

Case Comment

**A POINTED PROBLEM: WHAT ARE “BENEFITS FROM CRIMINAL CONDUCT”?**

*Public Prosecutor v Gumedé Sthembiso Joel* [2024] SGHC 23

[2024] SAL Prac 12

In deciding what to make of 34.7kg of rhinoceros horns that had been illegally transported from South Africa into Singapore on their way to Laos, the High Court took the opportunity to clarify the meaning of “benefits from criminal conduct” under s 51(1)(a) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 (2020 Rev Ed).

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## **I. Introduction**

1 At the heart of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992<sup>2</sup> (“CDSA”) is the criminalisation of dealings with *benefits* that are derived from or obtained through the commission of serious offences such as corruption and drug trafficking, amongst others (hereinafter referred to as the “predicate offence”). As its legislative title suggests, the CDSA is meant to *confiscate* these benefits and deprive these criminals of the ability to enjoy the fruits of their criminal conduct.

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1 While the author is with Rajah & Tann Singapore LLP, the views expressed in this case comment are her own.

2 2020 Rev Ed.

2 But *all that glitters is not gold* – just because something is either actually or conceivably valuable and tangentially linked to criminal conduct of some kind does not necessarily mean that it constitutes “benefits from criminal conduct” under s 51(1)(a) of the CDSA. Section 51(1)(a) of the CDSA states that:

Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement, knowing or having reasonable grounds to believe that, by the arrangement —

(a) the retention or control by or on behalf of another (called in this subsection that other person) of that other person’s benefits from criminal conduct is facilitated (whether by concealment, removal from jurisdiction, transfer to nominees or otherwise) ...

...

and knowing or having reasonable grounds to believe that that other person is a person who engages in or has engaged in criminal conduct or has benefited from criminal conduct shall be guilty of an offence.

3 Somewhere in between defining the criminal conduct and the subject matter of the CDSA offence is the oft-forgotten step of properly identifying the benefits that flow from the criminal conduct, which may or may not coincide with the subject matter of the offence under the CDSA.

4 *Public Prosecutor v Gumede Sthembiso Joel*<sup>3</sup> (“*Gumede Sthembiso Joel*”) represented the first case in which an illegal courier of rhinoceros horns was charged under the CDSA. Historically, individuals who were found either transiting through Singapore with rhinoceros horns or importing rhinoceros horns had been charged and convicted for offences under the Endangered Species (Import and Export) Act 2006<sup>4</sup> (“ESA”).

5 Just as one might puzzle over what the actual or imagined value of these keratin-based animal parts could be, the District

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3 [2024] SGHC 23.

4 2020 Rev Ed. As of April 2024, three individuals have been prosecuted under the ESA for offences involving rhinoceros horns, namely, Pham Anh Tu, Nguyen Vinh Hai and Thurman Shiraazudin Aiden Matthews.

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Court<sup>5</sup> and High Court<sup>6</sup> had the opportunity to consider whether these rhinoceros horns could properly be considered an exporter’s benefits from criminal conduct. The central issue at trial and in the Prosecution’s appeal was the interpretation of the phrase “that other person’s benefits from criminal conduct” within s 51(1)(a) of the CDSA and whether the rhinoceros horns that were being transported by Joel, (the “Respondent”) fulfilled this description.

6 Both the District Court and High Court concluded that on the facts, what was then Singapore’s largest haul of illegally transported rhinoceros horns could not properly be characterised as falling within the definition of “benefits from criminal conduct” under s 51(1)(a) of the CDSA.

## **II. Factual and procedural background of *Gumede Sthembiso Joel***

### **A. Facts of the case**

7 In *Gumede Sthembiso Joel*, there were three known persons involved in a larger criminal enterprise of illegal wildlife trafficking. The Prosecution’s case, based on investigations conducted in South Africa by the local authorities, was that:

- (a) An individual known as “Jaycee” had bought rhinoceros horns from poachers in South Africa.
- (b) Jaycee then sold the rhinoceros horns to a person known as “Jimmy”.
- (c) Jaycee also assisted Jimmy to illegally transport the horns without a valid Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) permit to other countries. For this purpose, Jaycee recruited couriers such as the Respondent.

