

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 63 (16 December 2022)
SCA 41/2020
(Appeal from MA 356/2016)
Arising out of MC 62/2016

In the matter between

Radomir Prus

Sandra Prus

Exelsior Dreams

Free Sun Limited

(rep. by Mr. Guy Ferley)

Appellants

and

The Government of Seychelles

(rep. by Ms. Nissa Thompson)

Respondent

Neutral Citation: *Prus and Others v The Government of Seychelles*
SCA 41/2020) [2022] SCCA 63 (Arising in MA 356/2019) Out of MC
62/2016

(16 December 2022)

Before: Fernando President, Robinson JA, Andre JA

Summary: Appeal against the disposal order made by the Supreme Court pursuant to
section 5 of POCA.

Heard: 1 December 2022

Delivered: 16 December 2022

ORDER

Appeal dismissed.

JUDGMENT

FERNANDO, PRESIDENT

1. The Appellants have appealed against the disposal order made on 14 September 2020, by the Supreme Court pursuant to section 5 of the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter referred to as POCA), on an application dated 13 November 2019 by the Government, of the specified property of the Appellants, namely the four bedroom ‘Maison’ on parcel number 72, situated on Eden Island and the 28.8-meter long motor yacht, named ‘Dream Angel’ moored at Eden Island Marina.
2. The disposal order had been made 12 months after the interlocutory order made under section 4 on 15 November 2017 and the dismissal of the set aside application on 8 July 2019. At the time of the application pursuant to section 5 of POCA there had been no application pending under section 4(3) of POCA for the discharge of the interlocutory order before the Supreme Court in respect of the specified property nor was there any appeal pending before this Court.
3. **Section 5(1) of POCA** states: “*Subject to subsection (2), where an interlocutory order has been in force for not less than 12 months in relation to specified property and there is no appeal pending before Court in respect of the interlocutory order, the Court, on application to it in that behalf by the applicant, may make a disposal order directing that the whole or a specified part of the property be transferred, subject to such terms and conditions as the Court may specify, to the Republic or to such other person as the Court may determine and such transfer shall confer absolute title free from any claim of any interest therein or encumbrances to the Republic or such person.*” **Subsection 5 (2)** states that an application for a disposal order cannot be made “*while (a) an application made under section 4(3); or (b) an appeal against an order made under the application referred to in paragraph (a); or; (c) an appeal against any order made under section 4, is pending.*” According to subsection 5(2) of POCA, the 12 month period shall be calculated from the making of the interlocutory order under section 4, which was in the instant case on 15 November 2019, unless the Court for good cause shall otherwise determine.

4. The Appellants have filed the following grounds of appeal:
- a) “The Honourable Judge erred in law in failing to hold that the Appellants’ constitutional rights would be violated should the court fail to hold;
 - i. That a conviction must be proven by the Government
 - ii. The standard of proof should be between probable and beyond a reasonable doubt
 - iii. The burden of proof rests with the Respondent.
 - b) The Honourable Judge erred in law in failing to hold that the allegations and suspicions of the Respondent did not meet the required standard of proof to deprive the Appellants of their right in property.
 - c) The Honourable Judge erred in law in failing to hold that nonetheless and on the facts, the Appellant had proven their defence and the properties were not proceeds from criminal or illegal acts.
 - d) The Honourable Judge erred in law in failing to properly and adequately assess the facts and evidence and thereby the findings in the judgment were flawed in law.
 - e) The Honourable Judge erred in law in failing to hold that the Respondents had failed to discharge their legal and evidential burdens of proof.”

By way of relief the Appellants have prayed that the entire judgment of the Supreme Court be set aside.

