



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL CASE NUMBER 28 OF 2013

**BETWEEN
THE REPUBLIC**

**AND
CAROLINE SAVALA**

CORAM : MWALE, J.
Nyasulu, of Counsel for the State
Salima, of Counsel for the
Defendant Mbewe, Court Reporter
Kaferaanthu, Court Interpreter

Mwale, J

JUDGMENT ON APPLICATION FOR RESTITUTION UNDER ORDER 148 (1) & (2) OF
THE CRIMINAL PROCEDURE AND EVIDENCE CODE

Introduction

1. This is the State's application for restitution of stolen property under Section 148 (1) and (2) of the Criminal Procedure and Evidence Code. The respondent, Caroline Savala was convicted on 17th July 2015 of the offences of Theft, contrary to Section 278 of the Penal Code and Money Laundering, contrary to Section 35 (1) (c) of the Money Laundering Proceeds of Serious Crime and Terrorist Financing Act (hereinafter, the "Money

Laundering Act”). The amount of money stolen and subsequently laundered was MK84,963,341.14 of which the respondent admitted to having benefited MK4,298,167.06, and for which the State seeks restitution. The Court has been entreated to examine the respondent’s means before any order of restitution is made and to consider the provisions of Section 29 of the Penal Code in disposing of this matter.

2. Sentence in the matter was pronounced on 27th June 2016 for a period of 3 years imprisonment for the charges of Theft and 7 years imprisonment for the charge of Money Laundering to run concurrently. Paragraph 55 of the “Judgment on Sentence” gave the State liberty to commence proceedings for a confiscation order in respect of any property under Section 48,49,58,59,61 and 67 of the Money Laundering Act if they were so inclined. The State subsequently filed an application under Section 48 of the Money Laundering Act on 18th October 2016, seeking the following orders:

- (a) that tainted property in this case be confiscated to the Government;
- (b) that a pecuniary penalty order be made to recover stolen property from Caroline Savala, Leonard Kalonga and Florence Chatuwa in the total sum of MK84,963,341.14; and
- (c) in the event that there are no assets to satisfy recovery against Caroline Savala, that she serve no less than 10 years imprisonment.

Originally, therefore, the application was made against two other persons in addition to the respondent, namely the said Leonard Kalonga and Florence Chatuwa.

3. The application was opposed by the respondent on various grounds summarized as follows:
 - (a) The application is time barred under the Money Laundering Act under which such applications must be made within a year of conviction.
 - (b) The respondent has since filed an appeal before the Supreme Court of Appeal and therefore this application is premature.
 - (c) An order made pursuant to this application would be unjust and unlawful since the sentence passed on the respondent already took into account the fact that there was no restitution.

(d) There is no evidence of the existence of any tainted property as provided for under that Act.

(e) A prison sentence can only be imposed under Section 59 if the respondent fails to pay a substituted fine under Sections 48 of the Act, and therefore the prayer for a prison sentence must be dismissed.

4. In response to these arguments the State, on 27 February 2017, filed a new application under section 32 of the Penal Code sections 148 and 149 of the Criminal Procedure and Evidence Code to substitute the current application for one that was filed on 16 July 2016. On the date of the hearing of this new application on 23rd March 2017, the State orally rectified an error they had made in the Notice to the application. The State had stated in the Notice that the earlier application was made on 16th July 2016, when in fact it had been made on 18th October 2016. (For reasons that will become apparent later, it is important to take note of this date as the date on which proceedings for recovery of money in this case were first made.) As at the two other persons in addition to the respondent who were party to these proceedings had not been served with the Notice for the hearing of the application, the State sought an adjournment. In reluctantly granting the adjournment, I directed that when the matter did come for hearing, I should be specifically addressed on a number of issues, only two of which are relevant for the purposes of this judgment. The first of these issues was that as the State was now seeking to substitute the former application for the current one, I wanted to be addressed on what the status of the former application would be. In essence I wanted clarity as to the status of the initial application as the impression being created was that the State was withdrawing the initial application. If this was the case, the State were to make that clear at the hearing. I also directed the State to file skeleton arguments for their new application so as to enable the respondent(s) to reply in advance of the hearing as there were none filed at the time.
5. On 28th March 2017, the State filed a Notice of Entry of Discontinuance against Leonard Kalonga as he is yet to be sentenced for his involvement in a consolidated case in which he also pleaded guilty to an offence covering the sums of money for which the respondent was convicted of stealing and laundering. Subsequently, on 12 April 2017, the State filed

