

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

APPEAL NO. 291/2014

BETWEEN:

THE PEOPLE

APPELLANT

AND

AUSTIN CHISANGU LIATO

RESPONDENT

Coram: Wanki, Muyovwe and Malila, JJS

on 3rd February, 2015 and

For the Appellant: Mr. B. Mpalo, Senior State Advocate, with Mr. M. K. Chitundu, Principal State Advocate, National Prosecutions Authority

For the Respondent: Prof. M. P. Mvunga SC, of Messrs. Mvunga & Associates; Mrs. N. B. Mutti and Mr. M. Chitambala, of Messrs. Lukona Chambers; and Mr. M. Mutemwa, of Messrs. Mutemwa Chambers

JUDGMENT

Malila, JS, delivered the Judgment of the court.

Cases referred to:-

1. *Shauban Bin Hassien and Others v. Chong Fook Kan and Another* (1903) 3 ALL ER 1629
2. *Queensland Bacon v. Rees* (1966) 115 CLR 266
3. *Streat v. Bauer & Blanco* BC 9802 155
4. *George v. Rockett* (1990) 170 CLR 104
5. *Anderson v. Judge of District Court* (1992) 27 NSWLR 702
6. *R. v. Chan* (1992) 63 A Crim R 242
7. *Simutenda v. The People* (1975) ZR 294

8. *Director of Public Prosecutions v. Sharon Lee Brown* (1994) 72 Crim R 527
9. *Director of Public Prosecutions v. Ahmud Azam Bholah* (2011) UK PC 44
10. *R. v. Iliham Anwoir, Brian McIntosh, Ziad, Megharbi and Adnan Elmoghrabi* (2008) EWZA Crim 1354
11. *DPP v. Ng'andu & Others* (1978) ZR 253
12. *DPP v. Chibwe SCZ Judgment No. 54 of 1975*
13. *Mususu Kaenga Building Limited and Another v. Richman's Money Lenders Enterprises* (1999) ZR 27
14. *R. v. John Rondo* (2001) 126 A Crim. R. 562:
15. *The Director of Asset Recovery Agency & Others v. Green & Others* (2005) EW HC 3168
16. *R. v. Buckett* (1995) 79 A Crim R302
17. *Woomington v. DPP* (1935) AC 462, 481
18. *Asset Recovery Agency v. Jackson and Smith* (2007) EWHC 2553.
19. *John Nyambe Lubinda v. The People* (1988-89) ZR 110
20. *Chimbini v. The People* (1973) ZR 191
21. *David Dimuna v. The People* (1988 - 1989) ZR 58
22. *McIntosh v. Lord Advocate* (2001) Cr. App. R. 498
23. *Stock v. Frank Johns (Tipton) Ltd* (1978)
24. *I.R.C. v. Hinchey* (1960)

Other authorities cited

1. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010, of the laws of Zambia*
2. *The Proceeds of Crime Act, 2002 of the United Kingdom*
3. *Section 8 of the Supreme Court Act, chapter 25 of the laws of Zambia*
4. *Article 5 paragraph 7 of the United Nations Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, 1988,*
5. *The United Nations Convention Against Transnational Organized Crime, 2000*
6. *Black's Law Dictionary 8th and 9th editions at page 1487 and 1585*
7. *Journal of Money Laundering, Volume.8, issue 2, pages 104 to 114*
8. *Article 18(12) of the Constitution of Zambia*

This is an appeal against a decision given on 12th December, 2013, by the High Court, constituted as a divisional court, and sitting in its appellate jurisdiction.

The issues for determination in this appeal become much clearer after a recapitulation of the background facts, even if cursory, that provoked the proceedings in the lower courts. Those facts can fairly be described as exotic, and they raise novel and recondite points of law.

The respondent was arraigned, tried and convicted by the Subordinate Court of the first class on one count of possession of property suspected of being proceeds of crime contrary to **section 71 (1)** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010¹**, of the laws of Zambia.

The particulars of the offence were that the respondent, on the 24th November, 2011 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did possess and conceal money at his farm, namely No. L/Mpamba/44, Mwembeshi, amounting to K2,100,100,000, being reasonably suspected of being proceeds of crime.

After hearing six prosecution witnesses, and the respondent having opted to remain silent, the learned trial Magistrate, in a judgment delivered on 23rd July, 2013, was satisfied that, on the

totality of the evidence before her, the prosecution had proved the case against the respondent to the requisite standard. She convicted the respondent and subsequently sentenced him to twenty-four months imprisonment with hard labour. She also ordered forfeiture of the K2,100,100,000 and the farm to the State.

Piqued by that judgment, the respondent appealed to the High Court, impugning the judgment on four grounds. Before the learned High Court Judges, the parties made detailed submissions and copious lists of authorities prior to doing 'battle' through a stella assemblage of learned counsel. The High Court crystallised the issues for determination as gyrating around the onus and the standard of proof of the subject offence. In its judgment, now subject of this appeal, the High Court held that the learned Magistrate had misdirected herself in holding as she did, that the respondent failed to discharge the onus placed on him by section 71 (2) of the Forfeiture of Proceeds of Crime Act, when he elected to remain silent. The High Court reasoned that the provisions of section 71 (2) of the Act do not place any onus on an accused person to satisfy the court of the legitimacy of the source of the

property, subject of a charge under section 71 of the Act. In the view taken by the High Court, the prosecution had failed to adduce sufficient evidence to prove the offence with which the respondent was charged.

Discomposd by the High Court judgment, the Director of Public Prosecution, on behalf of the people, has now taken up the cudgels and seeks to assail that judgment through this appeal, and has fronted four grounds as follows:

- “1. The court erred in law when it held that to prove reasonable suspicion under section 71 (1) the prosecution had to show the link between the source of the money or the accused to possible criminal conduct.**
- 2. The court erred in law when it held that under section 71 (2) the prosecution needed to prove that the accused had knowledge that the source of the money was a result of criminal conduct.**
- 3. The court erred in law when it held that the prosecution’s burden of proof under section 71 (1) was not discharged as the prosecution failed to adduce evidence upon which an inference could be drawn that money could reasonably be suspected to be proceeds of crime.**
- 4. The court erred in law when it construed section 71 of the Forfeiture of Proceeds of Crime Act in a manner that would render it impossible to give effect to the intention of the Legislature taking into account the preamble to the said Act.”**

A perusal of these grounds of appeal makes it crystal clear to us that the appeal raises a point of paramount importance in

that it poses for consideration the broad question whether section 71 of the Forfeiture of Proceeds of Crime Act, does prescribe a different standard of proof from the ordinary general criminal law standard, and whether the onus of proof and the evidentiary burden of proof ought to be understood differently under that section, from the general criminal law position.

