justice M.M. Samba J. He was found guilty on the 6th day of November 2017 on Counts 1,2,3,5 and 6 and acquitted and discharged on counts 4, 7 and 8. The 1st Respondent served a 3 years custodial sentence at the Sierra Leone Correctional Centre and was released.
2. The applicant, the Anti-corruption Commission thereafter claims that 7 vehicles that were under the control and possession of the 1st Respondent during the course of their investigation were impounded by the Sierra Leone Police and kept in custody at the Kingtom Police Garage. The Commission has therefore applied to the court for the forfeiture of the said 7 vehicles. The 1st Respondent has however contested that the 6 vehicles out of the 7 vehicles do not belong to him and that they were acquired before the date of investigation and the preferment of the indictment upon which he was convicted.

THE LAW AND THE ISSUES FOR RESOLUTION

3. The application for forfeiture is made pursuant to Section 98(1) of the Anti-corruption Act 2008 which gives very broad powers to the Anti-corruption Commission in respect of forfeiture of any property in the possession or under the control of a person who is convicted of a corruption offence if the court is satisfied that a restriction notice was made in respect of the properties and also upon proof that the properties were acquired from the proceeds of corruption by either direct or indirect evidence.
4. The burden of proof is on the Anti-corruption Commission (ACC) to prove the above and that unless the contrary is proved by the convicted person, the properties would be deemed to have been derived from corruption and forfeited by order of the court.
5. This shifts the burden of proof to the person who has been convicted to prove that the properties are not proceeds of corruption. This he must do as per the dicta in *Walbrook and Glasgow* [1994] 15 Cr App R (S) 783 by "clear and cogent evidence" because a court cannot rely on the evidence of the defendant or in the case of Sierra Leone, the convicted person alone to disprove assumptions in forfeiture or confiscation cases, therefore if their evidence is unsupported it should be given minimal credibility.

Section 98(2) of the Anti-corruption Act 2008 also provides that the court may give directions:

- (a) "for the purpose of determining any dispute as to the ownership of or interest in the property or any part thereof;
 - (b) as to the disposal of the property."
6. In effect the standard of proof for forfeiture by virtue of section 98 of the Anti-corruption Act 2008 is lower than the standard required for obtaining a conviction under other sections of the Act and "a balance of probabilities" will be required for forfeiture whereas "beyond a reasonable doubt" is required for a conviction.

7. Forfeiture can also be a means of redress under the Anti-corruption Act 2008 where the prosecution gathers evidence, trace and secure the assets, impose a restriction order and evidence to prove that the assets are proceeds of crime are presented to the court during the prosecution's case in which case the standard of proof that is required for the conviction would be the same required for forfeiture which is proof "beyond a reasonable doubt".

8. In the UK, confiscation proceedings are governed by the Proceeds of Crime Act 2002, are stricter than the provisions under the Anti-corruption Act 2008 and when Asset forfeiture law in the UK was challenged on the grounds of proportionality in the case of *R v Smith* [2001] UKHL 68 their Lordships stated that;

"If in some circumstances it can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes. That is a matter for the judgment of the legislature, which has adopted a similar approach in enacting legislation for the confiscation of the proceeds of drug trafficking."

9. In contrast, it can be seen that Section 98(1) provides for the convict to prove that the properties or assets to be forfeited were not obtained from proceeds of crime. This brings me to the definition of "proceeds of crime" which is defined in Article 2(e) of the United Nation Conventions against Transnational Organized Crime which Sierra Leone ratified on the 12th day of August 2014 as follows:

"Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence''.

10. The issues for determination before the court therefore are;

1. Whether the vehicles which are the subject matter of the application before this court were in the possession or under the

control of a person who has been convicted of an offence under part IV of the Anti-Corruption Act of 2008.

2. Whether a restriction notice had been served on the 1st Respondent not to dispose or interfere the said vehicles.
3. Whether the vehicles were derived from proceeds of corruption.
4. Whether the vehicles belong to the 1st Respondent or not; and pursuant to Section 98(2) issue directions in order to ascertain the true ownership of the said vehicles.

