

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., ORIYO, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 220 OF 2011

THE ATTORNEY GENERAL APPELLANT

VERSUS

1. MUGESI ANTHONY	}	 RESPONDENTS
2. BASHIRI WAZIRI		
3. SAS LOGISTICS LIMITED		

**(Appeal from the decision of the High Court of
Tanzania at Mwanza)**

(Nyangarika, J.)

**Dated 27th day of July, 2011
in**

Miscellaneous Criminal Application No. 25 of 2011

JUDGMENT OF THE COURT

**25th September, 2013 & 14th February, 2014
ORIYO, J.A.**

The appeal is against the Ruling and order of the High Court sitting at Mwanza in Miscellaneous Criminal Application No. 25 of 2011, delivered on 27th July, 2011.

The background to the appeal is as follows. Sometimes in early April 2011, the first respondent was driving a motor vehicle, Scania make, with registration number T 263 BLL and trailer registration number T 615 BGC, along the roads in Magu District, Mwanza Region. The second respondent was a passenger in the said motor vehicle owned by the third respondent. While on the road, a policeman on patrol stopped the motor vehicle, searched it and arrested the first two respondents and the motor vehicle. Upon inspection and search of the motor vehicle, a consignment of 25 bags of **cannabis sativa** (bhang), weighing 283 kilogrammes was discovered. Going by the evidence on record as per the affidavits of one Winfred Moses Kipamila, the then officer commanding Police Station, Magu District, Mwanza Region and one Benedict Michael Wakulyamba, the then Deputy Regional Crimes Officer Mwanza Region, two (2) bags were found in the driver's cabin, thirteen (13) bags were found under the chassis of the motor vehicle tightened with a rope and ten (10) bags were found in the boot thereof.

The first two respondents were then formally arrested and subsequently charged in the District Court of Magu in Criminal Case No. 82 of 2011 with **Illicit Trafficking in Narcotic Drugs** contrary to section 16

(1) (b) (i) of **the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95, R.E. 2002.**

While the 1st and 2nd respondents were awaiting trial, the appellant Attorney General, invoked the provisions of section 38 (1) of the **Proceeds of Crime Act, Cap 256, R.E. 2002**, to move the High Court to issue a restraint order against the motor vehicle and its trailer. The application was lodged in the High Court of Tanzania at Mwanza vide Miscellaneous Criminal Application No. 25 of 2011. The application was duly heard and it was dismissed with costs. The High Court ordered the seized motor vehicle and trailer to be released to the third respondent. And in the event, the motor vehicle is required as an exhibit during the trial of the first and second respondents, it should be made available upon a prior notice of 30 days, the High Court further ordered.

Aggrieved by the High Court decision, the Attorney General, instituted this appeal on the same date of the delivery of the ruling, on 27/7/2011. However, before the appeal was heard, the Attorney General, in terms of Rule 4(2) (a) of the Court of Appeal Rules, 2009, moved the Court for an order of stay of execution of the High Court order of 27/7/2011. The stay order was granted on 23/11/2011.

In challenging the High Court dismissal order of 27/7/2011, the Attorney General lodged a Memorandum of Appeal in this Court with five grounds of appeal as follows:-

1. That the Honourable High Court Judge erred both in law and fact in dismissing the application by the Applicant with costs and ordering the motor vehicle with registration No. T 263 BLL and trailer with registration No. T. 615 BGC that was subject of the application and a pending criminal trial, to be released to the 3rd respondent with a condition of serving the 3rd respondent a 30 days prior notice if the said motor vehicle is required by the Republic as exhibit or otherwise.
2. That, the Honourable High Court Judge erred in law in setting time limit of 60 days within which a property seized under the Proceeds of Crime Act [Cap. 256 R.E. 2002] can remain in the custody of the investigative machinery.
3. That, the Honourable High Court Judge erred both in law and fact by his failure to understand the purpose and scope of the Proceeds of Crime Act [Cap 256 R.E. 2002] when holding inter-alia that the 3rd

Respondent established a uniform innocent owner defense by preponderance of evidence.

4. That, the Honourable High Court Judge erred in law in holding that **the Proceeds of Crime Act** [Cap 256 R.E. 2002]does not seem to provide *locus standi* to the DPP in dealing with restraint applications both pre and post charging.
5. That, the Honourable High Court Judge erred in law by acting and relying on defective counter affidavits filed by the 3rd Respondent after he had dismissed preliminary objections by the Appellant on defectiveness of the said Counter affidavits.

At the hearing of the appeal, Mr. Biswalo Mganga, learned Principal State Attorney and Mr. Sethi Mkemwa, learned Senior State Attorney, teamed up to represent the appellant Attorney General. The first and second respondents had no legal representation, and thus appeared in person, while the third respondent was represented by a team of two learned counsel, Mr. Kassim Gilla and Mr. Ibrahim Mbugha.

