FINANCIAL INTELLIGENCE UNIT v PUTTAROO N A R

2023 SCJ 337

SCR 123155 (5A/138/22)

THE SUPREME COURT OF MAURITIUS

In the matter of:-

Financial Intelligence Unit

Applicant

v.

Nooroodeen Ally Rehaz Puttaroo

Respondent

In the presence of:

Bank One Ltd

Co-respondent

JUDGMENT

This is an application for a Recovery Order made under section 34 of the Asset Recovery Act, wherein the applicant is praying the Court:

(a) to declare that the sums of (i) Rs 614,083.15, (ii) Rs 905,000, (iii) Rs 1,250,000 and Rs 162,148.80 in capital, interests and accessories as well as all monies held in the name of Nooroodeen Ally Rehaz Puttaroo**,** NIC No. P010564110337F, the respondent, either singly or jointly or otherwise with Bank One Ltd and which were frozen following an Order of the District Court of Port Louis (3rd, Division) made on 08 April 2002 in C. N 539/2002, shall vest in the State;

(b) to direct and order co-respondent (i) within seven days as from the date of the present Order, to deposit the aforementioned amounts of money in the Recovered Assets Fund of the applicant held with SBM Bank (Mauritius) Ltd and (ii) to confirm in writing to the applicant the details of the amounts so deposited by it;

(c) to direct that a notice of the Recovery Order be published in two (2) daily newspapers of wide circulation as soon as practicable after the Order is made; and

(d) to revoke or discharge the Order of the District Court of Port Louis (3rd Division) made on 08 April 2002 in C.N. 539/2002 in respect of other property, assets or money held by the said Nooroodeen Ally Rehaz Puttaroo.

In an affidavit dated 21 April 2022, Mr M. K. Beetun, investigator at the Asset Recovery Division, has averred on behalf of the applicant that on 05 April 2002, the Police lodged a provisional information against the respondent before the District Court of Port Louis for the offence of importation of heroin. On 08 April 2002, a Freezing Order was issued in respect of all the assets and properties of the respondent. On 28 March 2008, the Court of Assizes found the respondent guilty of "*attempt at possession of 2890 grams of heroin for the purpose of distribution"* and he was sentenced to undergo a term of imprisonment of 35 years with penal servitude and to pay Rs 5,000 as costs. On 22 June 2012, the Court of Criminal Appeal maintained the judgment of the Court of Assizes. Following a Request for Customer Information served on all banks, the co-respondent informed the applicant in writing that the respondent has four account numbers each containing consequential amounts of money. It has come to the knowledge of the applicant that the respondent has been involved in drug trafficking since a long time as he has been on the watch list of the ADSU for several years and the sources of the funds in the accounts are mostly cash and cheques deposits making it difficult to trace out the origin of the funds.

The applicant has also called as witnesses Mr Allan Etiennette, Bank Manager at Bank One Ltd, and PC Beetun to support the application. Mr A. Etiennette has produced four statements of account:

(i) a joint account bearing No. 03030003035 in the name of the respondent and his wife Mrs Razia Bibi Noore for the period May 2001 to October 2022 (Doc D). It is noted that from September 2001 to March 2002, there have been 13 cash deposits of considerable amount of money;

(ii) a fixed deposit account bearing No. 06074003515 in the name of the respondent for the sum of Rs 905,000 (Doc E). The original fixed deposit account was opened on 16 July 1999 and the same amount was renewed on 16 August 2002 and 14 September 2005;

(iii) statement of a joint account bearing No. 06033621952 in the name of the respondent and his wife for the sum of Rs 1,250,000 (Doc F);

(iv) a joint saving account in the name of the respondent and his wife bearing account No. 01012080869 for the sum of Rs 162,148.80 (Doc G).

The witness further explained that when a fixed deposit reaches its maturity and there is no instruction from the customer, the said account is renewed and a new account is opened.

Mr M. K. Beetun from the applicant's Asset Recovery Division gave evidence that in 2002, the respondent was working as an overseer and was earning a monthly salary of Rs 7,000. He has also stated that since 1995 the respondent was in the watch list of the ADSU but he was only arrested in 2002.

A notice of motion paper together with applicant's affidavit thereto attached were served on the applicant through the Commissioner of Prisons.

The respondent was *inops consilii* and stated in Court that he has no objection to the present application. However, he has also stated that he was running a supermarket which then took fire and he was paid a considerable sum of money from an insurance company. However, he did not remember how much he was paid by the insurance company.

The co-respondent was represented by Ms Kirtee Nekram, Junior Legal Coordinator.