5. The Respondent had raised a preliminary objection to the maintenance of this appeal on the basis that a ‘disposal order’ made pursuant to section 5 of POCA cannot be appealed. It is the argument of the Respondent that section 5 of POCA, or POCA in general, does not make statutory provisions for an appeal against a Disposal Order to the Court of Appeal. This is erroneous since section **22 of POCA** does in fact states: *“For the avoidance of doubt an appeal from an order made under this Act, other than an interim order shall lie to the Court of Appeal.”* Further, **Articles 120 (1) and (2) of the Constitution** states as follows: **Article (1)** *“There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction to hear and determine appeals from a judgement, direction, decision, declaration, decree, writ or order of the Supreme Court and such other appellate jurisdiction as may be conferred upon the Court of Appeal by this Constitution and by or under an Act.”*, and **Article (2)** *“Except as this Constitution or an Act otherwise provides, there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court.”* There is no doubt that what has been appealed against is an order made by the Supreme Court. There is nothing to the effect in the Constitution or in section 5 or elsewhere in POCA or in any other Act, excluding the right of appeal against a ‘disposal order’ made pursuant

to section 5 of POCA. It was held in **Treffle Finesse V The Republic CR Appeal No 1 of 1995**: *"The general right of appeal conferred by Article 120(2) of the Constitution and the general jurisdiction of this Court to hear appeals from the Supreme Court conferred by Article 120(1) can only be restricted by the Constitution itself or by an Act which provides that there shall be no such jurisdiction or no such right... The words "Except as this Constitution or an Act otherwise provides" envisage provisions which are expressly exclusionary and which exclude a right of appeal. Where the Constitution confers a right such right can only be taken away, where the Constitution so permits, by statutory provisions which are expressly and manifestly exclusionary."* It would have been a different matter if POCA had provided that no appeal shall lie to the Court of Appeal from a disposal order under section 5. Quite contrarily section 22 of POCA referred to earlier, provides otherwise. I therefore have no hesitation in dismissing the objection raised by the Respondent.

6. In the Skeleton Heads of Argument of Appellants, they have stated they will not at the hearing canvass ground (a), (i), (ii) and (iii). I have however decided to deal with them for future reference since they raise important issues pertaining to civil confiscation of proceeds of crime.
7. Grounds of appeal (a) and (b), ambiguous as they can be, is a complaint of the failure by the learned Judge to hold, that the Appellants' right to a fair hearing and the right to property guaranteed under the Constitution, would be violated should the Court fail to hold in relation to the matters itemized therein. It is clear from the judgment that the learned Judge was very much aware, made reference, and dealt with these matters in detail in the judgment. The learned Judge had dealt with the issue whether a conviction needs to be proven by the Government at length from paragraphs 49 – 58 of the judgment and has in my view correctly held that a conviction need not be proved. The learned Judge had said: "The thrust of modern proceeds of crime legislation is to target the unexplained wealth of the criminal and not the criminal himself. The POCA regime in Seychelles adopts much of the **model proposed in the United Nations Convention Against Corruption**, in which legislation provides for non-confiscation-based confiscation/forfeiture proceedings that do not require a predicate offence to be established." The learned Judge had cited the **South African case of Prophet V National Director of Public Prosecutions 2006 (2) SACR 525** where the Constitutional Court had held: "Civil forfeiture provides a unique remedy used as a measure to combat organized crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner". The aim of the civil proceedings in rem was to prevent unjust enrichment through corruption, by sending a clear signal to public officials already involved in

corruption or considering doing so, that their wrongful acts, even if they passed unscaled by the criminal justice system, would nevertheless not procure pecuniary advantage either for them or for their families. See ECHR judgments in **Silickiene V Lithuania, (Application no. 20496/02), 10 April 2012** and **Veits V Estonia, (Application no. 12951/11), 27 April 2008**.

8. **Article 48 of the Constitution of Seychelles** states that Chapter III of the Constitution which contains the Seychellois Charter of Fundamental Human Rights and Freedoms “*shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of—*

(a) the international instrument containing these obligations;

(b) the reports and expression of views of bodies administering or enforcing these instruments;

(c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;

(d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.”