In arguing the appeal, Mr. Mganga, preferred to begin with the last ground of appeal, ground five, that the learned High Court Judge acted

and relied on a defective affidavit filed by the third respondent in the High Court, which had a defective verification clause and jurat. Elaborating on the complaint, Mr. Mganga stated that the verification clause of the counter affidavit of one Adam Ambari, the General Manager of the third respondent, was done at Dar es salaam on 23/6/2011 while the jurat of the same affidavit showed that it was affirmed on the same date, but in Mwanza and not Dar es Salaam. He submitted that the counter affidavit offended the provisions of section 8 of **the Notaries Public and Commissioner for Oaths Act, Cap 12, R.E. 2002**. As for the jurat, the learned Principal State Attorney argued that the place, date, and the name of the attesting officer have to be clearly shown, but the counter affidavit lacked the name of the advocate who witnessed the signature of the deponent, Adam Ambari. He added that, in its place, there was only a signature and a rubber stamp of one James Njelwa. Mr. Mganga forcefully submitted that the absence of the name of the witnessing officer in the jurat thereof rendered the counter affidavit defective. To support his argument, Mr. Mganga referred to the decisions of this Court in **DPP vs Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported) and **Felix Francis Mkosamali vs Jamal A. Tamim**, Civil Application No. 4 of 2012 (unreported). He concluded that it was not

proper for the High Court to act on a defective counter affidavit. He urged us to discard the counter affidavit.

In rebuttal thereof, Mr. Gilla, learned counsel, making reference to **The Notaries Public and Commissioner for Oaths Act**, submitted that there is no law which prohibits the verification of an affidavit to be done at one place and the jurat thereof at another place. He further submitted that even if it was prohibited it would still be possible in practice, to verify it in Dar es Salaam, then travel to Mwanza to have it attested. In conclusion, Mr. Gilla expressed his view that the jurat of the counter-affidavit was in full compliance with the provision of section 8 of the **Notaries Public and Commissioners for Oaths Act**, (supra). He stated that the place and the date of the making of the counter-affidavit were shown and the signature of the deponent was witnessed by one James Njelwa on 23/6/2011 as evidenced by his name on the rubber stamp embossed thereon and his signature.

For obvious reasons, Mr. Mganga, learned Principal State Attorney argued the remaining four grounds of appeal in their chronological order as follows.

In support of **ground one** of appeal, Mr. Mganga stated that the High Court erred when the criminal case was still pending in court, to order the return of the motor vehicle to the third respondent with preconditions for its availability as an exhibit in court when required. He submitted that since the motor vehicle was arrested carrying a consignment of **cannabis sativa**, under section 2 of the **Drugs and Prevention of Illicit Traffic in Drugs Act**, the motor vehicle was an "*instrumentality of Crime*" which rendered it a "*tainted property*" in terms of section 3 of **the Proceeds of Crime Act**, and liable to an order of arrest.

On his part, Mr. Gilla, arguing in support of the High Court decision to refuse to grant a restraint order against the motor vehicle, stated that it was wrong for the appellant to join the owner of the motor vehicle in the application because the owner is excluded in terms of section 38(1) of the Proceeds of Crime Act, as the owner is not a party in the pending criminal case. He submitted that since the owner of the motor vehicle was not charged, the appellant erred in making the application under section 38(1) as it was done.

Regarding **ground two** of appeal, Mr. Mganga argued that it was incorrect for the High Court to set a sixty days time limit for the motor

vehicle to remain under custody, as there is no law which imposes such a time-limit. He made reference to various provisions and penal legislations on seized properties including **The Criminal Procedure Act, Cap 20 R.E. 2002, The Proceeds of Crime Act (supra), The Drugs and Prevention of Illicit Traffic in Drugs Act, (supra)**, which do not set such time limits.

For the third respondent, Mr. Gilla, submitted that the basis of the High Court decision to impose the time limit of 60 days was derived from section 225(4) of the Criminal Procedure Act, (supra), which imposes a time limit of 60 days on the prosecution to finalise investigations. The learned counsel expressed his views that if left unchecked, the prosecution might fall into a lapse which could be prejudicial to the owner of the property.

With respect to **ground three** of appeal, Mr. Mganga submitted that the learned judge misunderstood the purpose and scope of the **Proceeds of Crime Act**, in particular, section 43(3), which sets out a uniform defence of an innocent owner. He submitted that since the offence here is a specified offence, the defence of innocent owner is not available to the third respondent. He made reference to two decisions of the Supreme

Court of South Africa in:- 1. **Simon Prophet vs National Director of Public Prosecutions**, Case No. 502/2004; 2. **National Director of Public Prosecutions vs R.O. Cook Properties (PTY) LTD and Others**, Cases 260/2003, 666/2002, 111/2003 and a decision of this Court in **DPP vs Mukula Mandungu**, Criminal Appeal No 47 of 1989, (unreported).

For the third respondent, Mr. Gilla's response to ground three was simple. He distinguished this case from those referred to and relied upon by the appellant. As for the two decisions from South Africa, he stated that they are not binding on the Tanzanian courts and the circumstances are dissimilar. He urged us to ignore the decisions from South Africa.

Arguing on the final complaint in **ground four** of appeal that the Director of Public Prosecutions has no *locus standi* in this case brought under the **Proceeds of Crime Act**, Mr. Mganga merely dismissed it as unfounded. In support, he made references to the **National Prosecutions Service Act**, No. 27 of 2008 and **The Office of the Attorney General (Discharge of Duties) Act**, No. 4 of 2005, which vest each with powers to collaborate in criminal prosecutions. He thus asked us to find that the appeal has merit.

On the other hand Mr. Gilla submitted in support of the High Court decision that the Director of Public Prosecution has no *locus standi* in cases under the **Proceeds of Crimes Act**. He stated that the power to prefer a charge under this legislation is vested in the Attorney General and not the Director of Public Prosecutions. He urged us to dismiss the appeal.