THE EVIDENCE IN THE CASE

11. On the 24th day of May 2019, the Commission by way of an Originating Notice of Motion applied to this court for the following orders:

1. That this Honourable Court grants an Order of Forfeiture of the property(s) of the Respondent herein in view of the High Court Judgment dated 6th day of December 2017 by the Honourable Justice M.M.Samba J.A, (Justice of the High Court then) in respect of the Convicts/Respondents herein.
2. Any further order(s) that this Honourable Court may deem fit and just in the circumstances.
3. That the cost of this application be costs in the cause.

In support of this application, was the affidavit of V.T Biandoma sworn to on the 24th day of May 2019 and the exhibits attached thereto. Counsel for the State relied on the entire affidavit, particularly on paragraph 3 of the said affidavit for an order for the forfeiture against 7 (seven) vehicles “which during the course of the investigation were property(s) under the control and possession of the 1st Respondent to wit:

1. A grey BMW X3 Jeep with Registration No. KON 777;

2. A Grey Toyota Serena Van with Registration No. AJM 255;
 3. A Grey Toyota Hilux D/Cab with Registration No. ADP 192;
 4. A green Honda Accord S/C with Registration No. AGB 229;
 5. A silver Nissan Primera S/C with Registration No. AKN 036;
 6. A silver Honda CRV Jeep with Registration No. AIN 742; and
 7. A maroon Toyota FJ Cruiser with Registration No. AHT 617
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which were impounded by the Sierra Leone Police and kept in custody at the Kingtom Police Garage.”

- 12.. The said application was filed exparte for the forfeiture of the 7 vehicles allegedly impounded from the Respondent sometime in 2015 by a team of Operations Security Division (OSD) personnel and officials from the Anti - Corruption Commission that are deemed by the State to be proceeds of corruption. The application for forfeiture was made under Section 98(1) of the Anti-Corruption Act 2008 which reads

“Upon application by the Commission to the court, any property of or in the possession or under the control of any person who is convicted of an offence under part IV and any property of that person, subject of a restriction notice shall unless proved to the contrary, be deemed to be derived from corruption and forfeited by order of the court.”

- 13.. Consequent upon the above provision with specific reference to:

“subject of a restriction notice shall unless proved to the contrary, be deemed to be derived from corruption and forfeited by order of the court.”

The court directed the ACC to serve on the 1st Respondent all relevant documents in file. The Applicant complied with the directions of the court and the exparte application became an inter-partes application as the court in the interest of justice was giving the 1st Respondent an opportunity to prove to the contrary that the vehicles were not derived from corruption. As a result of the service of all documents on the 1st Respondent, S. Nicol Esq. entered

representation for the 1st Respondent and filed an Affidavit in Opposition on the 28th day of June 2019 and a Supplemental Affidavit on the 21st day of October 2019 respectively.

14. Counsel for the 1st Respondent in the Affidavit in Opposition sworn to by Selwyn Agibade Nicol Esq. dated 28th day of June 2019 stated that the vehicles itemized for forfeiture in the Affidavit of V.T. Biandoma sworn to on the 24th May 2019, were not acquired from proceeds of corruption. He emphasized that out of the 7 vehicles mentioned only 3 of those vehicles were in the impounded and in the custody of the Sierra Leone Police Force and parked at the Kingtom Police Garage.
15. Counsel for the 1st Respondent also stated in paragraph 8 of his Affidavit in Opposition that only one out of the 7 vehicles itemized belonged to the 1st Respondent i.e. the silver Nissan Primera S/C with Registration No. AKN 036 and that the 1st Respondent had sold the said vehicle a long time ago due to frequent mechanical problems.
16. He also submitted that the life cards were found in the premises of the 1st Respondent by the Anti-Corruption Commission when it carried out a raid on him and that with the exception of silver Nissan Primera S/C with Registration No. AKN 036 which belonged to the 1st Respondent, all the other life cards were owned by individuals who came to the 1st Respondent requesting loans and deposited their life cards as collateral security to him.
17. On 6th June 2019, pursuant to the direction of the court, Counsel for the State filed a Supplemental Affidavit sworn to by V.T. Biandoma and exhibited the Judgment of Justice M.M. Samba J. as she then was, dated 6th November 2017. The court having read the said judgment found that the 7 vehicles, the subject matter of this application were not mentioned in the judgment which to my mind clearly indicates that they were not part of the Applicant's case during that trial and hence no mention of them in the said judgment. In my view the ACC should have applied for the forfeiture of the vehicles with

proof that the vehicles were derived from proceeds of corruption during the trial which culminated in the conviction of the 1st Respondent.