9. The United Nations Convention Against Corruption (UNCAC) entered into force in the Seychelles on 15 April 2006 having ratified it on 16 March 2006. **Article 54 of UNCAC** states that each State Party shall in accordance with its domestic law consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction. The **Financial Action Task Force (FATF)** was established in July 1989 as an inter-governmental group by a Group of Seven (G-7) Summit in Paris. It has since been globally recognised, including Seychelles, as an authoritative body setting universal standards and developing policies for combating, amongst other, money laundering. In 2003 it issued a specific recommendation, which was calling for confiscation even in the absence of a prior criminal conviction (known as Recommendation no.3), which was to the effect that countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

10. The ECHR in the case of **Gogitidze and Others V Georgia (Application no. 36862/05) 12 May 2015**, observed that “*Having regard to such international legal mechanisms as the 2005 UNCAC, FATF, Recommendations and the two relevant Council of Europe Conventions of 1990 and 2005 concerning confiscation of the*

proceeds of crime that common European and even universal legal standards can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction. Secondly, the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings in rem. Thirdly, confiscation measures may be applied not only to the direct proceeds of crime but also to property, including any incomes and other indirect benefits, obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets. Finally, confiscation measures may be applied not only to persons directly suspected of criminal offences but also to any third parties which hold ownership rights without the requisite bona fide with a view to disguising their wrongful role in amassing the wealth in question.”

11. In the affidavit supporting the application under section 5 of POCA, for disposal of property, Assistant Commissioner, Jean Celliers, had summarized the criminal conduct of the Appellants’ in this case as stated at paragraph 8 of the judgment as follows: “The fraud believed to have been committed by the Respondents [*Appellants before this Court*] consisted of the diversion of part of a subsidy paid by the European Union for new technology and machinery associated with waste management in the Czech Republic, Hungary and Poland for the benefit of a Czech group of companies (Exelsior Group Ltd, hereinafter Exelsior) to be supplied by a UK company, FPR Engineering Limited (a shell company, herein after FPR) to the Respondents in Seychelles and that this conduct further amounted to money laundering”. It was the position of Superintendent Prinsloo that the stages of money laundering are all evident in the transactions, namely ‘the placement stage’, ‘the integration stage’, and ‘the layering stage’.
12. **Section 5 (3) of POCA** states: “*The Court shall make a disposal order in relation to any property, the subject of an application under subsection (1) unless it is shown to its satisfaction by the respondent...that the property does not constitute, directly or indirectly, proceeds of criminal conduct and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly constitutes proceeds of criminal conduct*”. Thus at the stage of section 5(3) the burden shifts entirely to the person against whom an application under section 5 of POCA has been made and there is no burden on the applicant who is seeking the disposal order. The learned Judge has referred to this at paragraph 66 of the judgment. Given the ‘civil’ nature of the proceedings in question, it is acceptable that the burden of proof in the proceedings should be shifted on to the person against whom an application under section 5 of POCA is made. Such civil mechanisms, involving the forfeiture of the proceeds of crime or otherwise unlawfully obtained or unexplained property, are known in UK, Italy and the USA. See the ECHR cases of **Raimondo V Italy**,

(Application no. 12954/87), 22 February 1994, and AGOSI V the United Kingdom, (Application No 9118/80)24 October 1986.