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5 See *Public Prosecutor v Gumede Sthembiso Joel* [2023] SGDC 268.

6 See *Public Prosecutor v Gumede Sthembiso Joel* [2024] SGHC 23.

(d) On 3 October 2022, Jaycee received from Jimmy 34.7kg of rhinoceros horns (the “Horns”) which were already packed in boxes.

(e) Jaycee then handed the boxes containing the Horns to the Respondent, who checked the boxes in before boarding the flight to Laos via Singapore.

8 The Respondent was arrested in Singapore and charged with assisting another to retain the “benefits from criminal conduct” under s 51(1)(a) of the CDSA (the “CDSA Charge”). The Respondent also faced two charges under s 5(1) of the ESA for being in transit in Singapore with the rhinoceros horns and without the requisite permits.<sup>7</sup>

9 What is significant is the manner in which the CDSA Charge was framed.

(a) The relevant “criminal conduct” was Jaycee’s “sale of the Horns to ‘Jimmy’ and the syndicated export of the Horns from South Africa to Laos without CITES permits in connection with such sale”.<sup>8</sup> This therefore formed the relevant predicate offence on which the CDSA Charge was premised.

(b) Such conduct, if it had occurred in Singapore, would have constituted an offence under s 4 of the ESA which is a “serious offence” under the Second Schedule to the CDSA. The conduct thereby qualifies as a “foreign serious offence” which would constitute “criminal conduct” within the definition under s 2(1) of the CDSA.

10 Accordingly, Jaycee was the “primary offender”<sup>9</sup> who had committed the predicate offence of selling and exporting

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7 The CITES is an international agreement that regulates the trade of wild animals and plants to ensure that their survival is not threatened to extinction. Singapore is a party to the CITES.

8 *Public Prosecutor v Gumede Sthembiso Joel* [2023] SGDC 268 at [29].

9 In this case comment, a “primary offender” shall be defined as a person who engages in the relevant criminal conduct under the CDSA and benefits from that criminal conduct. Pertinently, within the framework of an offence under s 51(1)(a) of the CDSA, the “primary offender” is the same person who is being assisted by the alleged offender under the CDSA.

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the Horns without the requisite permits, and the Respondent was alleged to have been the “secondary offender” under the CDSA who facilitated Jaycee’s retention of his benefits from the predicate offence, being the Horns.

**B. The Respondent’s acquittal in respect of the CDSA Charge**

11 At first instance, the District Court acquitted the Respondent of the CDSA Charge, on the basis that the Horns could not be considered Jaycee’s “benefits from [Jaycee’s] criminal conduct” for the purposes of s 51(1)(a) of the CDSA,<sup>10</sup> and that to do so “would do violence to the plain language of the words in the legislation and did not accord with the legislative purpose of the CDSA”.<sup>11</sup>

12 This acquittal was upheld by the High Court on appeal. The High Court interpreted the phrase “that other person’s benefits from criminal conduct” where:

(a) A “benefit” would mean an “advantage, profit or gain”.<sup>12</sup>

(b) “[T]he ‘benefits’ must be ‘a result of’, ‘in consequence of’ or ‘be gained, obtained and/or acquired by the primary offender as a result of’ the criminal conduct”. In other words, there must be a causal link between the primary offender’s criminal conduct and the benefits gained by the primary offender (the “Causation Requirement”).<sup>13</sup>

13 In its decision, the High Court departed from the District Court’s view and concluded that the Causation Requirement was satisfied.

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10 *Public Prosecutor v Gumede Sthembiso Joel* [2023] SGDC 268 at [66] and [69].

11 *Public Prosecutor v Gumede Sthembiso Joel* [2023] SGDC 268 at [70].

12 *Public Prosecutor v Gumede Sthembiso Joel* [2024] SGHC 23 at [24] and [31].

13 *Public Prosecutor v Gumede Sthembiso Joel* [2024] SGHC 23 at [24] and [26]; *Public Prosecutor v Gumede Sthembiso Joel* [2023] SGDC 268 at [43] and [44]. This is further supported by the contextual language in the CDSA which makes it clear that the “benefits” are to be *derived from* the criminal conduct in question: see for instance ss 7, 11 and 51(4)(a) of the CDSA.