Although the grounds of appeal as formulated encompass other issues of law which were strenuously canvassed before us, the interpretation of section 71 is, in our view, the dominant purpose of this appeal.

Written heads of argument together with lists of authorities were filed in court. The parties indicated that they would adopt and place reliance on these heads of argument.

The prolixity of the arguments advanced before us, replete with long quotations from works by learned authors and judicial *dicta*, have only served to obfuscate the issues. We, nonetheless, consider all the grounds raised and arguments advanced, *seriatim*.

Under ground one of the appeal, it was contended on behalf of the appellant that the appeal turns on the construction to be placed on the words 'may reasonably be suspected of being proceeds of crime,' in section 71 (1) of the Forfeiture of Proceeds of Crime Act, the question being whether the money which the respondent was found in possession of, may reasonably be suspected of being proceeds of crime. The learned counsel for the appellant cited and quoted *dicta* from no less than five case authorities to define the term "reasonable suspicion." These include the case of **Shauban Bin Hassien and Others v. Chong Fook Kan and Another**¹. In that case, the court defined suspicion as a state of conjecture or surmise where proof is absent. The learned counsel also referred to the case of **Queensland Bacon v. Rees**² where a suspicion was defined as mere idle wondering whether something exists or not. A passage from the judgment of Smart J, in **Streat v. Bauer & Blanco**³ was also quoted. More purposefully perhaps, the following passage from the judgment of the Australian Court in **George v. Rockett**⁴, was reproduced.

“suspicion, as Lord Devlin said in *Hussein v. Chong Fook Kam (1970) AC 942 at 948*, ‘in its ordinary meaning is a state of conjecture or surmise, where proof is lacking: ‘I suspect but I cannot prove.’ The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.”

Counsel submitted that reasonable suspicion must attach to the property and not to the person or persons the subject of the inquiry.

It was the appellant’s further submission that although generally, the standard of proof in criminal matters is that of beyond reasonable doubt, section 71 (1) deals with an offence pertaining to the existence of a reasonable suspicion. They contended that it is not required to prove that the money or other property ‘is reasonably suspected’ but rather that the money or property ‘may be reasonably suspected....’ Citing the case of **Anderson v. Judge of District Court**⁵, counsel submitted that the word ‘may’ falls short of ‘is’ while the word ‘suspects’ falls short of ‘known’ or even ‘convinced’ or ‘shown’. The learned counsel went on to quote a passage in the judgment of Kirby P in that case.

In the view of the appellant's counsel, the effect of the word 'may' rather than 'is', is that the suspicion need not be conclusive, and that in arriving at the criminal standard, the court need not be satisfied that the relevant suspicion is the only suspicion, or that the relevant suspicion is even the most likely of the possible suspicions. The case of **R. v. Chan**⁶ was cited as authority for this proposition.

The appellant's counsel next referred to section 71 (3) of the Forfeiture of Proceeds of Crime Act which provides that the offence under sub section (1) is not predicated on proof of the commission of a serious offence or foreign serious offence, and therefore, that in the present case, no predicate offence needed to be proved.

The appellant fervidly submitted that the facts in the present case aroused suspicion, and that the evidence led by the prosecution pertaining to the quantity of the cash money found in the respondent's possession, as well as the method of concealment employed by the respondent, provoked suspicion in the mind of any reasonable person. Counsel referred us to exhibit

P4, the photographic album, which depicts in graphic form, both the cash involved and the method of concealment, and asserted that, that would create in the mind of any reasonable person an apprehension or fear that the state of affairs envisioned in section 71 (1) of the Forfeiture of Proceeds of Crime Act, had occurred.

The learned counsel faulted the High Court for its suggestion that individuals may keep money in any manner they desire, labeling it as misleading and flying in the teeth of the evidence reflected by exhibit P4, which showed that the money was not kept in a house in the sense suggested by the High Court, but was in fact concealed away from the respondent's house. The manner of concealment, according to the learned counsel is also prohibited under the Forfeiture of Proceeds of Crime Act. They further argued that the steps taken by PW6, the investigations officer from the Drug Enforcement Commission, after the discovery of the money, to verify the legitimacy of the source of the money in question, fortifies the apprehension that it was derived or realized from the commission of an offence. According to the learned counsel for the appellant, the prosecution's case was complete when PW6 testified that he checked the

respondent's personal and business accounts, and looked into the sources of the respondent's income, including his gratuity from the National Assembly, and the income from his lodges. This evidence, in counsel's view, provided *prima facie* proof that the money the appellant was in possession of, and which he concealed in the manner describe, may be proceeds of crime. At this point, submitted the learned counsel, the evidentiary burden had shifted to the accused (respondent) to avail himself of the statutory defence in subsection (2) of section 71 of the Forfeiture of Proceeds of Crime Act, if the appellant wished to rely on it.

The appellant's learned counsel further submitted that the prosecution had proved beyond reasonable doubt, firstly, that the respondent was in possession of money, and secondly that the said money may reasonably be suspected of being proceeds of crime. Once this was done, it was, according to the learned counsel, incumbent upon the respondent to avail himself of the opportunity to discharge the lesser, civil standard, onus available to him of satisfying the court that he had no reasonable grounds for suspecting that the money was unlawfully obtained, as provided under subsection (2) of section 71. The respondent,

however, failed to seize that opportunity. The case of **Simutenda v. The People**⁷ was cited to illustrate the court's duty to draw proper inferences from the available evidence, when an accused person fails to give any contrary evidence to a court.