an application for Restitution of Government Money in which they sought “to withdraw all applications made in this matter for confiscation; pecuniary penalty or restitution and to substitute therefor an application for restitution of the sum of MK4, 298,167.06 to the Government ...” or “such sum as this Court deems reasonable in the interests of justice”. The application was allowed and so the current proceedings are in respect of section 148 of the Criminal Procedure and Evidence which can only apply to the respondent, Caroline Savala, as Florence Chatuwa has not been convicted by this Court.

6. The grounds for the Application for Restitution of Government Money were laid out by the State as follows:

- (a) by its judgment of 17 July 2015, this Court convicted the respondent of Theft and Money Laundering for the sum of MK84,963,341.14;
- (b) by the same judgment, the Court found that the respondent had only benefitted MK4,298,167.00 from the crimes;
- (c) by the same judgment, the Court gave the State leave to apply for a tainted property or pecuniary penalty order;
- (d) under section 148 (1) and (2) of the Criminal Procedure and Evidence Code, the Court is authorized to restore property stolen by a respondent to the owner and this could be done by writs of restitution and this is what this application seeks to do for the sum of MK4,298,167.00;
- (e) before the order is made, the State seeks an examination of the respondent as to her means; and
- (f) the provision of section 29 of the Penal Code should be considered in the determination of this application.

7. Finally, in response, the respondent has raised a number of issues in opposing this current application which may be summarized as follows:

- (a) according to the judgment on sentence, the sentence that the respondent is serving took into account the fact that there was no restitution and therefore granting an order on the present application would result in double punishment; and

(b) section 29 of the Penal Code has no application to the present proceedings, which should be dismissed in their entirety.

Court's Reasoned Determination

(a) The Law

8. This application is made under Sections 148 (1) and (2) of the Criminal Procedure and Evidence Code which provides as follows:
 - (1) If any person guilty of an offence mentioned in chapters XXVI to XXXII, inclusive, of the Penal Code, in stealing, taking, obtaining, extorting, converting, or disposing of or in knowingly receiving any property, is prosecuted to conviction, the **property shall be restored to the owner or his representative.** (Emphasis supplied.)
 - (2) In every case referred to in this section, the court before which such offender is convicted shall have powers to award, from time to time, **writs of restitution** thereof in a summary manner. (Emphasis supplied.)
9. The operative phrase in section 148 (1) of the Criminal Procedure and Evidence Code is that the person to whom it applies must be guilty "*of the offence mentioned in chapters XXVI to XXXII, inclusive of the Penal Code*". The first offence on which the respondent was convicted, Theft under section 278 of the Penal Code, falls within chapter XXVI. Money Laundering, which is the second offence, does not fall under the Penal Code. The process for recovering assets for the offences under the Money Laundering Act is provided for under the same Act which unfortunately cannot be invoked at this time because the time limits for bringing such an application under that Act had already elapsed by the time the current proceedings were being brought. For this reason, I must at the outset rule that this application can only proceed with relation to property under the charge of Theft against the respondent. This finding in this particular case is academic as both charges against the respondent related to exactly the same subject matter or property. The distinction still needs to be made for the avoidance of doubt in view of the requirements of the statutory provision used in this case. The application made by the State under section 148 of the CP&EC shall therefore only apply to the conviction on Theft.

(b) Historical Context of Section 148 of the Criminal Procedure and Evidence Code.

