

IN THE SEYCHELLES COURT OF APPEAL

Hans Josef Hackl

Appellant

V

The Financial Intelligence Unit

1st Respondent

The Attorney General

2nd Respondent

SCA 10 of 2011

[Before: MacGregor PCA, Twomey and Msoffe JJA]

B. Hoareau and Frank Ally, Counsel for the Appellant

B. Galvin and D. Esparon, Senior State Counsel and Principal State Counsel for the Respondents

Date of hearing; 20th August 2012

Date of judgment: 31st August 2012

JUDGMENT

Twomey, JA

1. This case is without doubt one of the most comprehensive attacks on the constitutionality of laws, specifically the provisions of the Anti-Money Laundering Acts of 2006 and 2008 (hereinafter AMLA) and the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCCCA) as against the right to property guaranteed in the Constitution of Seychelles.
2. It arises out of orders made by then Acting Chief Justice, Bernadin Renaud on 17th June 2009 against the Appellant, prohibiting him from the disposal or dealings with several parcels of land and properties at Anse Kerlan Praslin and Mare Anglaise, Mahé; the sale of or dealings with motor vessels catamaran *Storm* and *Monsun* and motor vehicles bearing licence plates S18826 and S18827 all belonging or registered in the name of the Appellant. The order also applied to monies in several accounts in Barclays Bank amounting to US\$1, 188235 in the name of the Appellant.

3. These orders had been made as a result of ex-parte proceedings based on the affidavit of Declan Barber, director of the 1st Respondent. He had averred inter alia that the properties seized and frozen were the benefits of criminal conduct or proceeds of crime, specifically the earnings obtained from inter alia “the unauthorised supply of heavy duty graphite into Iran for the purposes of medium and long range ballistic missiles and the nuclear weapons programme in that country...[and] the said Hans Joseph Hackl ha[d] pleaded guilty to certain charges of the said criminal conduct and ha[d] been sentenced to 6 years imprisonment by a court in Germany.”
4. The Appellant petitioned the Constitutional Court for a number of declarations. These included a declaration that article 26(1) (the right to property) had been contravened by the orders and that section 3(1) of POCCCA (interim orders in relation to property derived from criminal conduct) was repugnant to and not envisaged by the provision relating to limitations to the right of property as “necessary in a democratic society.” He also prayed for a declaration that the provisions of AMLA and POCCCA insofar as they contain provisions with retrospective application to conduct or acts before the coming into force of AMLA and POCCCA are unconstitutional. He further prayed for a declaration that the provisions of POCCCA and AMLA which import criminal conduct of offences arising from acts outside the jurisdiction of Seychelles which are of themselves not criminal offences in Seychelles are unconstitutional.
5. The Constitutional Court delivered unanimous judgments dismissing the petition in its entirety. It is against this decision that the Appellant has now appealed and submitted 8 grounds on which he relies For the sake of clarity, we shall succinctly state the Appellant’s contention as follows:
 1. The definitions of “benefit from criminal conduct” and “criminal conduct” in AMLA and POCCCA
 - (i) are repugnant to the principle of separation of powers as contained in the Constitution
 - (ii) breach the principle of sovereignty
 - (iii) are repugnant to the right of equal protection of the law as contained in article 27(1) of the Constitution.
 2. The provisions of AMLA are repugnant to the constitution in that they breach the right to a fair hearing, namely
 - (i) section 3(9)(c) of AMLA breaches the rule against double jeopardy as contained in article 19(5) of the Constitution.

(ii) section 3(9) of AMLA allows the creation of offences retrospectively and hence breaches Article (19)(4) of the Constitution

(3) The Constitutional Court by its decision extended the limitations permissible by the Constitution to the right to property.