The law relating to asset recovery is governed by section **35 of the Asset Recovery Act** which reads as follows:

35. Recovery Order

(1) The Court shall, subject to subsection (2) and section 37, make a Recovery Order where it finds that the property concerned is proceeds, a benefit, an instrumentality or terrorist property.

(2) The Court shall not make a Recovery Order of property or transfer the proceeds from the sale of the property to the State unless it is satisfied that it is in the interests of justice to do so and until such notice as the Court may direct has been given to any person in whose possession the property is found or who may have interest in the property or claim ownership of the property, to show cause why the property should not be recovered.

(3) The Court may make an Order under this section where a person is not in Mauritius or was acquitted of the offence, the charge was withdrawn before a verdict was returned or the proceedings were stayed.

(4) The Court making a Recovery Order shall cause to be published a notice of the Order in 2 daily newspapers of wide circulation as soon as practicable after the Order is made.

(*5) A Recovery Order shall not take effect –*

(a) before the period allowed for an application under section 36, or an appeal under section 39, has expired; or

(b) before such an application or appeal has been disposed of.

The issues which I have to determine are:

i) whether the property concerned is proceeds, a benefit, an instrumentality or terrorist property;
ii) whether a notice was given to any person in whose possession the property is found or who may have interest in the property or claim ownership of the property, to show cause why the property should not be recovered; and
iii) whether it is in the interests of justice to grant the order.

Standard of Proof

It is relevant to note that in the explanatory memorandum of The Asset Recovery Bill, mention is made that "*the main object of the Bill is to prescribe the procedure to enable the State to recover assets which are proceeds or instrumentalities of crime or terrorist property, where a person has been convicted of an offence or where there has been no prosecution but it can be proved on a balance of probabilities that property represents proceeds or instrumentalities of an unlawful activity."*

In an application for a recovery order, the applicant has to prove to the Court on a balance of probabilities that the property is proceeds of crime.

Gale & Anor v Serious Organised Crime Agency [2011 UKSC 49] concerns an appeal by David Gale and his former wife under the Proceeds of Crime Act 2002 as

amended by the Serious Organised Crime and Police Act 2005 designed to prevent the enjoyment of the fruits of criminal activity. The court found that although specific offences had not been identified by Serious Organised Crime Agency (SOCA) in support of its claim for a civil recovery order, on the balance of probabilities, the evidence established that significant assets had been acquired as a direct consequence of money laundering and drug trafficking and on that basis a recovery order was granted. Griggth Williams J observed that *the burden of proof is on the Claimant and the standard of proof they must satisfy is the balance of probabilities. While the Claimant alleged serious criminal conduct, the criminal standard of proof does not apply, although 'cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not* – see **Secretary of State for the Home Department v Rehman [2003] 1AC 153.**

The burden of proof

The general rule is that the burden of proof is always on the applicant. However **Section 10 (11) (a) of the Constitution** allows for derogation to the said rule. Section 10 (11) (a) provides as follows:

> *(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of-*
>
> *(a) subsection (2) (a) , to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.*

It was observed in **Abango L. A. v The State** [2009 SCJ 81] that: *"It is only following a conviction of the substantial charge that the burden shifts on the appellant to establish particular facts in respect of the lawful origins of her property before the Court decides whether the appropriate sentence may include a forfeiture order. In conformity with section 10(11) (a), the law in question i.e. section 8(2) of the Act imposes on the accused the burden of proving particular facts in respect of the lawful origins of the money failing which it would be deemed to be proceeds of crime. Such facts which relate to the source from which the money or property originates would, as in the present case, be facts which are eminently within the knowledge of the appellant herself. It would be extremely difficult, if not virtually impossible, for the prosecution to know about the origin and source of the 38,000 U.S.*

dollars and to fulfil the burden of proving that the 38,000 U.S. dollars were, in whole or in part, directly or indirectly, the proceeds of a crime."

In **Director of Public Prosecutions v Parouty** [2011 SCJ 174], it was held that "*it is only reasonable to expect from the respondent's explanation as to how he obtained the funds to purchase the property. He is the one to know about his sources of income and his daily expenses. I am of the view that the legislation is not oppressive against the respondent, but on the contrary is reasonable in the circumstances and is proportionate in its endeavour to avert the evil that dealings of drug traffickers may cause."*

In the light of the above-mentioned caselaw, it is clear that in an application for a recovery order, the burden of proving the lawful origins of the money lies with the respondent.