We now move to consider the merits or otherwise of the appeal.

Unlike was the case with the appellant, we have decided to first determine the merits of **ground four of appeal**, challenging the *locus standi* of the **Director of Public Prosecutions** in these proceedings arising from the **Proceeds of Crime Act**. We shall first consider the complaint in the light of the basic law of the land, that is, **the Constitution of the United Republic of Tanzania, Cap 2, R.E. 2002**.

Articles 59 and 59 B of the Constitution provide for both offices of the **Attorney General** and the **Director of Public Prosecutions** and their functions respectively. Article 59 provides as follows:-

"59.-(1) There shall be the Attorney General of the Government of the United Republic, who in the subsequent Articles of this Constitution, shall simply

be referred to as the "Attorney General" who shall be appointed by the President.

(2) The Attorney General shall be appointed from amongst public officers qualified to perform functions of advocate or persons who are qualified to be registered as advocate and has continuously held these qualifications for a period of not less than ten years.

(3) The Attorney General shall be the advisor of the Government of the United Republic on matters of law and for that purpose shall be responsible for advising the Government of the United Republic on all matters of law, and to discharge any other functions pertaining to or connected with law which are referred or assigned to him by the President and also to discharge such other duties or functions which shall be entrusted to him by this Constitution or by any law.

(4) In the discharge of duties and functions in accordance with this Article, the Attorney General shall be entitled to appear and be heard in all courts in the United Republic.

(5) N/A"

By virtue of **Act No. 1 of 2005, Article 12**, thereof, the office of the Director of Public Prosecutions is provided for under **Article 59 B** which provides:-

"59B -(1) There shall be a Director of Public Prosecutions who shall be appointed by the President from amongst persons with qualifications specified in sub article (2) of Article 59 and has continuously held those qualifications for a period of not less than ten years.

*(2) The Director of Public Prosecutions shall have powers to **institute, prosecute and supervise all criminal prosecutions** in the country. (Emphasis ours).*

(3) The powers of the Director of Public Prosecutions under sub article (2) may be exercised by him in person or on his directions, by officers under him or any other officers who discharge these duties under his instructions.

(4) In exercising his powers, the Director of Public Prosecutions shall be free, shall not be interfered with by any person or with any authority and shall have regard to the following:-

- (a) the need to dispensing justice;*
- (b) prevention of misuse of procedures for dispensing justice;*
- (c) public interest.*

(5) The Director of Public Prosecutions shall exercise his powers as may be prescribed by any law enacted or to be enacted by the Parliament."

We have decided to reproduce at length the provisions of Articles 59 and 59 B of the Constitution to show the vast powers bestowed upon the Attorney General and the Director of Public Prosecutions under the Constitution in relation to public prosecutions in the country. The powers of the Attorney General include but are not limited to ***"advising the Government on all matters of law and to discharge such other duties entrusted to him by the Constitution or by any law"***.

Other duties entrusted to the office of the Attorney General by other law include those provided for under Act No. 4 of 2005, **The Office of the Attorney General (Discharge of Duties) Act. Section 8** thereof provides as follows:-

"8-(1) Without prejudice to the general provisions of Article 59, 59B of the Constitution and any other provisions of this Act, the duties of the Office of the Attorney General shall be as follows to:-

- (a) perform the functions of public prosecutions in accordance with the Constitution and any other written law;*

- (b) control all criminal prosecutions in the country;" etc.*

In terms of the **National Prosecutions Service Act, No. 27 of 2008**, the overall control of prosecutions, in the country is vested in the Director of Public Prosecutions, appointed under **Article 59B of the Constitution**, (supra) and is assisted by State Attorneys in the performance of the functions of **the National Prosecutions Service**. Section 9 thereof provides:

"9.-(1) Notwithstanding the provisions of any other law, the functions of the Director shall be to:-

- (a) decide to prosecute or not to prosecute in relation to an offence;*
- (b) institute, conduct and control prosecutions for any offence other than a court martial;*
- (c) take over and continue prosecution of any criminal case instituted by another person or authority;*
- (d) discontinue at any stage before judgment is delivered any criminal proceeding brought to the court by another person or authority; and*

- (e) *direct the police and other investigative organs to investigate any information of a criminal nature and to report expeditiously."*

Other powers/functions of the **Director of Public Prosecutions** are provided for under **section 10** as follows:-

10.-(1) Notwithstanding the provisions of any other law relating to appeals, revisions or applications, it shall be the function of the Director to:-

- (a) *institute, conduct and defend criminal proceedings in courts of law; and*
 - (b) *take over an appeal, revision or application arising from private prosecution, whether as appellant, applicant or respondent and where the Director takes over the appeal as appellant, or applicant he may continue or otherwise withdraw the appeal.*
- (2) *N/A*
- (3) *For the avoidance of doubt, the functions specified in this section may also be performed by a State Attorney or a public prosecutor in accordance with the provisions of this Act."*

In the Ruling of the High Court delivered on 27/7/2011, the learned High Court Judge, challenged the *locus standi* of the Director of Criminal Prosecutions at page 66 of the Record of Appeal. With respect, we reproduce part of the decision as hereunder:-

*"The defendants, are the person (sic) whom proceedings in an offence has (sic) been started. Although the **Act** deals with the various roles of the Attorney General, it does not seem to provide for pre and post charge **locus standi** of D.P.P for the purposes of the restrains (sic) application. I say so because all functions performed by the D.P.P are in his capacity of being a prosecutor i.e. being a prosecutor is only one important function of the D.P.P If (sic) at least must be highly questionable whether when for example, the D.P.P gives advice to police under **Criminal Procedure Act** (Cap 20 R.E. 2002), that advice automatically makes him the prosecutor. What if for example, the advice is that there has not been a criminal offence committed or that another agency should assume the prosecution duties, how (sic) any interpretation can the advice given be considered by the prosecutor?"*

Therefore, if the Attorney General, as in the present case, is the applicant and turns out not to

have legal standing, the pre trial restrain order must be void obinitio (sic).