6. In the context of the present case it is worth noting that legislation using civil procedures to deal with “criminal assets” is an emerging global trend in the battle against crime. There are many models : the US model which provides for the confiscation of any property constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense; the UK model which provides that such property must have been obtained ‘by or in return for unlawful conduct’; the Irish model which defines proceeds of crime as “any property obtained or received by, or as a result of, or in connection with the commission of an offence”; the Commonwealth model which defines proceeds of unlawful activity as any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with, an unlawful activity, irrespective of the identity of the offender; the Australian model which defines property as "proceeds" of an offence if it is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence; the South African model with perhaps the widest definition, defining "proceeds of unlawful activities" as: . . . any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly . . . in connection with or as a result of any unlawful activity carried on by any person.” Seychelles has adopted the Irish model in both AMLA and POCCCA. It is the provisions of those laws that are now under scrutiny.

The separation of powers

7. The Appellant contends that the principle of separation of powers contained in articles 85 and 89 of Constitution has been breached by section 3(9)(c) of AMLA inasmuch as it leaves wide discretion in the hands of the Attorney General amounting to an abdication of power by the Legislature. The specific provision in 3(9) (c) complained of relates to the definition of criminal conduct which

“shall also include any act or omission against any law of another country or territory punishable by imprisonment for life or a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of R50, 000 whether

committed in that other country or territory or elsewhere and whether before or after the commencement of this Act, unless the Attorney General shall certify in writing that it would not be in the public interest to take action in the Republic in relation to an act or omission as defined in this sub-section” (our underlining)

This, the Appellant contends confers an unfettered discretion on the Attorney General to decide whether an act or omission in another country and in any particular case constitutes criminal conduct justifying the institution of an action in Seychelles. As there is no delegation of power to the Attorney General who is a member of the Executive branch of Government in the provision, the principle of separation of power has been breached. Whilst they could not find an authority on all fours with the present matter they rely on the case of ***Ali and Rasool v State of Mauritius [1992] 2 A.C. 937*** in which the transgression complained of was between the Executive and the Judiciary.

8. ***Ali*** is clearly distinguishable from the present case for other reasons. In ***Ali*** the principle of separation of powers was breached as the Director of Public Prosecutions, who was an officer of the executive branch of government was vested with the power to choose whether to prosecute an accused person in an Intermediate Court or a District Court (neither of which had power to impose the death penalty) or before a judge in the Supreme Court without a jury which would result in the imposition of a death sentence in the event of a conviction for drug trafficking. This amounted to the selection of the penalty to be imposed and hence infringed the principle of separation of legislative, executive and judicial powers implicit in the Constitution. In effect the executive was encroaching on the domain of the judiciary by being allowed to preselect the penalty to be imposed on conviction. In ***Ali*** a judicial power was appropriated by the executive.
9. ***Ali*** is a far cry from the present case. No legislative power is given to or appropriated by the Attorney General under AMLA. He is accorded those same powers as are conferred by article 76(4) of the Constitution – the discretion to institute criminal actions viz “in any case in which the Attorney-General considers it desirable so to do.” The Attorney General of Seychelles ultimately exercises his discretion in every criminal case he institutes. AMLA only specifies that in the exercise of that constitutional discretion he has to certify in writing whether it is in the public interest ***not*** to bring such action. It does not create further discretion. It is the

safety valve as suggested by Mr. Galvin against the abuse of the delegated power to the Attorney General.

10. The Appellant has also relied on the cases of ***B. Sham Rao v The Union Territory of Pondicherry 1967 SCR(2) 650, State v Dougall 89 Wn.2d 118 (1977), Bholaz AZ and Anor v The State of Mauritius (2009) 432*** and the Seychelles cases of ***Finesse v Banane [1981]SLR 103*** and ***Kim Koon and Co. Ltd v R SCAR 1969 60.***

The Respondent has relied on ***Mistretta v United States 488 U.S.S. 361 (1989)***. The Appellant's submission based upon his authorities is that the only laws enforceable in Seychelles are those passed by the Legislature and that since the delegation to the Attorney General is not qualified in any way it amounts to an abdication of the legislative power of the Assembly. This would be a very persuasive argument if one was to ignore the point made in ***Mistretta (supra)*** that there is no unconstitutional delegation of power because of an alleged absence of any ascertainable standards for guidance of the function accorded in the delegation. In any case the proviso in section 3(9)(c) contains the standard by which the Attorney General is so guided – that of “public interest.”