10. A reading of the words used in the said section 148 makes it very clear that the provision applies only to simple and straightforward restitution. The overall effect of the provision is that the property which is the subject of the charge which resulted in a conviction, should be “*restored to the owner*” by way of “*writs of restitution*” in a “*summary manner*”. According to the provision the simplest meaning according to the language used, what we are dealing with is a simple return/restoration or restitution of property that is the subject of a conviction. The procedure for the return/restoration or restitution, the “writ of restitution”, is not explained in the provision. Most commonly in legal terminology, the term “writ of execution” features in property law. A “writ of restitution” is issued in property law after a trespasser has re-entered land in disregard of a “writ of possession”. In this context, it is issued to refer to the eviction of squatters or trespassers. For this reason, I found it imperative to look into the historical context of section 148 of the CP&EC in order to understand what the term “writ of restitution” referred to and how it was obtained in a “summary manner”.
11. The provision under section 148 of the CP&EC comes from a 1529 English statute entitled 21 Henry VII C 11. The exact wording of the provision as it appeared in that medieval statute directs that:

... justices afore whom any felon or felons have robbed or taken away any money, goods or chattels, from any of the King’s subjects, from their person or otherwise attainted, by reason of evidence given by the person so robbed, or owner, or by any other, by their procurement **have power by the said act to award from time to time writs of restitution** for the said money, goods and chattels, in like manner as though any such felon or felons were tainted at the suit of the party in appeal.”
[Emphasis supplied.]

This piece of legislation in English law was introduced because prior to its passing, a conviction of a person for larceny resulted in that person’s property being forfeited to the Crown (our equivalent of the State), automatically. Included in the forfeited property was stolen property, the subject of the charge and conviction which were in the convicted

person's possession at the time of arrest and were the subject of the charge and conviction. The result of the application of this automatic forfeiture to the Crown was that the actual owner of the property lost any title to the stolen goods as after conviction the presumption was that they now belonged to the Crown¹.

12. The statute referred to above (21 Henry VII CII) was therefore enacted in 1529 to remedy the situation of injustice created by the rule that forfeited property would vest in the Crown by providing that after a conviction, title in stolen goods that were subject of the conviction would revert to the owner. This meant that from the time of the enactment of this statute, the stolen property would no longer be forfeited automatically by the Crown, but the court could by virtue of a "writ of restitution" revert title in the goods back to the owner in a summary manner.

13. Victoria, in Australia had a similar provision² on its statute books, also derived from 21 Henry VII CII with the same effect as section 148 of the CP&EC. In 1993, the Law Reform Committee for the Parliament of Victoria³ when faced with challenges in restitution, including the challenges presented by the whole process of reverting title in goods using "writs of restitution", noted that the process was no longer used in English law. With amendments to the English Sale of Goods Act 1893 in 1979, the position in England from 1979 was that on conviction, "*property in stolen goods reverted to the owner notwithstanding any intermediate dealings, the writ of restitution became unnecessary*"⁴(emphasis supplied). Notwithstanding the amendments to the Sale of Goods Act, the provision in the 1529 statute remained on the statute book in England until the enactment of the Crimes (Theft) Act 1968 which finally removed it from English law. The Crimes (Theft) Act came about as a result of recommendations made by the Criminal Law Revision Committee in its "Eighth Report: Theft and Related Offences"⁵. According to this report, the existing law on restitution in England at the time was "*complicated and*

obscure.... Because the enactments represent the last stages of a confused history

¹ Parliament of Victoria, Law Reform Committee; November 1993. "Restitution for Victims of Crime" Interim Report citing Encyclopedia of [Laws of England, Volume XI (London Sweet and Maxwell II) 1898 at 738 – 748)

² Victoria Crimes Act 1915, Section 471 pp 26-40

³ Cited above paragraphs 2.13-2.20

⁴ As above paragraph 2.19 page 39

⁵ As above citing: Criminal Law Revision Committee, Eighth Report: Theft and Related Offences (1966 Cmnd. 2977)

*going back to medieval times and [are] intimately bound up with forfeiture on conviction of felony*⁶.