Further, the improper granting of the restrain order may be sufficient for an aggrieved person to commence civil action against Attorney General for damages."

The learned judge went into pains to question the ***locus standi*** of the Director of Public Prosecutions under the **Proceeds of Crime Act**, (supra), where the law makes reference to the Attorney General only but not to the Director of Public Prosecutions, as in Section 38 (1) thereof, under which the application for restraint order was made.

In view of the clear provisions of the **Constitution of the United Republic of Tanzania, Articles 59 and 59B** and other legislative enactments including Acts **4 of 2005 and 27 of 2008**, we entertain no doubts in our minds that the offices of the Attorney General and the Director of Public Prosecutions are by law enjoined to cooperate and work together in the performance, control and prosecutions in all criminal matters in Tanzania. We are of the view that, had the said Articles of the Constitution and the provisions of the other legislations been brought to the attention of the learned judge, we harbour no doubt that he would not

have challenged the powers of the **Director of Public Prosecutions** in the case as he did. We find and hold that the learned judge erred in challenging the *locus standi* of the Director of Public Prosecutions in the matter which was criminal in nature.

Therefore we allow ground four of appeal.

As for **ground two** of appeal, having heard and considered counsel's submissions on this ground, we respectfully think that this ground should not detain us unnecessarily. We accept Mr. Mganga's strong submissions that the learned High Court Judge erred in law in setting the time limit of sixty (60) days because it is not backed by any known law as Mr. Mganga argued. We accordingly allow this ground of appeal.

Ground five is challenging the competency of the counter affidavit of Adam Ambari in Miscellaneous Criminal Application No. 25 of 2011 in the High Court. The appellant attacked both the **verification clause** and the **jurat** as defective. However, Mr. Mganga, answering a question from the Court on whether it is not possible for one to have an affidavit drawn in Dar es salaam and have the deponent and the witness travel together to Mwanza on the same date where the affidavit is sworn/affirmed; he readily conceded to such a possibility. After all, the verification is made by the

deponent. Therefore the only remaining issue here is on the ***jurat*** thereof, in that it lacked the name of the attesting officer/witness to the signature.

We think the law as regards to affidavital evidence is now settled. There is a plethora of decisions of this Court on the subject, including **DPP vs Dodoli Kapufi and Another, Felix Francis Mkosamali vs Jamal A. Tamim**, (supra), and **Bulk Distributors Ltd vs Happynes Mollel**, Civil Application No. 4 of 2008. In **DPP vs Dodoli Kapufi**, we stated as follows:-

*"A **jurat** is a certification added to an affidavit or deposition stating when, where and before what authority (whom) the affidavit was made. Such authority usually, a Notary Public and/or Commissioner for Oaths has to certify three matters, namely:-*

- (i) that the person signing the document did so in his presence;*
- (ii) that the signer appeared before him on the date and at the place indicated thereon; and*
- (iii) that he administered an oath or affirmation to the signor, who swore to or affirmed the contents of the document."*

We further stated that total absence of any of the above ((i) – (iii)) in an **affidavit, counter affidavit** or an **affidavit in reply**, renders such affidavit incurably defective.

There is no controversy that the counter affidavit of Adam Ambari does not bear the name of the Commissioner for Oaths before whom the oath was taken. Counsel for the third respondent denied that there was any omission because the name of the Commissioner for Oaths was shown by a rubber stamp embossed thereon as **James P. Njelwa**.

However, as the Court held in the case of **D.P.P Shapriya & Co. Ltd vs Bish International BV** [2002] E.A. 47:-

"A rubber stamp is not part of jurat."

The same was quoted with approval in **Wilfred Muganyizi Kagasheki and Another**, Civil Appeal NO. 107 of 2008, (unreported). See, also **Felix Francis Mkosamali vs Jamal A. Tamim**, (supra). In view of the clear legal position expounded above, the absence of the name of the attesting officer in the jurat of the counter affidavit of Adam Ambari renders the counter affidavit fatally defective. It is accordingly discarded.

In view of the **close relationship** between grounds **one** and **three** of appeal, we deem it appropriate to combine them and dispose them together. Reverting to the **first ground** of appeal on whether the trial High Court erred by dismissing the application lodged by the Attorney General for the pretrial restraint orders against the motor vehicle and its trailer, we have found it appropriate to preface our consideration and decision by the wording employed in the application before the High Court which stated:-

- "1. *An order prohibiting the defendants and all other persons from disposing of, interfering with or dealing in any other manner with Motor Vehicle make Scania with chassis No. 5131317 and registration No. T. 263 BLL and a Trailer with chassis No. GIBD 100001 with registration No. T 615 BGC so far as it remains property held by the Defendants and or any other person, whether the property is in their names or not, including all property held for or on behalf of the Defendants by any person or entity and further including the*

shareholding of the Defendants in any company and all other benefit received by the Defendants, any other person or entities at any time before or after the making of this application and the granting of the order or any property held by any person or entity who received such benefit, whether in the names of the Defendants or third person or entities on behalf of the Defendants."