Abdication of sovereignty

11. It was also suggested that Seychelles is the only country in which the definition of criminal conduct has been expanded to include offences committed outside the state which are themselves not criminal offences in Seychelles. That is not the case. For instance, the Australian Proceeds of Crime Act 2002 refers to the Mutual Assistance in Criminal Matters Act 1987 for definitions of terms used in that Act in the same way as POCCCA in Seychelles refers to AMLA for definitions of criminal conduct. In the Australian Act the following definitions are set out:

“criminal matter” includes:

a ...

b ...

c a matter relating to the forfeiture or confiscation of property in respect of an offence

d...

e a matter relating to the restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated, or that may be needed to satisfy a pecuniary penalty imposed in respect of an offence;

whether arising under Australian law or a law of a foreign country.”

12. In any case the appellant's argument also misses the point that it is not the criminal offence which is being targeted by POCCCA or AMLA. True there is an undeniable connection between the "criminal conduct" as defined, but it is the assets derived from any such conduct that is being aimed at. The distinction is important especially in terms of the argument that the provision breaches fundamental principles relating to the sovereignty of Seychelles. All that is necessary to trigger the provisions of POCCCA is a predicate crime and not a criminal offence per se. This is the reason why it need not matter whether the conduct is a criminal offence in Seychelles or not. If the Appellant himself was being charged with a "serious offence" or "criminal conduct" which was not itself a criminal offence in Seychelles he may well have had a point. POCCCA does not seek to make the offence of exporting graphite which is a criminal offence in Europe a criminal offence in Seychelles as well. It only seeks to ensure that benefits from that activity and other criminal conduct cannot be enjoyed by a person in Seychelles. Is the provision a bold departure from previous enacted laws? Undoubtedly it is; but desperate times require desperate measures.
13. Jurisdictions around the world have had to create laws to fight money laundering and organised criminal and terrorist financing. Seychelles has to meet commitments under UN Conventions and satisfy other international standards concerning such activities. Our laws contain provisions that are no more and no less of these requisite standards. The safety valve provided in AMLA requiring a consideration of the public interest protects against the unqualified abdication of our sovereignty.
14. We have also had to consider in this context whether there are permissible limitations to the principle of sovereignty. We find that there are. In this context we state that the rule of law and international human rights law may well override a state's claim to sovereignty. Each case must be decided on its own facts and we cannot state conclusively that there might not be cases where the interpretation of section 3(9) (c) might result in a breach of the principle of sovereignty. However, we are of the view that in the case before us, the discretion of the Attorney General was rightly exercised in allowing action to be taken against the Appellant's property. The present case concerns the export of components for nuclear warheads and the public, national and international interest far outweighs the principle of sovereignty.
15. We note that article 48 of the Constitution of Seychelles in relation to the Chapter III – Seychellois Charter of Fundamental Human Rights states:

“This Chapter shall be interpreted in such a way so as not to be inconsistent with any 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 instruments 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.

We also note that Seychelles has acceded to the Treaty on the Non-Proliferation of Nuclear Weapons since 1985. It is also a signatory to the United Nations Human Right Charter, of which the purpose set out at Article 1 of its Chapter 1 is of note:

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...”