13. A reading of the judgment clearly shows that the learned Judge was very much aware of the standard of proof required in establishing a section 5 POCA application. According to section 9(3) of POCA, the standard of proof required to determine any question arising under this Act, other than proceedings for an offence contrary to section 23 shall be that applicable to civil proceedings. The ECHR in the case of **Gogitidze and Others V Georgia (Application no. 36862/05) 12 May 2015**, stated that, whenever a confiscation order was the result of civil proceedings in rem which related to the proceeds of crime derived from serious offences, the court does not require proof “beyond reasonable doubt” of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, would suffice.
14. The learned Judge had at paragraph 63 of the judgment stated that no application was made, during the proceedings before the Supreme Court for a determination of whether there has been or is likely to be a contravention of the Appellants’ charter rights so as to refer the matter to the Constitutional Court. It is only if it had been done that the question whether the alleged complaint of contravention of the Constitution, was frivolous or vexatious or the issue raised had not previously been decided by the Constitutional Court or the Court of Appeal could have been determined, which is a sine qua non, prior to referral. It is to be noted that the **Constitution provides in article 26(2)(d)** that the right to property may be subject to such limitations as may be prescribed by law and necessary in a democratic society in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime. It is to be emphasized that only lawfully obtained property enjoyed full constitutional protection. For the reasons set out in paragraphs 5 to 8, and 10 to 12, I dismiss ground (a) of appeal.
15. Grounds (b), (c), (d) and (e) of appeal, are almost to the same effect, namely the failure of the learned Trial Judge to hold that the Respondent failed to discharge its legal burden set out in POCA due to insufficiency of evidence. I find that the said grounds of appeal, do not set forth in separate numbered paragraphs the findings of fact to which the Appellants are objecting, and are therefore vague or general in terms, thus in contravention of rules 18(3) and 18(7) of the Seychelles Court of Appeal Rules 2005. A simple and general statement that the allegations and suspicions of the Respondent did not meet the required standard of proof, or that the Appellants’ had proven their defence, or that the learned Judge had failed to properly and adequately assess the facts and evidence; was totally insufficient to satisfy the requirements of rules 18(3) and 18(7) of the Seychelles Court of Appeal Rules 2005, in the face of the detailed judgment making reference to the evidence of the Respondent (paragraphs 8, 15 – 22, and 24) and the evidence of the Appellants’

(paragraphs 12, 13, 26 – 35, 38, and 39) and setting out the different explanations by the Appellants’ at different times during the several proceedings of this case (paragraphs 69 and 70), indicating their lack of credibility. That alone should suffice to dismiss grounds (b), (c), (d) and (e). I do not believe it is the duty of this Court to pin-point what evidence was available to substantiate the disposal order made by the Supreme Court pursuant to section 5 of POCA. It was the duty of the Appellant to have set forth the findings of fact to which they are objecting in filing the Notice of Appeal, none of which had been stated. The learned Judge had at paragraphs 71 -73 of the judgment reasoned out why she had concluded that the Appellants had failed in its burden of establishing to the satisfaction of court; that the property does not constitute, directly or indirectly, proceeds of criminal conduct.

16. I wish to state that sufficiency or insufficiency of evidence and credibility of witnesses are factual issues, which are essentially matters for the Trial Judge. The ECHR in the case of **Gogitidze and Others V Georgia (Application no. 36862/05) 12 May 2015**, reiterated that “*It is not within its province to substitute its own assessment of the facts for that of the domestic courts, who are better placed to assess the evidence before them*” (see **Grayson and Barnham v. the United Kingdom, nos. 19955/05 and 15085/06, 23 September 2008**). An appellate court would also rarely interfere with the findings of a Trial Judge on factual matters unless they are palpably wrong. At paragraph 74 of the judgment the learned Judge had stated: “...but of utmost importance is the fact that the Court is not satisfied that the Respondents have been able to show the legitimate source of their funds to acquire the specified property in this application. The different explanations by the Respondents at different times during these proceedings indicate their lack of credibility and I have no hesitation in disregarding their evidence.” At paragraph 75 of the judgment the learned Judge had said: “I am satisfied on the pleadings and the evidence before me, namely the affidavits of Assistant Commissioner Jan Celliers and Superintendent Hein Prinsloo and the exhibits appended to their affidavit that a disposal order in favour of the Applicant should issue in respect of the property.” For the reasons set out in paragraphs 12 and 13, I dismiss grounds (b), (c), (d), and (e).