The application was supported by three affidavits of Pius Hilla, State Attorney, Mwanza, Wilfred Moses Kipamila, Assistant Inspector of Police, Magu and Benedict Michael Wakulyamba, Deputy Regional Crimes Officer, Mwanza. The application was however strongly resisted by the third respondent through its learned advocate, Mr. Mandele. The learned counsel contended before the learned High Court judge that the said *cannabis sativa* did not belong to it at all and was loaded on the motor vehicle without its knowledge and consent.

This contention notwithstanding, the third respondent conceded on the design and presence of special sealed chambers which he claimed to contain highly explosive materials.

After considering the affidavital evidence of parties and their respective submissions, the learned High Court Judge refused to grant a restraining order and stated as follows:-

*"In my considered view, I am not satisfied that the pre trial restrain order sought is necessary or justified in all circumstances of this case. On the contrary, **the 3rd defendant has established a uniform innocent owner defense by preponderance of evidence that they were unaware that the vehicle was used for illegal purposes** and took all reasonable steps immediately after seizure.*

I therefore dismiss the application with costs to the 3rd defendant". (Emphasis ours).

There is no gainsaying that the appeal fails or succeeds on this sole ground. However, before we proceed to examine the merits or otherwise of this ground of appeal we deem it necessary, briefly, to state some of the

salient features found in the Drugs and Prevention of Illicit Traffic in Drugs Act, "The Drugs Act," (supra). The Object of the Act is stated as :-

*"....to consolidate the law relating to narcotic drugs; to make provision for **the control and regulation of operations relating to narcotic drugs and psychotropic substances**; to provide for the forfeiture of property derived from or used in illicit traffic in narcotic drugs and psychotropic substances; to provide for the prevention of illicit traffic in narcotic drugs and psychotropic substances and to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances."*
(Emphasis is ours).

The Drugs Act has to be read together with the **Criminal Procedure Act, Cap 20** and the **Proceeds of Crime Act**, (supra), with modifications where necessary. The application for pretrial restraint orders as already stated, was made under the **Proceeds of Crime Act, Section 38 (1)** thereof which provides:-

*"38(1) Where a person has been convicted of a serious offence or has been or is about to be charged with a serious offence, **the Attorney General may apply to a court for a restraining***

order in terms of this Part against all or any specified property of that person including property acquired after the issue of the restraining order and property of a person other than the person convicted.” (Emphasis is ours).

However, the court’s powers to grant restraint orders under section 38 are pegged on the fulfillment of certain terms and conditions spelt out in section 39 of the **Proceeds of Crime Act. Section 39** provides in part as follows:-

“39(1) Where the offence concerned is a ***specified offence***, the court shall, subject to this section, issue a restraining order against the property.

(2) Where the offence concerned is a ***serious offence other than a specified offence***, the court shall, subject to this section, issue an interdict against the property unless the court is satisfied that it is not in the public interest to make such an order.

(3) Where the defendant has not been convicted of the offence concerned, the court shall not issue a restraining order unless -

- (a) *the application for the interdict is supported by an affidavit of a police officer stating that he believes that the defendant committed the offence; and*
 - (b) *the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.*
- (4) *Where the application is made pending the charging of the defendant with the offence concerned, the court shall not issue a restraining order unless it is satisfied that the defendant will be charged with the offence or a related offence within forty –eight hours.*
- (5) *Where the offence concerned is **a serious offence other than a specified offence**, the court shall not issue a restraining order against the property of the defendant unless-*
 - (a) *the application is supported by an affidavit of a police officer stating that he believes that-*
 - (i) *the **property is tainted property**; or*

- (ii) *the defendant derived a benefit, directly or indirectly, from the commission of the offence; and*
 - (b) *the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.*
- (6) *Where a restraining order is sought against a person other than the defendant, the court shall not issue the restraining order unless-*
- (a) *the application is supported by an affidavit of a police officer stating that he believes that-*
 - (i) *the property is tainted property in relation to the offence; or*
 - (ii) *the property is subject to the effective control of the defendant who derived a benefit, directly or indirectly, from the commission of the offence; and*
 - (b) *the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.*

- (7) *In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant, the court may have regard to the matters referred to in subsection (2) of the section 23.*
- (8) *A restraining order shall be granted in respect of property whether or not there is any risk of the property being disposed of, or otherwise dealt with, in such manner as would defeat the operation of this Act.*
- (9) ***A court may refuse to grant a restraining order if the Republic fails to give the court such undertakings as the court considers appropriate with respect to the payment of damages of costs in relation to the granting and operation of the order".*** (Emphasis ours).

In dismissing the application for pretrial restraint orders, the High Court based its decision on two principal reasons. The first one was that the third defendant had established a **uniform innocent owner defence by preponderance** of evidence. The second one was that the applicant Attorney General did not give any undertaking to pay damages, costs, etc. in terms of section 39 (9) (*supra*).