16. In a parallel context, we note the decision of the European court of Human Rights (ECtHR) in the interpretation of the European Convention of Human Rights in the case of ***Hizb Ut-Tahrir v Germany Application No.31098/08 (2012) 55 E.H.R.R.*** The facts of the case are not dissimilar to the case before us. In ***Hizb Ut-Tahrir*** the Applicant, whose name means “Liberation Party” and which describes itself as a “global Islamic political party and/or religious society” and which was established in Jerusalem in 1953 advocating the overthrow of governments throughout the Muslim world had its assets in Germany seized. The Applicant complained that the confiscation of its assets in Germany violated its right to the peaceful

enjoyment of its possessions under art.1 of Protocol No.1 of the Convention, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Whilst ultimately it had not exhausted domestic avenues in relation to its right to property, the ECtHR found that the applicant’s complaint did not disclose any appearance of a violation of the right he claimed had been breached. In the same way we find that the Applicant’s use of the Seychelles Charter of Human Rights is an attempt to deflect from its aims and purposes and are clearly contrary to the values of the Charter. This ground is therefore not sustainable.

Equal protection to the law

17. The Appellant argues that insofar as section 3(9)(c) of AMLA bestows a discretion on the Attorney-General not to institute an action in certain cases and does not set out factors or guidelines in which he can exercise the said discretion, this constitutes a breach of the right to equal protection before the law. There are obvious locus standi issues with this ground. The appellant has not demonstrated how he has been treated any differently to another person or the ground upon which he is alleging he was treated differently. In any case, there is no issue of discrimination against the Appellant arising from the proceedings since the Attorney General has not exercised his discretion under the provision. However, even if we were to find that the Appellant had standing on this issue we fail to follow his line of argument that there would be discrimination if the Attorney General exercised his discretion. That discretion is not exercised haphazardly, spontaneously or absolutely – it is exercised in the “public interest”. This ground of appeal also has no merit.

Right to a fair hearing

18. The right to a fair hearing is contained in Article 19 of the Constitution:

“Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court.”

The Appellant contends that his right to a fair hearing has been contravened in two main ways.

Double jeopardy

19. First he contends that section 3(9)(c) of AMLA insofar as it permits a person to be “twice criminally responsible for the same act or omission” is in breach of article 19(5) of the Constitution which provides:

“A person who shows that the person has been tried by a competent court for an offence and either convicted or acquitted shall not be tried again for that offence or for any other offence of which the person could have been convicted at the trial for that offence, save upon the order of a superior court in the course of an appeal or review proceedings relating to the conviction or acquittal.”

The thrust of the Appellant’s argument is that since he has already been penalised for the offence in Germany, (he has been convicted and is serving a six years sentence in Germany in relation to the exportation of heavy graphite to Iran), he cannot again be penalised in Seychelles. The double penalisation argument has been deliberated on in jurisdictions all over the world in countries whose laws have similar provisions to that of Seychelles.

20. In the ***United States v. Ursery (95-345), 518 U.S. 267 (1996)*** the Supreme Court of the United States of America after reviewing a long list of similar precedents found that in contrast to the *in personam* nature of criminal actions, *in rem* forfeitures are neither "punishment" nor criminal for purposes of the double jeopardy clause of the American Constitution. In the case of ***Bennis v. Michigan (94-8729), 517 U.S. 1163 (1996)*** the forfeiture was found constitutionally permissible even in the case of a joint owner of property as the court found that

“historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.”

21. Similarly in the South African case of ***Simon Prophet v The National Director of Public Prosecutions CCT 56/05*** the Constitutional Court in effect traces the origins of modern forfeiture laws to the common law of the *deodand* (the guilt of inanimate objects) of the Middle Ages :

“Civil forfeiture provides a unique remedy used as a measure to combat organised 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.”

22. In ***Gilligan v Criminal Assets Bureau and others and Murphy v GM. PB and ors [2001] IESC 82*** the Supreme Court of Ireland found:

“The court is satisfied that the United States authorities lend considerable weight to the view that in rem proceedings for the forfeiture of property, even when accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events are civil in nature and that this principle is deeply rooted in the Anglo-American legal system.”