(a) The District Court had found that the Causation Requirement was not satisfied, as:<sup>14</sup>

... the illegal sale of the Horns from Jaycee to Jimmy did not cause or lead to Jaycee acquiring or obtaining the Horns. On the contrary, the sale of the Horns resulted in Jaycee having to part possession with the Horns and consequently, the Horns were seized on transit to Jimmy.

(b) However, the High Court focused on the fact that “after selling the horns to Jimmy, Jaycee had relinquished possession of the Horns to Jimmy”.<sup>15</sup> As such, on 3 October 2022, Jaycee had to collect the Horns from Jimmy for them to be exported out of South Africa. Based on this fact, the High Court reasoned that Jaycee had obtained the horns from Jimmy as a result of Jaycee’s criminal conduct in relation to the illegal export of the horns.<sup>16</sup>

14 Notwithstanding the above, the High Court was of the view that ultimately, the Horns did not represent any sort of “advantage, profit or gain” to Jaycee. As Jaycee had already sold the Horns to Jimmy and delivered them to Jimmy’s possession, the only reason Jaycee came into possession and control of the Horns once more was merely as a means to facilitate their export. Thus, the Horns could not be regarded as Jaycee’s benefits from his criminal conduct of illegally exporting them, but merely the subject matter of his illegal export.<sup>17</sup>

15 The High Court also rejected the Prosecution’s alternative argument that the intangible benefit to Jaycee was the increase in intrinsic value of the Horns as they became “progressively more masked and unencumbered” as they moved away from South Africa. This argument was neither encompassed by the CDSA Charge as framed nor canvassed by the Prosecution at trial, and further, was unsubstantiated by evidence. In any event, the High Court was of the view that it would be a stretch to find that

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14 *Public Prosecutor v Gumede Sthembiso Joel* [2023] SGDC 268 at [69].

15 *Public Prosecutor v Gumede Sthembiso Joel* [2024] SGHC 23 at [36].

16 *Public Prosecutor v Gumede Sthembiso Joel* [2024] SGHC 23 at [36].

17 *Public Prosecutor v Gumede Sthembiso Joel* [2024] SGHC 23 at [37].

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any increase in the intrinsic value of the Horns and/or gains in intangible benefits could form *Jaycee’s* benefits from his criminal conduct.<sup>18</sup> Instead, any such benefits would have been reaped by Jimmy as the owner of the Horns.

**C. Brief observations**

16 Three observations can be made about this case.

17 First and fundamentally, the CDSA needs to be appreciated as an Act that criminalises what we shall consider to be “secondary” offences that are premised on or arise out of a predicate offence. The predicate offence can be committed either by the alleged offender or by some other person.<sup>19</sup>

18 The tiered nature of an offence under s 51(1) of the CDSA and the often-complex contexts in which these transactions arise make the analysis of its component parts as critical as the facts of each case. As such, it is always useful to dismantle the phrase “that other person’s benefits from criminal conduct” and identify:

- (a) the *criminal conduct*, also known as the predicate offence, which must have a cause-and-effect relationship with the alleged benefit;
- (b) the *benefit*, which must accordingly have *resulted from* the criminal conduct; and
- (c) the *primary offender*, being “that other person” who must have benefitted from the criminal conduct.<sup>20</sup>

19 Second, where the criminal conduct takes place outside of Singapore’s borders in cases such as this, the difficulty that

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18 *Public Prosecutor v Gumede Sthembiso Joel* [2024] SGHC 23 at [41].

19 For instance, s 54 of the CDSA involves the offender’s own benefits from criminal conduct whereas s 51 of the CDSA deals with the benefits from criminal conduct belonging to another person, also referred to in this case comment as the “primary offender”.