We think that the second reason can briefly be disposed of. Where the Republic fails to give such an undertaking in respect of payment of damages/costs, the court has discretion to grant or not to grant the order sought. The trial High Court, freely exercised its discretion by refusing to grant the order sought by the Republic. We also take note that at the hearing, the issue of payment of costs was neither raised by the High Court nor by the third defendant who was ably represented by counsel. The issue was raised and determined by the High Court *suo motu* in its decision, without hearing the parties on the same. It would not have been proper therefore, for the learned High Court judge to deny the orders sought by the appellant on that ground.

As for the **uniform innocent owner defence**, it is available to a defendant in such proceedings under section 43 (3) of the **Proceeds of Crime Act**, which states as follows:-

"43 (3) Any person having an interest in property which is the subject of a restraining order may apply to a court for the variation of the restraining order to exclude the person's

interest from the order and the court shall grant such application:-

(a) if the offence concerned is not a specified offence and the interest is not tainted property; or

(b) Where the offence concerned is a specified offence, it is satisfied that-

*(i) **the applicant was not in any way involved in the commission of the offence; and***

*(ii) **the interest in the property was acquired for sufficient value without knowledge, and in circumstances such as not to arouse a reasonable suspicion that the property was tainted property.** "(Emphasis ours)."*

As alluded to earlier in this Judgment, the third defendant denied any knowledge, consent, conspiracy or any involvement in the procurement

and transporting of the illegal cargo found in its motor vehicle and trailer. In addition, Mr. Mandele argued that the motor vehicle and trailer were legally procured for value before the commission of the crime. The terse response of the Attorney General was that the defence of innocent owner is not available to the third defendant /third respondent.

Under **the Proceeds of Crimes Act, property which is an instrumentality of an offence** is categorized as **tainted property**. In terms of section 3(1) thereof, **tainted property** is defined as:-

- "(a) any property used in, or in connection with
the commission of the offence;*
- (b) any proceeds of the offence; or*
- (c) N/A....."*

It is not in dispute that a motor vehicle, Scania make, registration number T 263 BLL and its trailer with registration number T 615 BGC, the property of the third respondent, was impounded in Magu District, Mwanza Region, carrying a consignment of narcotic drugs, namely, bhang, sometimes in April, 2011, contrary to the provisions of the **Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95**. In terms of section

3(1) of the **Proceeds of Crime Act**, the motor vehicle was in the circumstances rendered a **tainted property**.

The issue in dispute in this appeal is whether the learned High Court judge erred in dismissing the application for a restraint order against property of the respondent, in terms of section 38 of the **Proceeds of Crime Act**, on the ground that the third respondent was an **innocent owner**.

In order to do justice to the parties in this appeal, we have decided to begin from the beginning by first considering on whether it was established beyond doubt that the third respondent's motor vehicle and trailer were **tainted property** in terms of section 3(1) of the **Proceeds of Crime Act**. Then we shall proceed to look at the second issue on whether the third respondent was an **innocent third party owner**.

In the course of his submissions, the learned counsel for the third respondent challenged and distinguished the South African court decisions relied upon by the appellant on the ground that Tanzanian courts are not bound by South Africa court decisions.

In our respectful view, that statement coming from the bar is not quite accurate. It is not denied that the South African legal system is

dissimilar to our legal system which is based on the common law system. Strictly speaking, Tanzanian courts are not bound by such decisions. However, it will not be wrong when dealing with matters arising from similar circumstances to seek inspiration or borrow a leaf, from decisions arising from similar legislations in identical circumstances around the world, including South Africa, Australia, the United Kingdom, etc; irrespective of differences in legal systems. Otherwise without opening up, our legal jurisprudence will have limited room to develop. In this regard we have taken into account the relevant legislation in this matter, The **Proceeds of Crime Act, 1994**, which has identical provisions with similar legislation in South Africa, **The Confiscation of Proceeds of Crime Act 1989**, Australia, **The Confiscation Act, 1997**, and The **Proceeds of Crime Act, (POCA)**, 2002 of the United Kingdom, etc. It is obvious here that the South African legislation and others which have been around for a longer period than ours have been tested in those foreign courts for a longer period. Even if such legislation has not been around for a longer period than ours, there is always something to learn from their court decisions. And at this juncture, we acknowledge the unreserved resourcefulness and industry of Mr. Biswalo Mganga and Mr. Sethi Mkemwa, learned Principal

and Senior State Attorneys, respectively, who supplied the Court with most of the foreign and the sole local authorities in this appeal.

Therefore, we find justification for the appellant's reliance in aid on foreign courts' decisions including South African, Australian, United Kingdom and others, which we now take the liberty to look at.

In the case of the **National Director of Public Prosecutions and Smilo Eliot Goci**, Case No. 21509/10, the applicant Director of Public Prosecutions applied for a forfeiture order against a motor vehicle, the property of the respondent on the ground that the motor vehicle was an **instrumentality of an offence**. It was alleged that on the material date, the said motor vehicle, driven by the driver of the respondent with one passenger on board, was impounded by the police while ferrying a consignment of drugs known as **dagga**, weighing 1660.5 kilogrammes. The respondent opposed the forfeiture order on the defence that he was an **innocent owner**, relating to both the respondent's purchase of the vehicle and his alleged lack of knowledge of the unlawful cargo. The respondent pleaded ignorance of the consignment.