18. On the 21st day of October 2019, Counsel for the 1st Respondent filed a Supplementary Affidavit sworn to by Selwyn Agibade Nicol Esq in which he exhibited SAN 2 to SAN 6 which are printed of information of vehicles from SLRSA stating the owner's name, describing the type of vehicle, number, colour and the date of registration of the vehicle.
19. The Court therefore subpoenaed witnesses to give evidence in respect of the claims relating to the number of vehicles that were impounded by the Applicant and the ownership of the vehicles which are in dispute.
20. The ACC called two witnesses, the first witness was Thomas T. Kanu who testified that he is an investigator at the Anti-Corruption Commission and he played a dual role in the investigation of the 1st Respondent at the time he was indicted by the Commission and when the vehicles were impounded. He further testified that ACC did not impose a restriction notice on the vehicles and that only three vehicles were impounded by the Commission and kept at the Kingtom Police Garage as follows
- (1) a grey BMW x 3G registration Number KON 777
 - (2) a grey Toyota Hilux Registration Number ADP 192 and
 - (3) A grey Toyota Serena Van AJM 255.
- 21 Under- Cross examination, the witness stated that he could not recall whether they had retrieved life cards for the vehicles at the premises of the 1st Respondent during the investigation of the matter and he was questioned also as to how he reached the conclusion that the 1st Respondent was the owner of all the vehicles and that they were proceeds of crime, he replied that the 1st Respondent had stated that in his statement that he made to the ACC during the investigation. I note that the said statement of the 1st Respondent was not referred to or exhibited in the affidavits of V.T. Blandoma nor was it tendered in court to corroborate the evidence of the

witness. In addition a substantial part of the testimony of this witness was discredited under cross examination. I have therefore attached very little weight to his testimony.

22. The ACC's 2nd witness Hindolo Saffa testified that he is the Officer in charge of the Police Garage at Kingtom on duty at the time the said vehicles were lodged with the Police Garage at Kingtom. He also testified that only 3 vehicles were lodged with the Police Garage at Kingtom and that details of the 3 vehicles received from ACC officials at different times during the 27th August 2015 were recorded in the Police garage dairy and that they have since been in safe keeping at the Police Garage at Kingtom. He also tendered photocopies of the entries in the police diary marked exhibits A1 and 2. Under cross examination, he stated that he did not at any point in time receive life cards in respect of the 3 vehicles from the Anti-Corruption Commission.

23. I hold that this evidence did not corroborated and is completely at variance with the number of vehicles enumerated in the affidavit sworn to by V.T Biandoma on the 24th day of May 2019 which was 7 vehicles and the witness testified as to having received only 3 vehicles. I hold that the vehicles should have been traced, sufficient evidence gathered in respect of the documentation especially the life cards of the said vehicles and a restriction notice should have been effected by the ACC pursuant to section 98(1) of the Anti-corruption Act 2008. I also hold that the said life cards should have been exhibited in the affidavit sworn to by V.T Biandoma on the 24th day of May 2019 or to his affidavit in reply and other supplementary affidavit(s) filed. Furthermore, the ACC should have produced evidence either directly or indirectly to prove that the vehicles were derived from proceeds of corruption.

24. In the case of the 1st Respondent, the court subpoenaed the Information Analyst Abdulai Barrie who had signed the information print outs of the vehicles. This direction was made pursuant to Section 98(2) to aid the court in

"determining any dispute as to the ownership of or interest in the property or any part thereof".

25. Abdulai Barrie testified that he was an employee of the Sierra Leone Road Safety Authority (SLRSA) and his duties included printing out vehicle information or print outs when mandated to do so by his superiors. He testified that he had printed out the information of 7 vehicles as a result of a letter from S. A. Nicol Esq. that was minuted to him by his supervisor. He also identified Exhibit SAN 1 as the letter from S.A. Nicol that was minuted to him for action and Exhibit SAN 2-6 as the printout of the information of the different vehicles.