14. The foregoing gives some indication of the type of action that is envisaged in straight forward restitution cases but it does also point to the complexities of being stuck with a provision that has proved obsolete in the jurisdiction from which it originates. Even if the technicalities relating to section 148 did not render it obsolete, the type of action it envisages is totally inconsistent with the present application. Section 148 envisages a situation in which there is some property in whatever form at the time of arrest in the possession of the person subsequently convicted of theft or an offence involving taking. In such situations the return of such property upon conviction should not belabour the courts and the State. Such property should be returned to the true owner summarily since the property is already available and there would have been evidence given during the trial who the true owner of that property was. The return of the property to the true owner would therefore not be contentious. As the provision is to apply summarily, it does not leave room for processes to trace or identify the property to be restituted. In conclusion, as explained by the learned authors of Blackstone's Criminal Practice⁷:

A restitution order is designed to restore to a person entitled to them, goods which have been stolen or otherwise unlawfully removed from him or to restore to him a sum of money representing the proceeds of the goods out of money **found in the offender's possession on apprehension.** [Emphasis supplied.]

15. In the present application, there is no property or there are no goods which were in the respondent's possession at the time of arrest. There would therefore appear to be nothing capable of a straightforward summary restitution process as required under section 148.

16. What the State should therefore have applied for are either orders for confiscation or compensation or like orders. Such types of orders are not dealt with summarily as they require some processes to trace or prove the convict's means. The proceedings for

⁶ Criminal Law Revision Committee at 76.

⁷ Peter Murphy (Ltd) 1995 " Blackstone's Criminal Practice" Blackstone Press Limited, Paragraph E15.1 Page 1735

compensation or confiscation would only have been possible under the Money Laundering Act, which unfortunately could only have been commenced within a year of conviction. As the State has correctly pointed out, in my Judgment on Sentence I gave leave to the State to:

file an application under section 48 of the Money Laundering Act for a confiscation order or pecuniary order in respect of any tainted property.

When I examined the State during hearing of the present application as to why it took them so long to commence recovery proceedings, the response was as follows:

I will briefly state that the main reason was that the State had erroneously misinterpreted the provisions of the Money Laundering Act on confiscation and pecuniary penalty orders partly because between the judgment and the sentence, a long period had passed such that by the time sentence was being passed it was close to or just 12 months from the date of conviction. But the law requires that confiscation orders or pecuniary penalty orders must be made soon after conviction. At the time of the conviction the State should either have made the application for pecuniary penalty orders or should have asked the Court to defer to after sentence. That did not happen. Therefore, although in your Judgment on Sentence you had given the prosecution leave to make those applications, upon comment from the defence, the prosecution felt that the Court may have granted the leave *per incuriam* the provisions of the Money Laundering Act. It is these considerations that prompted the State to withdraw the applications under the Money Laundering Act and use section 148 of the Criminal Procedure and Evidence Code. (Emphasis supplied.)

17. While, for reasons alluded to in the Judgment on Sentence, a long time did elapse between the conviction and the sentencing, this however cannot be said to be the reason why the State failed to make the appropriate application for recovery. The respondent was convicted on 17th July 2015, and the sentence was passed on 27th June 2016. (The respondent in her earlier submissions in opposition to this application stated that she was convicted on 16th June 2015 which is incorrect.) According to my calculations, from the date of conviction the 12-month period would have expired on 16th July 2016 and the

Judgment on Sentence was delivered prior to that date. Had the State immediately upon sentence or soon thereafter initiated proceedings for confiscation or compensation or such the like, they still had three weeks or so to beat the statutory clock. Further, the State did not have to wait for the Court to give them leave to commence recovery proceedings. Having charged the respondent with an offence under the Money Laundering Act, the State should have been prepared for the possibility of a conviction and for all eventualities subsequent to a conviction under that Act. Such preparation would have enabled them to prepare in advance to make an application for the recovery which under the said Act would have had to be made soon after conviction. The State failed to take action despite the very long period between conviction and sentence to make such application and it was therefore not surprising that they were prompted to do so in the Judgment on Sentence. The prompting was not *per incuriam* as time had not yet run out at that point.