In arriving at its decision the Western Cape High Court sitting at Cape Town relied on a decision of the South African Supreme Court of Appeal in **National Director of Public Prosecutions vs R.O. Cook Properties** 2004 (2) All S.A. 491, where the Supreme Court set out the test to be applied in such cases when it stated:-

"...where a forfeiture order is sought, the court must undertake a two-stage inquiry to ascertain whether the property in issue was an instrumentality of an offence and if so, the court must consider whether certain interests should be excluded from forfeiture."

As to what amounts to **an instrumentality of an offence**, it is defined as any property which is concerned in the commission or suspected commission of an offence. It is similar to **tainted property** under section 3(1) of our laws (supra).

In **Cook Properties**, it was held:-

"the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense, the property must facilitate

or make possible the commission of the offence..... the link between the crime and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime".
(Emphasis ours).

The Court further stated:

*"In a real substantial sense the property must facilitate or make possible the commission of the offence. As the term '**instrumentality**' itself suggests (albeit that it is defined to extend beyond its ordinary meaning), **the property must be instrumental in and not merely incidental to the commission of the offence.**"* (Emphasis ours).

See also **DPP vs Garner** (26/4/1999, VCC), (unreported).

In an Australian case of **DPP vs Moran** [2002] VSCA 154, in the Supreme Court of Victoria Court of Appeal, the issue was whether the allegedly **tainted property** was subject to forfeiture order in terms of the Australian legislation, **the Confiscation Act, 1997**, as amended up to 2012. The Supreme Court dismissed the appeal by the Director of Public Prosecutions on the basis of section 33 (5) of the Australian Act, which provides:

"In considering whether to make an order under subsection (1) in respect of particular property the court may have regard to:-

- a) the **use that is ordinarily** made or **had been intended to be made**, of the property; and*
- b) any **hardship** that may reasonably be likely to be caused to **any person by** the order; and*
- c) **the claim of any person to an interest in the property** having regard to the matters specified in section 50(1)."* (Emphasis ours).

According to case law, in order to satisfactorily prove whether the property is **tainted** or not, it must be established that the property **was used or was intended by the respondent to be used in connection** with the commission of the offence or whether it was merely **incidental**.

In yet another drug offence decision in the case of **R. vs Hadad** (1989) 16NSWLR 476, it was found that the motor vehicle involved in the commission of the crime was owned **by an innocent third party**. The Appellate Court upheld the High Court decision which had stated :-

*"The circumstances here are somewhat unusual. **Any hardship** that would flow from the forfeiture of this vehicle would not flow to **Hadad**. Whilst he had possession of the vehicle, he had obtained that possession fraudulently from Mr. Cradle without payment. Further **it cannot be said that the ordinary and intended use of the vehicle by Mr. Cradle was for drug dealing**. The ordinary and intended use, whilst in his possession, was of course for the normal everyday use of a motor vehicle.*

If we were to make an order, undoubtedly considerable hardship would arise upon Mr. Cradle, who, in my view is completely innocent of any wrong doing". (Emphasis ours).

Unfortunately neither party brought to our attention relevant local court decisions on the issue save for the Court's decision issued on 14/9/1989, before the **Proceeds of Crime Act** (supra) became operational, in the case of **DPP vs Mikula Mandungu**, Criminal Appeal No. 47 of 1989, (unreported). In that case the respondent's lorry was impounded while ferrying illegally, a big consignment of elephant tusks from Tanzania to Burundi. Upon the driver's conviction, the trial court made an order of forfeiture in respect of the lorry. The owner thereof successfully applied for the restoration of the motor vehicle to him on the ground that the owner was not aware of the illegal cargo. On appeal to the Court, the DPP's appeal was allowed as the Court stated that:-

*"We are satisfied that the **respondent did not prove that his lorry was used** in the commission of these offences **without his knowledge or consent.**" (Emphasis ours).*

The decision, though made before the **Proceeds of Crime Act** became operational, is still good law today and would still be relevant based on the same facts where a **respondent owner of tainted property fails to prove on a balance of probabilities that he is an innocent owner.**

The law places a burden on owners and other interest holders when applying for exclusion of an interest to state that such owner acquired the property legally and neither knew nor had reasonable grounds to suspect that the property is an instrumentality of an offence. Such owners have to prove on a balance of probability, in order to qualify for an exclusionary order that he/she is an innocent owner.

In disposing of this particular ground of appeal, we wish to make it absolutely clear that we are alive to the noble objectives of these two pieces of legislation which reflect not only national but also international policy and grave concern in our resolve to combat organized crimes and illicit trafficking in drugs. As was lucidly pointed out by the U.K. Supreme Court in relation to **POCA** in **R. v. Wya** [2012] UKSC 51, the legislative purpose of these Acts:-

"is to ensure that criminals (and especially professional criminals engaged in serious organized

crime) do not profit from their crimes, and it sends a strong deterrent message to that effect".

Since it is a notorious fact that "*professional and habitual criminals*" among which the 3rd respondent is not counted, "*frequently take steps to conceal their profits from crime*", we unreservedly share Lord Steyn's firm stance that "**Effective but fair** powers of *confiscating the proceeds of crime*" are essential [**R. v. Revi**] [2002] UKHL 1.

All the same, in determining whether a particular property is tainted property or not, for the purpose of either a restraint or confiscation order, under these Acts, the principles to be considered are found in **case law** and **legislation**.