26. He gave the information and particulars of vehicles in his evidence-in-chief and emphasized that SLRSA is not the custodian of the original life cards which are always given to the owners and that the SLRSA keeps electronic copies information of vehicles licensed at the SLRSA. He also stated as per the owners and the dates the vehicles were registered on the respective exhibits as follows:

1. Exhibit SAN 2, is the print out of information in respect of vehicle with registration number KON 777 and the name of the owner is Fanta Kakay and it was registered on 19th May 2015.
2. Exhibit SAN 3; is the print out of information in respect of vehicle with registration number AJM 255 and the name of the owner is Muna Sheriff and it was registered on 13th June 2014.
3. Exhibit SAN 4, is the print out of information in respect of vehicle with registration number ADP 192 and the name of the owner is Ivy International Ltd and it was registered on 25th February 2008.
4. Exhibit SAN 5, is the print out of information in respect of vehicle with registration number AIN 742 and the name of the owner is

Mohamed Osman Sesay and it was registered on 9th September 2013.

5. Exhibit SAN 6, is the print out of information in respect of vehicle with registration number AHT 617 and the name of the owner is Foday M. Kallay and it was registered on 30th January 2013.

Under Cross examination Abdulai Barrie corroborated the evidence in the Supplemental Affidavit of S.A. Nicol Esq sworn to on 21st October 2019.

DETERMINATION OF THE CASE

27. From the above, it is clear that the 3 vehicles were impounded and kept at the Kingtom garage which are Exhibits SAN 2, SAN 3 and SAN 4 and these vehicles belong to Fanta Kakay, Muna Sheriff and Ivy International and were registered on 19th May 2015, 13th June 2014 and 25th February 2008 respectively. The other 4 vehicles were not impounded or traced by the ACC. Notwithstanding that, from the evidence of Abdulai Barrie, they were registered between 2008 and May 2015.
28. In effect 6 out of the 7 vehicles were registered before the 11th day of June 2014 and July 2015 which are the dates on which the alleged offences for which the 1st Respondent was convicted were committed. Also, I am satisfied from the evidence led by the 1st Respondent that the 6 vehicles do not belong to him as stated in the Supplemental Affidavit of S.A. Nicol and corroborated by Abdulai Barrie the Data analyst from Sierra Leone Road Safety Authority. I am also satisfied that the vehicle with registration number KON 777 that was registered on 19th May 2015 which is Exhibit SAN 2, is not owned by the 1st Respondent but by Fanta Kakay and is therefore not derived from proceeds of corruption.
29. Also, the ACC on the other hand proved that the 1st Respondent had been convicted of corruption offences under Part IV of the ACC Act 2008 as the Conviction Certificate of the 1st Respondent was exhibited as Exhibit B in the Affidavit sworn to by V.T. Biandoma on the 24th day of May 2019. It

also proved that 3 vehicles were in the possession or under the control of the 1st Respondent as they had been impounded and taken to the Kingtom Police Garage for safe keeping. It did not however prove that they were derived from proceeds of corruption. There is no direct or indirect evidence before this court to prove that these vehicles were derived from proceeds of corruption.

30. In addition the other 4 vehicles that were enumerated in the Affidavit of V.T. Biandoma sworn to on the 24th day of May 2019 did not address the issue of the 4 vehicles being under the control or in the possession of the 1st Respondent nor where the whereabouts of these vehicles alluded to either in the different affidavits of the applicant or in the evidence of the two witnesses called by the ACC. I satisfied therefore that the 4 other vehicles were not in the possession or under the control of the 1st Respondent. Furthermore, none of the vehicles were subject of a restriction notice in accordance with Section 98(1) of the ACC Act 2008 and finally the ACC did not prove that any of the 7 vehicles were derived from proceeds of corruption.

CONCLUSION

31. I am therefore satisfied on a balance of probability that only one vehicle out of the 7 vehicles that are the subject matter of this application was owned by the 1st Respondent and that all of the 7 vehicles were not acquired during the period under investigation and I so hold.

I therefore make the following orders:

1. The application for forfeiture is dismissed as the properties were not acquired during the period under investigation.
2. No order as to cost.

3. That the 3 vehicles impounded by the ACC currently kept at the Kingtom Police Garage be returned to the owners.



Hon. Justice Cosmofina Jarrett J.

21st December 2020