20 This premise is embedded in the language of s 51(1) of the CDSA, which makes it clear that the person who owns the benefits from criminal conduct is the person being assisted.

invariably arises is the ability of the foreign authorities to gather information and evidence relating to the predicate offence. Naturally, the corresponding challenges that present themselves for practitioners on the one hand would take the form of verifying or challenging those investigation findings, and as for the Prosecution on the other hand, determining the manner in which a charge ought to be framed.

20 While it may not be necessary for the Prosecution to prove all the constituent elements of a predicate offence beyond a reasonable doubt,<sup>21</sup> practitioners must nonetheless satisfy themselves that, given the manner in which a charge under the CDSA is framed, the elements of the offence can be proven to the satisfaction of the court.

21 Third, the pivotal fact in *Gumede Sthembiso Joel* appeared to be the sale of the Horns by the exporter to a third party *prior to the export*, which involved the exporter relinquishing possession of the Horns to the third-party owner. However, the decision on its own does not provide the answers to a plausible scenario where Jimmy does not exist, and an exporter recruits a courier to assist him in exporting something on his own account.

22 As such, the next section of this case comment will explore the related underlying and perhaps more important involving transportational offences and the CDSA: *When does something become a benefit from criminal conduct?*

### III. Transportational offences and the CDSA

23 Aside from the pointed question of whether the Horns in *Gumede Sthembiso Joel* constituted “benefits from criminal conduct”, the case also raises other curious but important questions, such as whether and how the CDSA applies in the context of transportational offences involving the illegal movement of properties across Singapore’s borders, being illegal imports, exports and trafficking. For instance, and *in general*,

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<sup>21</sup> *Ang Jeanette v Public Prosecutor* [2011] 4 SLR 1 at [58].



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where an alleged offender enters into an arrangement to assist the primary offender in the commission of a transportational offence, can the subject matter of the transportational offence constitute “benefits from criminal conduct” for the purposes of s 51(1)(a) of the CDSA?

24 This author would venture the following proposition: A benefit from criminal conduct must exist at the time that the arrangement within the meaning of s 51(1)(a) of the CDSA becomes operative, and not after. For this reason, where the arrangement in question is to carry out a transportational offence on behalf of the primary offender, the subject matter that is being illegally transported cannot properly be considered a benefit from the transportational offence.

25 The sections to follow will briefly discuss the object and purpose of the CDSA, before dissecting the components of an offence under s 51(1)(a) of the CDSA and finally demonstrating the application of the abovementioned proposition.

**A. The purpose and object of the CDSA**

26 The key objectives of the CDSA are uncontroversial and two-fold:

- (a) to criminalise the laundering of benefits derived from wrongdoing which serves to conceal and disguise the illicit origins of ill-gotten gains; and
- (b) to provide for the confiscation of such benefits, such that criminals are stripped of their gains and deprived of the ability to enjoy the fruit of their criminal conduct.

27 This is evident both in the legislative framework and history behind the CDSA. As the Court of Appeal in *WBL Corp Ltd v Lew Chee Fai Kevin*<sup>22</sup> observed:<sup>23</sup>

The CDSA is an anti-money laundering statute. Its principal object is to prevent ill-gotten gains from being laundered into

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22 [2012] 2 SLR 978.

23 *WBL Corp Ltd v Lew Chee Fai Kevin* [2012] 2 SLR 978 at [31].

other property so as to avoid detection and confiscation by the enforcement agencies.

28 In other words, the targeted mischief lies in the movement of property that has been tainted by the illegality of some other criminal conduct, as opposed to the illegal movement of legitimate, untainted property.

**B. A proposition: The “benefits from criminal conduct” must exist as a result of the predicate offence at the time when the arrangement becomes operative**

29 It follows from the purpose of the CDSA and the natural and ordinary meaning of the language in s 51(1)(a) of the CDSA that:

(a) The property must have its quality or status as a benefit from criminal conduct at the time when the arrangement in relation to that benefit was entered into or comes into operation.

(b) The property must be “tainted” by reason of criminal conduct (*ie*, a predicate offence) that is *distinct and separate* from the arrangement alleged to constitute the offence under the CDSA. In other words, a property which first acquires its criminal character, quality or status only as a result of the arrangement cannot properly be considered a benefit from criminal conduct.