23. Another analogy is the equitable doctrine of disgorgement intended to prevent unjust enrichment. In the application of disgorgement to “literary proceeds of crime” cases (see for example ***Attorney General v Blake (Jonathan Cape Ltd. Third Party) [2001] HL 1 AC 268***) it was argued and upheld that the Attorney General in his capacity as guardian of the public interest had a public claim to seek the aid of the civil court in support of the criminal law in such cases. There was no distinction explicitly made in the case which would suggest that convictions abroad would be treated differently from convictions in Britain. A further example of this concept is the transnational holocaust litigation in the United States. It is acknowledged that this appeal is not the forum for a discussion about how one deals with the manufacturers and exporters of poison gas, landmines and nuclear weapons and their components knowing that the profit they make from their activities aids and abets the commission of mass crime nor is this decision a salve for the moral revulsion society in general feels over criminals profiting from their activities but the point nevertheless has to be borne in mind.

24. Mr. Hoareau also pointed out that POCCCA provides for civil proceedings procedures for the civil confiscation of property where the acquisition of such property is the result of ‘criminal conduct’ or a “serious crime.” This does not help the Appellant’s argument. In the instant there has been no indictment or conviction of the Appellant on any criminal offence in Seychelles. The forfeiture of several properties both immovable and moveable in Seychelles belonging to the Appellant is a civil matter. As we have pointed out recently (***FIU v Mares Corp [2011] SCAA 48***) POCCCA sits uncomfortably between civil and criminal law and while it deals with the proceeds of criminal conduct its provisions are essentially civil in

nature. As such they do not attract the protection of article 19(5) of the Constitution.

Retrospective effect of AMLA

25. The Appellant raises a second constitutional challenge in relation to the breach of his right to a fair hearing. He argues that section 3(9) of AMLA allows the creation of offences retrospectively and hence breaches Article (19)(4) of the Constitution. In this respect he states that the order which provided for the forfeiture of properties belonging to the Appellant were unconstitutional inasmuch as they applied to properties that had been acquired before the enactment of the legislation under which the orders were made. Article 19(4) of the constitution provides:

“Except for the offence of genocide or offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time it was committed.”

26. This argument cannot succeed for the same reason articulated above in respect of the fact that the proceedings against the Appellant were not criminal but civil in nature. The Appellant has not been charged with any offence. In any case as was articulated by McGuinness J in the Irish High Court case of ***Gilligan v Criminal Assets Bureau and ors (supra)*** the acquisition of assets which derive from crime was not a legal activity before the passing of the legislation complained of and did not become an illegal activity because of the act. Similarly in ***Murphy v GM PB and ors (supra)*** O’Higgins J held that what has to be borne in mind in such cases is that

“In any event, the act is prospective and not retrospective. The action upon which the act focusses is a possession or control of the proceeds of crime. It is only the possession or control after [the coming into force of the Act] to which the act attaches consequences. It does not affect the possession or control of anything prior to the coming into force of the Act. While the Act looks at events that predate the coming into force of the Act, it cannot be said to have a retrospective operation. At page 387 of Craies on Statute Law (7th edition) it is stated that “a statute is not properly called a retrospective statute because part of the requisites for its action is drawn from a time antecedent to its passing.”

Limitations to the right to property.

27. The Appellant further argues that the Constitutional Court allowed limitations to the right to property not permissible under article 26 (2) (a) or (d) of the Constitution when read with article 47(b) of the Constitution. This arises from orders made under sections 3 and 4 of POCCCA in relation to properties derived from criminal conduct. POCCCA adopts the definition of criminal conduct as laid out in AMLA. These are all matters of interpretation and construction and it is important to bring into view the relevant provisions.

Section 47(b) of the Constitution provides

“where a right or freedom contained in this Charter is subject to any limitation or qualification, that limitation, restriction or qualification-

(a)...

(b) shall not be applied for any purpose other than that for which it has been prescribed

Article 26 of the Constitution provides

“(1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society-

(a) in the public interest;

...