While supporting the trial Magistrate's finding that the inference was irresistible, that the money in issue could have derived from crime, the learned counsel for the appellant criticized the High Court for holding that to prove reasonable suspicion that the money was proceeds of crime, the prosecution ought to link its source or the accused to possible criminal conduct. The High Court's conclusion on this point, according to the learned counsel, went contra to the provisions of subsection (3) of section 71 of the Forfeiture of Proceeds of Crime Act which states that the offence under subsection (1) of section 71 is not predicted on proof of a commission of a serious offence or a serious foreign offence. Cited in aid of this submission was the case of **Director of Public Prosecutions v. Sharon Lee Brown**⁸ where at pages 12-15, the court stated that:

"The test deals with and interrogates the accused person's state of mind as to whether or not he had suspicion that the

money could have been proceeds of crimes which question is only resolved by interrogating the source or manner it came into the accused person's possession."

The learned counsel posited that the High Court applied a test which was not that of section 71(1) but that of subsection (2) of section 71 of the Forfeiture of Proceeds of Crime Act, when considering whether the requirements under section 71 (1) were satisfied on the evidence before the court. He further submitted that the court misconstrued the *ratio* in the case of **Director of Public Prosecutions v. Sharon Lee Brown**⁸. The thrust of the appellant's argument here, was that the prosecution's burden under subsection (1) of section 71 is a relatively lower one, as it is confined to proving that the accused was in possession of property that may be reasonably suspected of being proceeds of crime. That burden does not extend to proof of the mental state of the accused person in relation to the money or other property. It was on this basis that we were beseeched to uphold ground one of the appeal.

In their equally detailed and animated written heads of argument, the learned counsel for the respondent gainsaid the

submissions by the learned counsel for the appellant. In their retort to the appellant's arguments on ground one, counsel for the respondent began by taking issue with the charge. They argued that what the appellant was charged with is not one count. They contended that the particulars of the offence alleged possession and concealing. To this effect, counsel agreed with the finding of the High Court that the charge was defective and consequently bad at law. The learned counsel then supported the High Court's reasoning that, to prove reasonable suspicion under section 71(1) of the Forfeiture of Proceeds of Crime Act, the prosecution in the present case had to adduce evidence linking the sum of K2,100,100,000 found in the possession of the respondent, or indeed the respondent himself to some criminal activity or conduct. They contended that the appellant failed to establish the essential ingredients of the charge under section 71 (1) of the Act, namely, to show that the money found in possession of the respondent may reasonably be suspected of being a proceed of crime.

The learned counsel dismissed as a misconception, the definition of 'reasonable suspicion' as given by the appellant's

counsel. According to counsel for the respondent, the explanation of the term 'reasonable suspicion' in the authorities cited by the appellant's counsel was inapropos as that term was, in those cases, explained in relation to police powers of arrest, rather than in circumstances akin to those envisioned in section 71 of the Forfeiture of Proceeds of Crime Act. They argued that 'reasonable suspicion' is not equivalent to *prima facie* proof. The case of **Shaaban Bin Hussein and Others v. Chong Fook Kan & Another**¹ was cited as authority. Counsel argued that under the Forfeiture of Proceeds of Crime Act, 'reasonable suspicion' is an essential ingredient of the offence under section 71(1), and must be specifically proved through evidence. They suggested that a more useful definition of the term 'reasonable suspicion' is that given in **Black's Law Dictionary**¹ (8th edition) as follows:-

"A particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity."

Counsel maintained that 'reasonable suspicion' in section 71 (1) of the Forfeiture of Proceeds of Crime Act attaches to both property subject of the offence, and the conduct of a person in

instances where the accused is not a third party in relation to the property. They adverted to the definitions of the words 'proceeds', 'proceeds of crime' and 'unlawful activity' under section 3 of the Act, to substantiate their submission on this point.

The learned counsel for the respondent next submitted on the standard of proof. They sought confute the appellant's claim that a lower standard of proof suffices under section 71 (1) of the Act, contending that under that section, the prosecution is duty bound to prove every ingredient of the offence beyond reasonable doubt. A multitude of authorities from within and without this jurisdiction on the standard of proof in criminal proceedings, were cited to buttress this position. More pointedly, the learned counsel referred to the case of **Anderson v. Judges of District Court**⁵ which was cited by the learned counsel for the appellant, and argued that, that case confirmed that the standard of proof required to secure a conviction in cases involving 'reasonable suspicion', is one prescribed by the general criminal law.

The learned counsel for the respondent argued that the quantity of cash found on the property of the accused did not

prove suspicion as there was nothing unlawful with the manner in which the respondent kept the money. Counsel referred to the Privy Council decisions in the cases of **Director of Public Prosecutions v. Ahmud Azam Bholah**⁹, and that of **R. v. Iliham Anwoir, Brian McIntosh, Ziad, Megharbi and Adnan Elmoghrabi**¹⁰ and quoted *in extenso*, passages from those judgments, *ipsissima verba*, in support of the position they took that the prosecution should adduce evidence from which could be made, an inference that the money found in the possession of the appellant came from criminal activity. Only in those circumstances, according to counsel, would the reasonable suspicion be proved. It was submitted that the appellant failed to adduce any evidence suggesting any criminal activity in relation to the sum of ZMK 2,100,100,000 found in the possession of the respondent to warrant charging him with the subject offence.

In a manner reminiscent of circumlocution and tautology, counsel for the respondent went on to cite numerous other authorities, replete with excerpts and quotations, to buttress the argument already delivered in rebutting this ground.

The learned counsel for the respondent raised objection to the reference by the appellant's counsel to the impressions in the photographic album, exhibit P4, arguing in what we consider, a somewhat elliptical manner, that the respondent could not challenge the decision of the lower court on the ground of exhibit P4, as that was a finding of fact which could not be a subject of appeal. Various authorities including **DPP v. Ng'andu & Others**¹¹ and **DPP v. Chibwe**¹² were cited. Counsel further argued that the particular issue relating to exhibit 4 did not specifically arise in the court below and can, therefore, not be competently raised in this appeal. The case of **Mususu Kalenga Building Limited and Another v. Richman's Money Lenders Enterprises**¹³ was also called in aid, for that submission.

We have ruminated on the rival submissions of the parties on ground one. Section 71 (1) of the Forfeiture of Proceeds of Crime Act under which the respondent was found guilty by the Subordinate Court, criminalizes the receipt, possession, concealment, disposal of, or bringing into Zambia, any money or other property that may reasonably be suspected of being proceeds of crime. As pointed out by the learned counsel for the

appellant, in the present case the aspect of possession of the money by the respondent, is common ground. What is in issue is whether the money in question may reasonably be suspected of being proceeds of crime.

We do not intend to address the question of the charge being possibly bad in law. It was not the *ratio decidendi* of the lower court, nor does it appear to have been contested at the trial before the learned Magistrate. We also do not agree that there were any findings of fact through exhibit P4 which cannot be raised before this court. To the contrary, P4 was admitted in evidence in the court below.

The appellant argues that the money may indeed be reasonably suspected of being proceeds of crime. The respondent denies this claim most emphatically. What become relevant questions are, first who should have the suspicion, second, how should that suspicion be proved, third, who should establish it, and finally, whether on the facts of the present case, reasonable suspicion was indeed established.

It should be clear from what we have thus far stated that central and determinative of the first ground of appeal are the questions what must be proved, who bears the burden of proof and what standard of proof is required.

Having already stated that the issue of possession by the respondent of the money is settled, we now only have to consider what must be proved to establish that the money 'may reasonably be suspected of being proceeds of crime. In addressing this question, learned counsel for the parties referred to numerous case authorities on what reasonable suspicion is.

It is obvious to us that it is the prosecution which must harbor the reasonable suspicion and which must prove it. As observed by the learned counsel for the appellant, most case authorities that have determined the meaning of 'reasonable suspicion', are those that considered that term in regard to the law of arrest and search. Counsel for the respondent took court objection to the reference made to these cases, arguing that the cases cited by the appellant in support of the meaning to be attributed to 'reasonable suspicion' are inapplicable and should

not be considered. We think, with utmost respect to the respondent's learned counsel, that the objection they make in this connection is not well-taken. Definitions of legal terms and concepts, even if made in different circumstances, may still serve a useful purpose of elucidating unclear terms in the interpretive approach which any court is enjoined to adopt. To us, the resort to definitions of general legal terms and concepts used for specific ends, serve no worse a purpose than that served by the concept of persuasive authorities in the context of *stare decisis*. We do not accept the narrow approach being advocated by the respondent's learned counsel, which in truth only seeks to asphyxiate the court in its bid to do justice under an Act of Parliament whose provisions have hitherto remained substantially untested in this jurisdiction. We are, therefore, of the view that reference by the appellant to the definition of the term 'reasonable suspicion' in case authorities that dealt with police powers of search and arrest, and other contexts such as bankruptcy, was not inappropriate.

The appellant's counsel quoted Lord Devlin in the case of **Shauban Bin Hassien and Others v. Chong Fook Kan and Another**¹ where he stated that:-

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, ‘I suspect but I cannot prove.’ Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is completed and it is ready for trial and passes on to its next stage.”

Reference was also made to the passage of Kitto J, in **Queensland Bacon v. Rees**² to the effect that a suspicion that something exists is more than a mere idle wondering whether it exists or not.

“It is a positive feeling of actual apprehension or mistrust, amounting to a ‘slight opinion, but without sufficient evidence’ as Chambers Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of existence.”

As we have already stated, the respondent's counsel suggested to us that these *dicta* are inapplicable for purposes of determining ‘reasonable suspicion’ under section 71 (1) of the Forfeiture of Proceeds of Crime Act. They proposed instead that

the definition of reasonable suspicion in **Black's Law Dictionary**⁸ (8th edition) be used.

We have examined the definition of reasonable suspicion in **Black's Law Dictionary**, as already quoted by the learned counsel for the respondent. In our considered view, the definition of reasonable suspicion as given in the cases cited to us by the learned counsel for the appellant, and that as given in **Black's Law Dictionary**, are not at variance. They seem to state or imply the same position that, reasonable suspicion is not arbitrary; there ought to be a factual basis upon which it is anchored. As explained by the New South Wales Court of Criminal Appeal in **R. v. John Rondo**¹⁴

“... reasonable suspicion involves less than a belief but more than a mere possibility. There must be some factual basis for the suspicion; reasonable suspicion is not arbitrary.”

We are, for our part, perfectly satisfied that reasonable suspicion as used in section 71 (1) of the Forfeiture of Proceeds of Crime Act, is mere conjecture or surmise, shy of actual proof that a state of affairs exists. Such suspicion must be based of

articulable facts. In this regard, we are persuaded by the *dicta* of Lord Devlin in **Shauban Bin Hussein v. Chang Fook Kan and Others**¹ as restated and adopted in **George v. Rocket**⁴ by the High Court of Australia, an excerpt of which we have reproduced earlier on in this judgment.

Having ascertained that what the prosecution needs to prove, is possession and reasonable suspicion, it now remains for us to consider whether proof of such suspicion should show a link between the source of the money or the accused to possible criminal conduct.

It is clear to us from the very definition of 'suspicion', that there is a call to prove what may well be inconclusive. Suspicion, being essentially a state of mind, is not in itself easy to prove with certainty. In fact, we think it cannot be proved conclusively and is, in itself to a large extent, subjective. What however, calls for proof under section 71 (1) of the Act is 'reasonable suspicion'. This necessarily entails that the suspicion ought to be based on some factual basis which removes the subjectivity implicit in ordinary 'suspicion'. If there are no grounds which make

suspicion reasonable, then such suspicion is mere suspicion or is unreasonable suspicion. It is that factual basis which makes suspicion reasonable, that require to be established. What is more, establishment of the factual basis does not, in our considered view, equal proof of suspicion. The articulable facts merely assist in determining whether the suspicion is reasonable, or is not reasonable under those circumstances. The factual basis which make any suspicion which is actually formed reasonable must be shown to exist at the time the suspicion was formed. Whether grounds for suspicion actually existed at the time that suspicion is formed, is to be tested objectively. Consequently, a suspicion may be reasonable even though subjectively it was based on unreasonable grounds. In our considered view, proof of reasonable suspicion never involves certainty of the truth. Where it does, it ceases to be suspicion and becomes fact.

Additionally, the terminology used in section 71 (1) namely, 'may reasonably be suspected' reinforces our view that proof beyond reasonable doubt of reasonable suspicion, was not contemplated or intended when section 71 (1) was formulated.

The learned counsel for the appellant have submitted that the effect of the word 'may' rather than 'is' is that the suspicion need not be conclusive. We agree with this submission. We are also greatly persuaded by the *dicta* of Kirby P, quoted by the appellant's counsel in **Anderson v. Judges of the District Court**⁵ where it was stated that:-

"How a level of thought which is qualified by what 'may' be (and does not have to reach beyond what is 'suspected') can be established beyond reasonable doubt, is not entirely clear. But the section exists and has survived for more than a century in substantially the same form. It must therefore be given meaning. Presumably, the criminal onus and the words of the section must be reconciled by saying that court before which the person is charged must be satisfied beyond reasonable doubt that the thing in question may be reasonably be suspected of being stolen or otherwise unlawfully obtained."

Our view is reinforced by section 71 (3) of the Act which dispenses with the need to prove a predicate offence for purposes of satisfying the requirements under section 7(1). Section 7 (3) reads as follows:-

"The offence under subsection (1) is not predicated on proof of the commission of a serious offence or foreign serious offence."

It is for these reasons that we accept the authorities that have been cited by the learned counsel for the appellant, to support the position we take, that in section 71 (1) of the Act proof of 'reasonable suspicion' entails a lower standard than beyond reasonable doubt.

Having so stated, we now proceed to consider what evidence needed to be adduced in the lower court to satisfy the requirements under section 71 (1). What, in this case, are the specific and articulable facts? The appellant's counsel submitted that sufficient evidence was adduced of specific and articulable facts to make the suspicion envisioned in section 71 (1) reasonable. These facts, according to the appellant's counsel, were the quantity of cash money found in the possession of the respondent and the method of concealment. We were referred to P4, the photographic Album, which shows photographs of the scene at the place where the money was hidden, and also depicts, quite graphically, the effort that went into unearthing the two trunks containing safes laden with money, that were buried underneath the ground in a chalet, and covered with reinforced concrete slabs.

We have examined the contents of exhibit P4. Considered together with the evidence given by the witnesses, they portray a highly unusual state of affairs. An amount of K2,100,100,000 in cash, is not inconsiderable by any stretch of imagination, whether then or now. It is not the amount of cash that people ordinarily possess and keep in their homes or chalets, even if there is diminished faith in the banking system, such as we witnessed in this country in the mid and late 1990s following the collapse of Meridien Bank and others. Besides the unusually large number of bank notes in the possession of the respondent, the mode of concealment of the money was most strange. In our view, these facts together cannot, but raise reasonable apprehension that the respondent not only had his cash to hide, but everything else about that cash. We agree with the appellant's counsel that these facts are totally out of the ordinary and were sufficient to ground reasonable suspicion.

Yet, the matter does not end there. PW6 gave evidence before the trial court to the effect that he investigated the respondent's bank accounts, both personal and business, and also examined his source of income, including his gratuity from the

National Assembly. The result of these investigations was, however, that the respondent did not at any one point have any such money from those known lawful sources. Although PW6 did not produce bank statements, pay slips, etc., to the trial court, his evidence was not shaken in cross examination. All these facts blend to make reasonable suspicion inevitable in the circumstances.

We hold, therefore, that the quantum of the cash found in the possession of the respondent, the method of concealment which he employed together with the facts investigated by PW 6 as to the possible source of the appellant's money were specific and articulable facts sufficiently established by the prosecution, which in our view, grounded reasonable suspicion. To prove reasonable suspicion under section 71 (1) of the Act, therefore, the prosecution does not have to show the link between the source of the money or the accused to possible criminal conduct. It is sufficient that possession and reasonable suspicion are proved. We disagree with the decision of the High Court in this connection. On this basis, ground one of the appeal succeeds.

In ground two, the appellant impugns the High Court's holding that under section 71 (2), the prosecution needed to prove that the accused had knowledge that the source of money was a result of criminal conduct.

In developing their arguments on this ground, the learned counsel for the appellant first posited that what is discernable from the High Court judgment was that the court opined that the *mens rea* for the subject offence was to be found in both subsections (1) and (2) of section 71 of the Act. Secondly, that the mental element comprised knowledge by the accused that the source of the money was a result of criminal activity, and thirdly, that the prosecution bore the burden to prove the said mental element beyond reasonable doubt.

The gist of counsel's submission here, as we understood it, was that the approach adopted by the High Court was patently flawed. It was counsel's contention that the prosecution has a lower burden as to *mens rea* under section 71 which, in their view, extends only to subsection (1). They contended that the mental element under subsection (1) relates to receiving,

possession, concealing, disposal or bringing into Zambia, any money, or other property. In the view of counsel for the appellant, the High Court misapprehended and misapplied the *dicta* in the Australian Court of Appeal case of **Director or Public Prosecutions v. Sharon Lee Brown**⁸.

In the opinion of the learned counsel for the appellant, the requisite knowledge in the present case, must relate to the possession of the money. The onus for the prosecution in this regard is to show that the accused knew that he was in possession of money. Counsel submitted further that although there is a mental element to the subject offence, the prosecution need not establish that the accused entertained any level of suspicion whether reasonable or otherwise, to establish its case. This is all because an accused person, may or may not, avail himself of the available defence in subsection (2).

Counsel quoted Olsson J in **DPP v. Sharon Lee Brown**⁸ where he said that:

“Once it is shown that there has been a relevant receiving, possession, concealment or disposal of property that may reasonably be suspected of being proceeds of crime, then an offence has, prima facie, been committed.”

Counsel reiterated that section 71 (2) of the Act provides the accused person with an opportunity to escape criminal liability by satisfying the court (on a balance of probabilities) that he or she has no reasonable grounds for suspecting that the property referred to in the charge, was derived or released from the commission of a crime. According to counsel, the defence in section 71 (2) goes to the state of mind of the accused at the time of possession. Counsel submitted that, whereas the prosecution has a burden to negate the defence, the accused has the burden to establish it; the evidentiary burden shifts to the accused to prove his innocent state of mind in relation to the property in question once the prosecution has proved section 71 (1). The case of **R. v. Buckett**¹⁶ was adverted to and relied upon.

In rebutting the appellant's submissions on ground two, the learned counsel for the respondent, relying on the decision in the **Sharon Lee Brown**⁸ case, argued that the accused's defence under section 71 (2) of the Forfeiture of Proceeds of Crime Act, only arises once the prosecution has proved that there is reasonable ground for suspecting that the property in question is

a proceed of some unlawful activity. In the present case, counsel contended, the prosecution failed to establish any objective indications of unlawful activity in relation to the money found in the possession of the respondent to require the respondent to invoke the defence under section 71 (2) of the Act. Counsel posited that under section 71 (1) the mental element is in establishing 'reasonable suspicion' on the basis of clearly established facts and circumstances of criminal or unlawful activity, and not knowledge of the accused that the source of money is some criminal activity.

Counsel concluded their arguments on this ground by reiterating their support for the High Court's reasoning that the prosecution needed to prove that there were reasonable circumstances showing that the money was sourced from some criminal activity.

We have carefully considered the opposing arguments of the parties on this ground. It seems that the arguments are confined to interpretation of section 71 (2) of the Forfeiture of Proceeds of

Crime Act, and more particularly what requires to be proved and on whom lies the burden of proof.

The learned trial Magistrate found that section 71 (2) of the Act placed the onus on the accused person to satisfy the court that he had no reasonable ground to suspect that the money had been derived from unlawful activity. That section provides that:-

“It is a defence under this section, if a person satisfies the court that the person had no reasonable grounds for suspecting that the property referred to in the charge was derived or realized, directly or indirectly from unlawful activity.

The High Court reasoned, from the stand point of the general criminal law position, that the prosecution bears the burden to prove its case against the accused beyond reasonable doubt. The court did not think that subsection 2 of section 71 of the Act suggested any reversal of the general position on who bears the burden of proof; that although the subsection did require of the accused person to plead, if he so wishes, his innocent state of mind, that is to say that he had no reasonable grounds to suspect the property to be from criminal activity, it did not shift the

burden on to the accused to establish the ingredients of the offence.

We agree that burden of proof in criminal proceeding lies and remains through out on the prosecution to prove its case against the accused person beyond reasonable doubt. However, despite the ringing phrase of Viscount Sanky LC in the timeless case of **Woomington v. DPP**¹⁷ regarding this ‘golden thread of English criminal law’, the presumption of innocence and the onus of proof which it entails, the law does, in appropriate instances, cast the evidentiary burden on the accused person to prove certain facts.

For the avoidance of doubt, we must state that the fundamental law of the land, the Constitution of Zambia, does recognize this reality. **Article 18(12)** of the **Constitution of Zambia** provides that:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of paragraph (a) of clause (2) to the extent that it is shown that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.”

The offence of recent possession as set out in section 319 of the Penal Code, chapter 87 of the laws of Zambia is a classic example of legislation that shifts the burden on the accused person to prove certain facts. It is, therefore, possible that in some cases, statute may cast the burden of proving certain facts on the accused person.

The question in the present situation is whether section 71 (2) does shift the burden to prove the offence under section 71 (1) from the prosecution to the accused person.

Our understanding of section 71 (2) is that it does not impose any duty on the accused person to prove any ingredient of the offence under section 71 (1). Where the prosecution proves its case against the accused under section 71 (1), it behoves such accused person, if desirous of defending himself, to show that he had no reasonable grounds for suspecting that the property to which the charge under section 71 (1) related, was derived from criminal activity. While we agree with the High Court that section 71(2) does not impose any obligation on the accused person to prove any ingredient of the offence under

section 71 (1), it does afford the accused an opportunity to explain the absence of reasonable grounds on his part, for suspecting that the property he was found in possession of under section 71(1) was proceeds of crime.

The Australian case of **DPP v. Sharon Lee Brown**⁸ which has been heavily relied upon by both parties, involved the interpretation of section 82 of the Proceeds of Crime Act, 1987 of Australia, which is *pari materia* with the section 71 of the Zambian Act. The High Court formed the view that the test put forward in that case deals with, and interrogates the accused person's state of mind as to whether or not he had suspicion that the money could have been proceeds of crime, which question is only resolved by interrogating the source or manner it came into the accused's possession.

With utmost respect to the High Court, we do not think that the case of **DPP v. Sharon Lee Brown**⁸ developed any such test as was stated by the High Court. We accept the appellant's submission that what was involved in that case was the interpretation of section 82 (2), the equivalent of section 71 (2) of

the Zambian Act. The issues on appeal in the **Sharon Brown**⁸ case were confined to the defence which the accused person sought to raise under subsection 2 of the Act, after the prosecution adduced evidence in support of the charge under section 82 (1). In the present case, the respondent opted not to avail himself of the defence available under section 71 (2). We agree with the submissions on behalf of the appellant that the High Court misconstrued the *ratio decidendi* in **DPP v. Sharon Lee Brown**⁸ and applied the test under subsection (2) as if it were the test required under subsection (1) of section 71. This was a misdirection. We accordingly uphold ground two of the appeal.

In ground three, the appellant alleges a misdirection on the part of the High Court when it held that the prosecution's burden of proof under section 71 (1) of the Forfeiture of Proceeds of Crime Act was not discharged as the prosecution failed to adduce evidence upon which an inference could be drawn that the money could reasonably be suspected to be proceeds of crime.

It is clear to us that this ground is not materially dissimilar to the first two grounds. The gamut of the appellant's argument under this ground is that the High Court misconstrued the import of section 71 (1) of the Forfeiture of Proceeds of Crime Act. It was submitted on behalf of the appellant that under section 71(1) the prosecution bears the burden only to show that the property found in the possession of the accused may reasonably be suspected of being proceeds of crime. Adopting the words used in **DPP v. Sharon Lee Brown**⁸ (paragraph 23) counsel for the appellant submitted that the evidentiary onus ends once the prosecution establishes that 'there are objective indications of unlawful activity in relation to the money or property.' It was counsel's contention that indications of unlawful activity can result from a combination of particular facts and circumstances, even if each is individually innocuous. In the present case, the court should have looked at the totality of circumstances, rather than one circumstance, to determine whether reasonable suspicion existed to support the fear that the money may be proceeds of crime.

Counsel fervidly submitted that where, as in the present case, the offence relates to possession of cash, the factors indicating that cash is related to criminal activity may include the quantity, packaging, circumstances of discovery, or method by which the cash is kept, including concealment. Counsel then went on to elaborate on the circumstances which, in counsel's view, contributed to reasonable suspicion in the present case, that the money in issue may be proceeds of crime. While acknowledging that many people do keep lawfully earned money at home, the learned counsel argued that the quantity of the money, if excessive, should raise suspicion. They adverted to **section 295** of the **Proceeds of Crime Act, 2002**² of the United Kingdom. The amount involved in the present case, was so high as to arouse reasonable suspicion. Counsel referred us to, and quoted a passage from the judgment of Sullivan J, in **The Director of Asset Recovery Agency & Others v. Green & Others**¹⁵, and that of King J, in the case of case **Asset Recovery Agency v. Jackson and Smith**¹⁸. In the former case, it was stated by Sullivan J at paragraph 33 and 34 of the judgment that:

“Just as the law-abiding citizen normally has no need to keep large amounts of bank notes in his possession, so the criminal will find the property in that particular form convenient as an untraceable means of funding crime... The four decisions do no more than recognize that conduct consisting in the mere fact of having a large sum of cash in the form of bank notes in one’s possession in certain circumstances...may provide reasonable grounds for suspicion and demand an answer....the circumstances which the cash is found may well be sufficient to require an explanation because, for example, absent any explanation, the large amount of cash is being necessarily exposed to the risks...”

The learned counsel also submitted that the method of concealment of the cash in the present case should raise reasonable suspicion that the source of the money was probably illicit activity. The money, in the present case, was found hidden at a farm house where the respondent did not ordinarily reside; the money was hidden in trunks buried underground beneath two concrete slabs. According to counsel for the appellant, this unusual way of keeping one’s money raised reasonable suspicion. The fact that the cash was concealed in a recently constructed building, which was built only after the general elections of 2011, means by necessary indication that the money was buried after the elections. The respondent held a cabinet portfolio immediately before those elections. These circumstances, according to the learned counsel for the appellant, raised

suspicion, as did also the modest income of the respondent from his salary and his business activities. In the absence of any satisfactory explanation to the contrary, the only inference that could be made was that the money was sourced from illegal activities.

In rebutting the appellant's arguments under ground three, the respondent's counsel contended that ground three sought to challenge a finding of fact established by the High Court. That finding of fact, according to the appellant's counsel, was that the court took judicial notice of the fact that it is common for people in Zambia to keep money in the manner the respondent kept the money found in his possession. Therefore, to raise an argument premised on finding of fact was contrary to the provisions of **section 8** of the **Supreme Court Act**³, chapter 25 of the laws of Zambia which proscribes appeals on points of fact. The respondent's counsel beseeched this court to dismiss ground three accordingly.

Having so submitted, the respondent's counsel, nonetheless went on to respond to the argument made by the appellant's

counsel on this ground in the alternative. It was contended that the respondent, being in possession of the quantity of cash that he had, was not itself proof of reasonable suspicion.

As regards the appellant's arguments on the method of concealment employed by the respondent, the learned counsel for the respondent submitted that the argument was not supported by the evidence on the record and, was in any case, not raised at the hearing of the appeal in the High Court. It could accordingly not be raised on appeal in keeping with the guidance of this court in the case of **Mususu Kalenga Building Limited & Another v. Richman's Money Lenders Enterprises**¹³. The same argument was advanced in relation to the appellant's argument regarding the absence of a bank trail of the subject money and the respondent's modest income. Counsel submitted that PW6, Isaac Musonda, who claims to have investigated the appellant's financial standing, did not produce the respondent's bank statements and payslips for the period between January 2010 and November 2011. The learned counsel quoted from the case of **John Nyambe Lubinda v. The People**¹⁹ where we stated that:-

“where evidence available only to the police is not placed before the court, it must be assured that had it been produced, it would have been favorable to the accused.”

The learned counsel for the respondent reiterated their submission that for offences such as the one create by section 71 (1) of the Forfeiture of Proceeds of Crime Act, an inference of guilt can only be established by clear evidence of criminal conduct in relation to the accused or indeed the money or property subject of the offence. The case of **Chimbini v. The People**²⁰ was cited as authority for the position that where evidence against an accused person is purely circumstantial and his guilt is a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can be drawn from the facts.

The learned counsel for the respondent ended their submissions on ground three by imploring the court to dismiss this ground of appeal.

We have mulled the arguments submitted to us by the parties under this ground. The appellant impugns the High Court’s finding that the prosecution’s burden of proof under section 71 (1) of the Forfeiture of Proceeds of Crime Act was not

discharged. We have already addressed the issues that are raised in this ground of appeal when we considered the arguments under ground one and two. We stated that the prosecution in the present case did, in fact, discharge the burden of proving the ingredients of the offence in section 71 (1). Possession of the money was clearly proved, and in our view, there is no doubt still lingering in that regard. Reasonable suspicion was equally proved, on a lesser standard than beyond reasonable doubt.

In our understanding, the framers of the Forfeiture of Proceeds of Crime Act did not intend to make proof of the crime under section 71(1) of the Act, to be beyond reasonable doubt. We are fortified in this regard by the clear provisions of section 78 of the Act, which, most surprisingly, neither of the parties referred us to. That section states that:-

“Save as otherwise provided in this Act, any question of fact to be decided by the court in proceedings under this Act is to be decided on the balance of probabilities.”

It was incumbent upon the respondent to raise the defence under section 71 (2) of the Act. The prosecution did not have to

prove that the respondent did not have reasonable grounds for suspecting that the money was derived from unlawful activity. The respondent, however, chose not to avail himself of that defence, opting instead to exercise his constitutional right to remain silent. The trial Magistrate made an inference that the money the appellant was found in possession of could have been derived from unlawful activity. She stated as follows:

“I find the circumstances surrounding the commission of this offence by the accused, gave rise to the irresistible inference that the money in issue could have been derived from a crime.”

In our considered opinion, that was a reasonable inference for the learned trial Magistrate to make on the evidence before her. We stated in the case of **Simutenda v. The People**⁷ that:-

“there is no obligation on an accused person to give evidence, but where an accused person does not give evidence, the court will not speculate as to possible explanation for the event in question; the court’s duty is to draw the proper evidence before it.”

In the case of **David Dimuna v. The People**²¹, we stated that:-

“whilst the court must not hold the fact that an accused remain silent against him, there is no impropriety in a

comment that only the prosecution evidence was available to the court...