The Property concerned are proceeds

The case of **National Crime Agency v Wong [2016] EWHC 142**, was a claim by the National Crime Agency (the "NCA") for a civil recovery order in respect of two properties. The Court endorsed that "*a claimant does not have to prove that particular lawful conduct on the part of the defendant, at a particular time, enabled the particular transaction; the Court is permitted to take a "global approach" to the evidence relied upon in order to find that the property was obtained through unlawful conduct and to take a common sense view of how an individual handles cash (i.e. by not using conventional banking facilities), the absence of a documented income or an absence of business records to support the inference that income has been obtained through unlawful conduct. (See* ***King J in Assets Recovery Agency v Jackson & Ors [2007] EWHC 2553 at para 18****)."*

In the case at hand, there is ample evidence on record to establish that the money held in the different bank accounts are proceeds and they are set out below:

a) in the statement of account bearing No. 03030003035 in the name of the respondent and his wife, Mrs Razia Bibi Noore, it is noted that from September 2001 to March 2002, there have been 13 cash deposits of considerable amount of money;
b) the opening of the a fixed deposit account bearing No. 06074003515 in the name of the respondent for the sum of Rs 905,000 (Doc E), was made on 16 July 1999;

c) the respondent and his wife have a joint account bearing No. 06033621952 in the sum of Rs 1,250,000 (Doc F);
d) the respondent and his wife have a second joint account bearing No. 01012080869 in the sum of Rs 162,148.80 (Doc G);
e) the evidence on record reveals that since 1995 the respondent was on the watch list of the ADSU but he was only arrested in 2002;
f) soon after the respondent was arrested in March 2002, there was no more deposit in his accounts;
g) the evidence on record also shows that in 2002, the respondent was working as an overseer at Mon Loisir Sugar Estate and was earning a monthly salary of Rs 7,000;
h) the respondent's four bank accounts at Bank One Ltd with consequential amounts of money did not reflect his earnings at the time of his arrest;
i) the respondent refused to give any explanation pertaining to the sums of money in his bank accounts when he was questioned by the Investigating Officer posted at the Asset Recovery Division;
j) on 28 March 2008, the respondent was found guilty by the Court of Assizes for the offence of attempt at possession of 2890 grams of heroin for the purpose of distribution and was sentenced to undergo a term of imprisonment of 35 years with penal servitude;
k) the Court of Criminal Appeal observed that the respondent had been depositing huge sums of money in cash in his bank accounts for which no explanation was given despite the fact that he did state in the various statements given in the course of the police enquiry that he would do so in Court;
l) in Court, the respondent did not furnish any explanation as to how consequential amounts of cash deposits were made in his four bank accounts;
m) the respondent merely stated in Court that he was running a supermarket which was burnt and he received a sum of money from his insurance company but he failed to produce any document to that effect; and
n) the respondent did not object that the order prayed for be issued against him.

In **Director of Public Prosecutions v Parouty** [2011 SCJ 174], the Supreme Court referred with approval to the guiding criteria laid down in **Walsh v UK [2006] ECHR 1154:** *(a) recovery proceedings are civil and not criminal; (b) the purpose of the proceedings is not*

punitive or deterrent but to recover assets which do not belong to the convicted person; and (c) the recovery order, although sometimes, involving heavy amounts, is not punitive in nature.

In the case at hand, it is only reasonable to expect from the respondent explanation as to how he obtained consequential sums of money in his four bank accounts when his monthly salary was only Rs 7,000. Indeed, the sums in the four accounts are disproportionately in excess of his salary as overseer.

Taking into consideration the evidence on record and in the interest of justice, I am satisfied that the applicant has proved on a balance of probabilities that the recovery order should be granted.

I, accordingly, declare that the sums of (i) Rs 614,083.15, (ii) Rs 905,000, (iii) Rs 1,250,000 and Rs 162,148.80 in capital, interests and accessories as well as all monies held in the name of Nooroodeen Ally Rehaz Puttaroo**,** NIC No. P010564110337F, the respondent, either singly or jointly or otherwise, with Bank One Ltd and which were frozen following an Order of the District Court of Port Louis (3rd, Division) made on 08 April 2002 in C.N 539/2002, be vested in the State.

I order the co-respondent within seven days as from the date of the present Order, to deposit the aforementioned amounts of money in the Recovered Assets Fund of the applicant held with SBM Bank (Mauritius) Ltd and (ii) to confirm in writing to the applicant the details of the amounts so deposited by it.

I also direct that a notice of the Recovery Order be published in two (2) dailies of wide circulation, one of which shall be l'Express as soon as practicable after the Order is made. I further revoke and discharge the Order of the District Court of Port Louis (3rd Division) made on 08 April 2002 in C.N. 539/2002 in respect of other property, assets or money held by Nooroodeen Ally Rehaz Puttaroo**.**

G. Jugessur-Manna
Judge

31 August 2023

For Applicant: **Mr Attorney S Sohawon –**
Ms V Nursimhulu, of Counsel together with
Mr K Rucktooa, of Counsel