(d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;

(my underlining)

Serious crime is not defined in the Constitution but it is in section 2 of AMLA (as amended):

“Serious crime” means any act or omission against any law of the Republic punishable by a term of imprisonment exceeding 3 years and/or by a fine exceeding R50, 000, whether committed in the Republic or elsewhere, and where the conduct occurs outside the

Republic, would constitute such an offence if it occurred within the Republic and also constitutes an offence under the law of the country or territorial unit in which it occurs...” (my underlining)

Section 3(4) of AMLA states

“(a) a person guilty of money laundering is liable on conviction to a fine not exceeding R5,000,000 or to imprisonment for a term not exceeding 15 years or both

28. The Appellant contends that the sale of embargoed goods to prohibited countries, namely heavy duty graphite to Iran, whilst it may constitute a serious crime and criminal conduct in Germany or indeed the European Union is not a serious crime or criminal conduct Seychelles. He argues that in this respect the grounds of the criminal conduct relied on by the Respondents in terms of section 3(9) (c) of AMLA cannot be read into that provision and are not within the limitations intended by the Constitution. Section (9)(c) of AMLA provides

“In this Act, “criminal conduct” means conduct which-

a

b

c shall also include any act or omission against any law of another country or territory punishable by imprisonment for life or a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of R50, 000 whether committed in that other country or territory or elsewhere and whether before or after the commencement of this Act, unless the Attorney General shall certify in writing that it would not be in the public interest to take action in the Republic in relation to an act or omission as defined in this sub-section; and...” (my underlining)

29. Hence, he contends that the orders made by Renaud, Acting Chief Justice under section 3(1) of POCCCA on June 17, 2009 which relied on the definition of criminal conduct as laid out in AMLA are unconstitutional. We have already ruled on several aspects of this argument but add that the Appellant has not been charged with any *serious crime* or criminal offence. The Appellant’s submission amounts to a disingenuous reading of AMLA and the permissible limitations to the right to property. The Constitution recognises that there is no absolute right to property and limitations as are necessary in a democratic society are permissible in circumstances involving both “serious crime” and in the “public interest.” There is obviously no right to property illegally obtained even if the

illegality arises in a different jurisdiction. One can dress this up in any way but it is certainly not the intent of either the Constitution or legislation to permit those who have derived money from criminal or illegal activity outside the jurisdiction of Seychelles to profit from their activities.

30. A similar argument was raised in relation to the right to privacy in the case of **Reference by Attorney-General under Section 342(a) of the Criminal Procedure Code [2009] SCAA6**. That case concerned the disclosure of documents relating to the corporate nature of two offshore companies. One of their arguments in resisting disclosure was the right to privacy. The Court of Appeal, on this issue, had this to say:

“As a rule the right to privacy does not override the public interest in the fight against crime. The Constitution of Seychelles is fairly clear on the principle that fundamental rights and freedoms of any individual which are protected by the Constitution are subject to the rights of others and the public interest and also that restrictions and limitations are permissible to the extent that must be reasonably justifiable in a democratic society. It is for the court to decide in any given case whether the public interest in the fight against crime justifies a restriction of the privacy of the individual.”

It is our view that those principles articulated by the court apply to all rights contained in the Charter.

31. The Appellant has relied on three European Court of Human Rights cases for this submission: **Silver and ors v UK [1983] 5 EHRR 347**, **Kokkinakis v. Greece [1993] 17 EHRR** and **Sunday Times v UK 2 EHRR 245**. **Silver** relates to breaches of the right to respect for private life and the right to freedom of expression. **Kokkinakis** concerned a conviction for proselytism and the limitation to the right of religious freedom. **Sunday Times** concerned the publication of articles by the newspaper on the thalidomide case and relates to the freedom of expression. All the cases are in proposition for the principle that for limitations to be necessary in a democratic society they must correspond to a “pressing social need” and be proportionate to the legitimate aim pursued. The **Silver** case is perhaps the most useful in this respect. In that case the applicants, prisoners and their correspondents complained of the interception of their mail by the prison authorities. The Court held that censorship of prisoners' letters solely on the grounds that they had been addressed to journalists, legal advisers, human rights organisations, or that the letters discussed maltreatment or attempted to stimulate public agitation or petition could not be considered as

"necessary." It set down some guiding principles in relation to the definition of necessary in a democratic society." It found inter alia that

- (a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable";
- (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
- (c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued";

In short, the court found that a balance must be struck between public safety on one hand and the interests of the prisoners on the other.

32. As concerns the right to property it is undeniable that limitations to the right to property must be proportionate even within the limitations aimed by the provision "public interest." We are conscious of the balancing exercise that must be carried out to ensure on the one hand that rights enshrined in the Constitution are not taken away by subsequent legislation. In a similar context, in the Irish case of ***Gilligan v CAB [1998] 3 IR 185***, McGuinness J accepted that while the Irish Proceeds of Crime Act 1996 might affect the property rights of the citizen, its provisions did not constitute an "unjust attack" (comparable to the Seychelles constitutional terminology of "limitations necessary in a democratic society") on the right to property as per Article 40.3.2 of the Irish Constitution, given that a court must be satisfied before making a forfeiture order that the property in question represented the proceeds of crime. Further, as she pointed out, the exigencies of the "common good" (which may be compared to our "public interest") include measures to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities: "the right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally required and held." In this respect she was satisfied that curtailment of a person's constitutional rights was proportionate to the objective of the legislation. McGuinness J also noted that she would be willing to hold that the common good requires measures to prevent accumulation of these assets derived from criminal

and that the right to private property cannot protect assets illegally acquired and held. We endorse the view of McGuinness J as they relate to much the same circumstances and similar legislation as POCCCA drafted ten years after the Irish proceeds of Crime Act and with near identical provisions.

33. Similarly in ***Phillips v. UK (2000) 64509/01 ECHR 702***, the ECtHR considered that a confiscation order issued after criminal conviction constituted a penalty within the meaning of Article 1, Protocol 1 to the ECHR and operated in the way of a deterrent to those considering engaging in drug trafficking and deprive a person of profits received from drug trafficking and given the importance of the aim pursued, the Court did not consider the interference suffered by the applicant disproportionate. In ***Arcuri and others v. Italy (2001) 54924/99 219***, there were no criminal proceedings directly related to the confiscation order issued but the ECtHR still found that even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of Article 1 Protocol 1, which gives the State the right to adopt such laws as it deems necessary to control the use of property in accordance with the general interest.
34. POCCCA provides for the confiscation of proceeds of crime. These are necessary and proportionate limitations to the right to property as permitted by our Constitution. The Appellant has not disputed that the funds and properties forfeited in Seychelles are derived from his criminal conduct in Germany. It is not in the public interest that persons be allowed to transfer money and freely invest in, buy or enjoy property in Seychelles when such money derives from their nefarious activities. It does not serve the good name or reputation of Seychelles. The laws of civil forfeiture are modern and may well introduce novel concepts that are alien to the classic understanding of the boundaries between criminal and civil law but they are certainly necessary and a proportionate response to the exigencies of international crime. Civil forfeiture responds to the policy challenge of ensuring that wrongful proprietary gains are disgorged. Seychelles has an interest in suppressing the conditions likely to favour the reward of crime committed; removing the instruments and the assets derived from the commission of unlawful activity which might in turn permit the funding of further offences meets this objective. The argument by the Appellant that the provisions of AMLA and POCCCA are repugnant to his constitutional right to property is therefore unsustainable.

34. In the circumstances this appeal is dismissed in its entirety. Costs are awarded to the Respondents.

Mathilda Twomey
Justice of Appeal

I concur

Francis MacGregor
President, Court of Appeal

I concur

January Msoffe
Justice of Appeal

Delivered at Victoria, Mahé, Seychelles, this 31st day of August 2012