30 While this has not yet been laid down as the law in Singapore, support for this proposition can be found in the UK, where there is an unbroken line of authorities by the English Court of Appeal on the abovementioned principles, which was affirmed by the Supreme Court of three judges in *R v GH*.<sup>24</sup> In the words of the English Court of Appeal:<sup>25</sup>

To say that [the CDSA] extends to property which was originally legitimate but became criminal only as a result of carrying out

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<sup>24</sup> [2015] 1 WLR 2126.

<sup>25</sup> *R v Geary* [2011] 1 WLR 1634 at [19].

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the arrangement is to stretch the language of the section beyond its proper limits.

31 This interpretation of the law is sound in so far as it draws a clear distinction between an arrangement which facilitates the illegal retention or control of property, which does not fall within the ambit of s 51(1)(a) of the CDSA, and an arrangement facilitating the retention or control of *criminal property*, which is required by s 51(1)(a) of the CDSA. It is that pre-existing quality which makes it an offence for a person to deal with the property or to arrange for it to be dealt with, while knowing or having reasonable grounds to believe that the primary offender is a person who engages in, has engaged in or has benefited from criminal conduct.

32 As a simple illustration:<sup>26</sup>

A person who gives a bribe may know that it will constitute criminal property in the hands of the recipient, but that does not make him guilty of entering into an arrangement which facilitates the acquisition of what is already criminal property. [emphasis in original omitted]

**C. A hypothetical: Assisting another in the commission of a transportational offence under s 51(1)(a) of the CDSA**

33 Consider a hypothetical situation where a courier agrees to assist a primary offender in the illegal import of some 50 cartons of corn (the “Corn”) without the requisite permits.<sup>27</sup> Unlike the situation in *Gumede Sthembiso Joel*, the Corn belonged to the primary offender (who had not sold the Corn to anyone else) and the criminal conduct in question is his illegal import without the requisite permits.

34 Admittedly, the idea that the subject matter of the illegal import could constitute “benefits from criminal conduct” is a superficially intuitive one, in so far as the physical and transactional movements of the imported property form the

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26 *Kensington International Ltd v Republic of Congo* [2008] 1 WLR 1144 at [67].

27 For the sake of discussion, the author shall take the liberty to assume that permits of some kind are required for the import of the Corn.

very object of the criminal conduct. One might also argue, quite persuasively, that the imported Corn represents an “advantage, profit or gain” to the primary offender that results from his import.

35 This analysis, however, fails to account for the critical fact that in order for an offence under s 51(1)(a) of the CDSA to be committed, the arrangement into which the offender enters must be one which facilitates the retention or control of property that already constitutes a benefit from criminal conduct, because:

(a) By itself, the Corn would not have been tainted by the illegality of the import at the time when the arrangement came into operation. The Corn would only have acquired its criminal character after the courier has imported them illegally pursuant to his arrangement with the primary offender.

(b) Moreover, the Corn would have borne its illegal taint only as a result of the courier carrying out the arrangement, and not because of any criminal conduct by the primary offender that was independent of the arrangement.

36 In these circumstances, the arrangement cannot of itself suffice to turn the Corn into a “benefit from the criminal conduct” of illegal importation. In fact, to do so would be to elide the material distinction between dealings with criminal property and criminal dealings with property. As it stands, the CDSA is meant to capture “benefits from criminal conduct” that are tainted by the illegality of an earlier predicate offence; it does not extend to property that becomes illegal only as a result of the arrangement.

#### IV. Concluding thoughts

37 The case of *Gumede Sthembiso Joel* is more than just about rhinoceros horns; it is perhaps also capable of answering more than just one pointed question of what constitutes *benefits from criminal conduct*. Beyond that, and bearing in mind the practical considerations when the criminal conduct in question takes place outside of Singapore, it would be prudent to undertake a careful

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examination of when something can be said to have acquired its character as a *benefit from criminal conduct*, especially as it moves from point to point in the context of a transportational offence.

38 This case comment has barely scratched the surface of what could be a much deeper discussion on the scope of the CDSA, and it is hoped that the local jurisprudence on these issues will continue to mature and grow.