17. The Appellants have through their Skeleton Heads of Argument in support of grounds (b) and (e) of appeal, filed in violation of this Court’s Practice Direction, 2 of 2019 dated 2nd December 2019, erroneously made an attempt to place reliance on the provisions of section 9 of POCA, which only applies to proceedings under section 3 (when there is an application for an interim order) or section 4 (when there is an application for an interlocutory order) of POCA. Those stages had passed when the application was made under section 5 for a disposal order and the disposal order was made, as stated at paragraph 2 above. When this was pointed out to Counsel for the Appellant at the hearing he agreed and said that he will not be pursuing grounds (b) and (e).

18. The Appellants have in support of grounds (c) and (d) of appeal, erroneously made an attempt to shift the burden of proof to the Respondent when it was entirely upon them as stated at paragraph 12 above. Here again the Appellants have made an attempt to place reliance on the provisions of section 9 of POCA, which has no application as stated at paragraph 17 above.
19. I am surprised to find that even Counsel for the Respondent had fallen into the error of considering that a ‘disposal order’ made by the Supreme Court, as one made under sections 3 or 4 of POCA and thus in relation to which section 9 of POCA applies. It is only at paragraphs 52 - 54 of the submissions of the Respondent, that Counsel for the Respondent, had identified a ‘disposal order’ made as one to be distinguished from sections 3 and 4 of POCA. At paragraph 53 it is correctly stated that the ‘disposal order’ was only an extension of the proceedings already had in the interlocutory and receivership orders. As stated at paragraph 2 above at the time of the application pursuant to section 5 of POCA there had been no application pending under section 4(3) of POCA for the discharge of the interlocutory order before the Supreme Court in respect of the specified property nor was there any appeal pending before this Court.
20. In view of what has been stated above I dismiss the appeal.

Fernando President

ROBINSON JA

21. I agree with the conclusion arrived at by the President in his judgment that the appeal should be dismissed.

F. Robinson JA

Signed, dated and delivered at Ile du Port on 16 December 2022.

ANDRE JA

IN ADDITION TO THE JUDGMENT OF FERNANDO PRESIDENT

[1] I have read the Judgment of the Learned Fernando President, and I am in concurrence with the judgment but I wish to however add to paragraph 5 of the judgment of Fernando President which addresses the question as to whether the Appellant had a right of appeal against the Disposal Order dated 14 September 2020.

[2] The Learned Fernando President’s pronouncement in paragraph 5 of said judgment is applicable in cases of a right to appeal generally. A more specific appeal against disposal orders is provided for in section 4(5) of POCA which states:

“Subject to subsections (3) and (4), an interlocutory order shall continue in force until—

(a) the determination of an application for a disposal order in relation to the property concerned;

(b) the expiration of the ordinary time for bringing an appeal from that determination; or,

(c) if such an appeal is brought, when the appeal is determined or abandoned, whichever is the latest, and shall then lapse.”

(Emphasis added)

[3] Section 4(5)(a) clearly refers to an order made by the court in terms of section 5(1) of POCA. The “determination” referred to in subsection (b) being the disposal order in subsection (a). This effectively means whilst an appeal against the disposal order is underway, the disposal order is stayed or the interlocutory order remains in force, until the disposal order is confirmed on appeal. Subsection (c) can be construed to mean that only once the appeal is either determined or abandoned, then further actions or proceedings on that issue lapse. The question that follows is: what is “the ordinary

time for bringing an appeal” as per subsection (b)? The answer is since section 5(1) provides for a period of 12 months within which to lodge an appeal against the interlocutory order, such 12 month period is the ordinary time for bringing an appeal in terms of this statute, and therefore shall be calculated from the making of the disposal order under section 5, unless the Court “for good cause shall otherwise determine” (section 5(2)(c)). The Disposal Order having been granted on the 14th September 2020, and the notice of appeal filed on the 13th October 2020, the requirements of POCA were met.

CONCLUSION

- [4] Consequently, whichever way the issue is scrutinized, from the provisions alluded to above, it is apparent that there is a right of appeal against the disposal order. These provisions do not offend the Constitution as such right to appeal cannot be open-ended and section 5(1) provides a time frame within which to lodge the appeal.

Andre JA

Signed, dated and delivered at Ile du Port on 16 December 2022.