18. I have carefully searched the court record for any early filing of the current application and the earliest date of filing was 18th October 2016. This date is confirmed by the State in their oral submissions to rectify the Notice for the current proceedings filed on 27th February 2017 and alluded to earlier in this judgment. 18th October 2016 was well beyond the statutory period. By their own admission, as can be seen from the State's response reproduced above, the State failed to take action in time. Their delay cost them the opportunity to make the only application that had the potential of enabling the recovery of Government money in this case.
19. Further as counsel for the respondent has correctly noted in his submissions, when this Court sentenced the respondent, the fact that there was no restitution impacted negatively on sentence. However, this does not mean an application under section 48 of the Money Laundering Act for a pecuniary order or confiscation order or even a compensation order would have been barred by the fact that the absence of restitution had impacted negatively on sentence. If the State had activated the tracing of the laundered assets by making a timely application under the Money Laundering Act and the proceeds of the crime were subsequently traced, recovering those proceeds would not have been double punishment,

it would have been a simple process of ensuring that the money was restored to Government and that the respondent did not benefit from her crime.

20. The State argued in the course of this application that before the Court makes an order of restitution, it must examine the respondent's means. The Court cannot however proceed in this manner for the simple reason that as alluded to earlier, such a process is not possible in restitution proceedings which under section 148 are disposed of summarily. Even assuming for a moment that the present proceedings been for compensation, for example, it would have been the responsibility of the respondent to inform the court of her resources, and not for the court to initiate inquiries into the matter (see *R v Bolden* (1987) Cr App R (S) 83).
21. The State has in its grounds for the current application closed by entreating the Court to grant a writ of restitution under section 148 (2) of the Criminal Procedure and Evidence Code against the respondent in the sum of MK4,298,167.06 or such sum as the court deems reasonable in the interests of justice. In addition to what I have reasoned above, this order cannot be granted. An application for restitution must be specific and relate to specific property or a specific sum of money which covers the specific value of the property whose restitution is sought. Any room for variation in the sum opens the proceedings up to inquiry which this summary process cannot accommodate.
22. For all I have reasoned above, I find that the State has failed to make out a case for restitution under section 148 of the Criminal Procedure and Evidence Code and the application is accordingly dismissed.

Section 29 of the Penal Code

23. The State has in its Skeleton Arguments for Restitution drawn the Court's attention to the provisions of section 29 of the Penal Code in the event that an order for restitution is made. Essentially the State's argument is that the said section makes provision for situations in which there is default in a payment to be made under an order to be commuted to a term of

imprisonment. The section does not only apply to fines but according to subsection (2) of section 29, it also applies to payment of costs under section 33 of the Penal Code; compensation under section 33 of the Penal Code and the payment of any sum under any Act. As I have found that an order of restitution cannot be made in the current case, the State's argument in relation to section 29 automatically falls away.

24. I would also like to utilize this opportunity to call for the reform of section 148 of the Criminal Procedure and Evidence Code with regard to the removal of the term and the technicalities behind the concept of "writs of restitution". The jurisdiction from which we obtained this term have since seen the wisdom to not only do away with the term but to also reform the law relating to restitution. As we increasingly find ourselves dealing with financial crimes that may very well be amenable to restitution proceedings (amongst other proceedings) for the recovery of Government money (or money belonging to any person), there is a need now, more than ever, for provisions in plain and simple language that are modern and unambiguous and respond to current challenges.

Made in open court this 25th day of May, 2017 in Lilongwe, in the Republic of Malawi.

A handwritten signature in blue ink, appearing to read 'F.A. Mwale', is written over a horizontal line.

F.A. MWALE
JUDGE