When the prisoner, who is given the right to answer this question, chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing inferences that properly flow from the evidence it has got..."

We are satisfied that ground three has merit. We uphold it accordingly.

In ground four, the appellant raises the issue of the intention of the Legislature in passing the Forfeiture of Proceeds of Crime Act. According to counsel, the lower court erred when it construed section 71 of the Act in a manner which defeats the intention of the Legislature as is discernable from the preamble of the Act. After quoting verbatim the preamble to the Forfeiture of Proceeds of Crime Act, the learned counsel for the appellant stressed that the Act is intended to, among other things, domesticate the United Nations Convention on Corruption. It was counsel's submission that by intending to domesticate the United Nations Convention on Corruption, the Act aims to bring international standards in the application of the law in this country. Counsel cited **Article 5** paragraph 7 of **the United**

Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, 1988, and the **United Nations Convention Against Transnational Organized Crime, 2000**, both of which urge states parties there-to to consider a reversal of the burden of proof regarding the lawful origin of alleged proceeds of crime. According to the learned counsel for the appellant the High Court did not take these standards into account. We were urged to have such international standards in mind as we interpret section 71 of the Act.

The respondent opposed ground four of the appeal arguing that the construction of section 71 of the Act by the High Court was consistent with authorities established in leading Commonwealth jurisdictions and the criminal law generally. Counsel for the respondent argued the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998 has not been domesticated in Zambia and is therefore inapplicable. They essentially reiterated previous submissions to the effect that section 71 of the Act requires reasonable suspicion to be proved beyond reasonable doubt.

We have considered the arguments advanced under this ground of appeal. The appellant's grievance is that the court below did not construe section 71 of the Forfeiture of Proceeds of Crime Act in a manner that would render it possible to give effect to the intention of the Legislature. The learned counsel for the appellant made reference to international conventions which appear to call upon states to reverse the burden of proof when it comes to the origins of suspected proceeds of crime.

We feel inclined to give the background, albeit, briefly, to the enactment of forfeiture of proceeds of crime laws to the extent that this is relevant to the understanding of the intention of the Legislature in passing the Forfeiture of Proceeds of Crime Act.

Forfeiture legislation was prompted in large measure by the desire to circumvent the difficulties encountered in proving and dealing with serious offences such as money laundering and drug trafficking. Writing in the **Journal of Money Laundering**⁷, Justice Anthony Smellie, QC, Chief Justice of the Cayman Islands, made the following pertinent observations:-

“the worldwide adoption of laws which enable the confiscation of the proceeds of crime reflects the acknowledged importance

of depriving the criminal of his profits. These laws recognize that organized criminals use their proceeds of crime to insulate themselves by the use of intermediaries, from detection and arrest. They acknowledge that the more profitable the crime, the more difficult it becomes for law enforcement the link the criminal to it. The proceeds of crime become the very means by which the bastions of organized crime can be treated and sustained.”

This statement captures succinctly, the thinking which quickly permeated international debate on the subject of proceeds of suspected crime. Various international conventions were made to provide flexible standards on the burden of proof, those referred to be the appellant being some of them.

In many jurisdictions, it is now a common occurrence for the burden of proof to shift, or to be lowered during confiscation or forfeiture proceedings of property reasonably suspected to be proceeds of crime. In the case of **McIntosh v. Lord Advocate**²², Lord Hope of the Privy Council stated as follows:

“The essence of drug trafficking is dealing or trading in drugs. People engage in this activity to make money, and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of activity and the harm it does to the community provide a sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest, of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused’s knowledge, and they are rebuttable by him at a hearing before a judge on a balance of probabilities. In my opinion, a fair

balance is struck between the legitimate aim and the rights of the accused”

It is clear to us that there would be no justifiable basis for making a distinction between proceeds of drug trafficking referred to by Lord Hope in **McIntosh v. Lord Advocate**²² and other serious crimes for purposes of forfeiture of property reasonably suspected to be proceeds of crime.

We take judicial notice that Zambia ratified the United Nations Convention Against Corruption on 7th December, 2007, the United Nations Convention Against Illicit Substances on 28th May, 1993, and acceded to the United Nations Convention against Transnational Organized Crime on 24th April, 2005. All these conventions sought to introduce international standards in the fight against corruption, illicit trafficking in drugs and psychotropic substances, and transnational organized crime. Zambia’s ratification and accession to these instruments evinces the direction that the country is taking. In our considered view, the Forfeiture of Proceeds of Crime Act No. 19 of 2010, does domesticate, though not entirely, some tenets of these

conventions by making provision on forfeiture of suspected proceeds of illicit activity and lowering the standard of proof.

The passage of the Forfeiture of Proceeds of Crime Act in 2010 was therefore, a deliberate act of the State, sequel to international clamour in this regard, to restate the burden and the standard of proof in proceedings relating to forfeiture of proceeds of crime. The framing of section 71 (1), (2) and (3) was a conscious and deliberate desire to change the standard of proof and the evidentiary burden of proof. Section 78 of the Act, which we have earlier on quoted, makes the intention of the Legislature quite evident. We do not think that the circumstances here can be equated to one where an Act creates a *casus omissus* where we must be 'legislators' in interpreting the particular Act. We see our role, as being that stated by Viscount Dilhorne in **Stock v. Frank Johns (Tipton) Ltd**,²³ of finding the intention of the legislature as expressed in the words used. To use the words of Lord Reid in **I.R.C. v. Hinchey**²⁴

“we can only take the intention of Parliament from the words which they have used in the Act.”

Having said the foregoing, therefore, we believe that the intention of the Legislature, in the fullness of its wisdom, and as evinced in section 78 of the Act, was to lower the standard of proof in the establishment of the cases envisioned by section 71 of the Act, as well as to reverse, to a certain extent, the burden of proof as suggested in section 71 (2) of the Act.

We agree, therefore, with the learned counsel for the appellant that the High Court, apparently oblivious of the background milieu that prompted the passing of the Forfeiture of Proceeds of Crime Act, adopted an approach which would never give effect to the intention of the Forfeiture of Proceeds of Crime Act. Ground four of the appeal also succeeds.

The net result is that this appeal succeeds on all grounds. The judgment of the High Court is set aside. We confirm both the conviction and the sentence passed by the learned Magistrate together with the order of forfeiture.