Basically, the considerations to be taken into account are **what was the ordinary use of the property** or **what was the intended use of the property** or **whether the crime was merely incidental** – See **DPP vs Cook Properties, DPP vs Garner, DPP vs Moran, R vs Hadad**, (supra) and **Section 33(5), The Confiscation Act, (Australia), 1997** as amended, inter alia.

In the present case, can it be said with certainty that the third **respondent's use or intended use of the motor vehicle and trailer** was for transporting bhang or narcotic drugs and psychotropic substances? From the material before us, our unequivocal answer to this pertinent question is in the negative. There was not even an oblique suggestion to that effect by the applicant now the appellant, either before the learned High Court Judge or before us.

However, the learned High Court Judge found no difficulty in holding that the said motor vehicle was **tainted property** as the same was not controverted by the respondents. He therefore refused to grant the appellant's application for restraint order on the ground that the owner, the third respondent, was an innocent owner thereof.

On whether **the defence of innocent owner** is available to the third respondent or not, in **ground three** of appeal, in the circumstances of the case, it is a tricky issue. The appellant Attorney General submitted that the third respondent did not qualify to benefit as an innocent owner. For this he greatly relied on the presence of special sealed chambers inbuilt inside the motor vehicle, which the third respondent had conceded as true. On behalf of the third respondent, it was submitted that the special

chambers were intended for carrying drugs but liquid mine blasting chemical and not solids like drugs and admittedly none of the sulfate bags with bhang were found in the special sealed chambers.

As already shown earlier on in this judgment it is a naked fact that the said narcotic drugs were not found in the special sealed chambers. This undisputed fact, in our view lends credence to the third respondent's defence of innocence and robs the appellant's reasons in support of this ground of appeal of its validity. This fact further proves that the use of the motor vehicle by the first and second respondents was merely incidental and was not the intended use by the third respondent in the commission of the offence charged or any other offence.

It must be reemphasized here that the third respondent's **burden of proof is on a balance of probabilities that he was an ignorant, innocent third party owner.** The burden is not on proof beyond reasonable doubt.

We are also increasingly aware that penal statutes should be construed with a certain degree of strictness. But to attain the desired justice, their statutory language must be given a **fair and purposive construction**" (**R. v. Waya** - supra), in order to avoid undesirable

consequences such as creating loopholes for the guilty through which to escape or snares for the innocent. For this reason, we wholly subscribe to the holding of the European Court for Human Rights in **John v. German** (2006) 42 EHHR 1084, para 93, that:-

"The Court reiterates that an interference with the peaceful enjoyment of possessions, must strike a 'fair balance' between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights....In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions..."

We entirely agree with the above apt holding. We conclude asserting that it was never the intention of Parliament nor is it in the "*general interest*" of our society, that the provisions of the **Proceeds of Crime Act**, be applied indiscriminately to innocent property owners in all cases. We are not going to reinvent the wheel here. It will suffice to observe in

passing here that as it was appropriately observed about five hundred years ago:-

"And earthly power doth show likest God's

When mercy seasons justice." (The Merchant of Venice Act IV, Sc.1, L. 196)

Gauged against the above benchmarks, we have found ourselves unable to share the certitude of Mr. Mganga that so long as the property was conveying illicit drugs, the defence of innocent owner cannot avail to the 3rd respondent. Acceding to such a strict approach, in our opinion, would lead to grave injustice in respect of innocent third parties, than to the attainment of the just and legitimate objectives of the Acts, and the reasonable expectations of the community of deterring the offender and protecting the innocent, at all costs.

In terms of Section 43(3) (b) of **the Proceeds of Crime Act**, (supra), where the defendant was not involved in the commission of the offence and that the motor vehicle and trailer were acquired for sufficient value and that such defendant was actually ignorant of the commission of

the offence, as in the case under discussion, such defence is made available to the defendant.

There is yet another aspect to it, **that of public policy**, in cases of forfeiture, confiscation, etc. It is an international practice that aircrafts, ships, other carriers, etc, are not subjected to such automatic forfeiture/confiscation orders, each time narcotic drugs/illegal substances are found on board. Quite often there are media reports of arrests made at airports, high seas, sea ports, etc; around the globe with illicit drugs or proceeds from other criminal activities without such aircrafts, ships, other carriers, etc; being impounded. The rationale here is not far to fetch as in most cases, and as was the case here, the carriage was merely **incidental** and not the **ordinary use** or the **intended ordinary use by the owner of the carrier**, which would warrant an automatic issue of a restrain order everytime the owner of a property is not charged. Such practice is based on a sound public policy reason. No one can imagine a situation where all such properties were to be confiscated each time an illegal cargo was found onboard and the extent of chaos, inconvenience and unfairness to all other innocent users and innocent owners, See **R vs Bolger** 16 NSWLR and **R vs Lake** (1989) 44 AGR 63. So in our considered opinion, each

case must be judged on the basis of its own peculiar facts and circumstances.

In view of the reasons stated, cited statutory and case law, we are constrained to dismiss grounds one and three of appeal. As stated earlier, we allow grounds two, four and five.

On the whole the appeal fails and we make no order as to costs.

DATED at **DAR ES SALAAM** this 12th day of February, 2014.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

I Certify that this is a true copy of the original.




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL