

## LECTURE 2

### WHAT CAN BE FORFEITED?

Gaborone, Botswana  
February 26, 2024, 10:15 am – 11:15 am

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#### Introduction

Before the break we talked about why forfeiting property is an important part of law enforcement

- Now we're going to talk about exactly what it is that can be forfeited
- Are we talking about the proceeds of crime or the things used to commit the crime?
- Are we talking about the property involved in any crime or only the property involved in certain kinds of crimes?
- Are we talking about money, any kind of moveable property, immovable property, intangible property?
- What, in other words, is the scope of the forfeiture law in Botswana

Botswana has a very robust asset confiscation law

- As we will see, unlike the law in some countries where the confiscation statute applies only to a subcategory of crimes ...

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- the Proceeds and Instruments of Crime Act (2014) provides for the confiscation or forfeiture of both the proceeds and instruments of virtually all serious crimes
- Moreover, it is very detailed not only in terms of *what* may be confiscated,
- But also in terms of *the procedure* for determining what property is subject to confiscation, and for obtaining an order confiscating that property

We need to talk about all of these things, but for now, we're going to set the procedural issues aside and focus on three things:

- For what crimes is confiscation authorized,
- What types of property can be confiscated, and
- What do the terms “proceeds” and “instruments” mean

### **Scope: For What Crimes is Confiscation Available?**

So, what are the crimes for which asset forfeiture is available?

- It turns out that the answer is different depending on whether the forfeiture is part of a criminal case or a civil case.

**Section 18** of the PICA provides that if the defendant has been convicted of a crime – that is, if we're talking about criminal confiscation –

- The Director of Public Prosecutions (DPP) may apply for an order forfeiting the proceeds and instruments of that crime

To what crimes does this apply?

- The law could not be more broad: it applies to “any offense under the Laws of Botswana” (Definition of “confiscation offense in § 1 of PICA)
- So, if the defendant is convicted of drug trafficking, smuggling, wildlife trafficking or any other crime under the Laws of Botswana
- Including all of the criminal offenses over which Customs agents have jurisdiction

- The prosecutor can ask the court to make an order forfeiting the proceeds and instruments of the crime for which the defendant has been convicted

- no matter how serious or minor the crime may be.

So, the scope of the criminal forfeiture law is very broad

- It applies to any offense under the Laws of Botswana

Now, as we'll discuss later, Botswana also has a non-conviction-based or civil forfeiture law

- It is a procedure for confiscating the proceeds and instruments of a crime in situations where there is no criminal conviction

To what crimes does that apply?

- **Section 27** of the PICA says that civil forfeiture is available to recover the proceeds or instruments of two sets of crimes--

1. any offense *under the Laws of Botswana* "for which the minimum penalty is imprisonment for 2 years" or
2. any offense *under foreign law* if the property is in Botswana, and the offense would have a minimum penalty of imprisonment for 2 years if the offense had occurred in Botswana

So, unlike criminal forfeiture, civil forfeiture in Botswana does not apply to all crimes, but it does apply to the most serious crimes

- crimes for which the minimum penalty is 2 years

So civil forfeiture is, in that respect, *narrower* than criminal forfeiture

- but importantly, it is *broader* than criminal forfeiture in another way

- applies to the proceeds and instruments of *foreign crimes* if property is found in Botswana and the crime is one that would be a serious offense if it had been committed in Botswana

Why is this important?

Criminal forfeiture is not helpful if the property is here in Botswana but the defendant is not

- or if the property and the defendant are here, but the crime was committed in another jurisdiction
- why? Because we cannot bring a criminal case against a person who is not physically here, or whose only crime was a violation of another country's law
- as we will see, these are among the situations in which civil forfeiture is most useful
- to recover the proceeds or the instruments of a foreign crime that have been placed in your country by a person who is not subject to criminal jurisdiction in Botswana

It is important to understand that it is possible to use civil forfeiture in those situations

- but it is also important to understand that it is limited in those situations to crimes that carry a minimum penalty of 2 years.

### **Pecuniary Penalty Orders**

In addition to requesting a criminal forfeiture order, the prosecutor in a criminal case can ask the court to order the defendant to pay a monetary penalty equal to the value of the benefit that he obtained by committing his offense

- so, if the defendant committed a crime from which he derived \$100,000 (or the equivalent in your currency),
- the court may order him under **Section 4** to pay a judgment of \$100,000.
- This is in addition to any forfeiture of the proceeds and instruments
- And it is important because it applies whether the defendant still has the property derived from the offense or not

For example, if he stole \$100,000 and still has the \$100,000 -- or he has a house, or a boat, or a bag of diamonds traceable to it

- the court can order the forfeiture of the money (or the traceable property), if the defendant still has it and it can be found
- But in all events, the court can order the defendant to pay a \$100,000 penalty whether he still has the proceeds of the crime or not.

So, to summarize:

- In a criminal case, the court can order the defendant to forfeit the proceeds and the instruments of any crime for which he is convicted, assuming the property can be found
- And it can also order him to pay a monetary penalty equal to the benefit that he derived from the crime.
- And in a civil case, it can order the forfeiture of the proceeds of any crime – including a foreign crime – that is found in Botswana, as long as the crime carries a penalty of at least 2 years incarceration.

### **What is “property”?**

Now, I keep using the term property

- Property that is the proceeds of the offense
- Property that is an instrument of the offense
- But what kinds of property are we talking about?
- Is it just money? Can it be other things?

Section 1 defines “property” very broadly:

- It includes “money or any other movable or immovable,” or tangible or intangible thing found in Botswana or anywhere else
- So it includes

- currency, securities, bonds and other negotiable instruments
- bank accounts (held in whatever currency)
- virtual assets
- vehicles, boats, aircraft, works of art, jewelry, precious stones or metals, and any other personal property,
- intangible rights such as secured interests, patents, licenses, and dividends and interest derived from the forfeitable property

So, virtually any form of property that a person might own is subject to forfeiture, as long as the prosecutor can show that it constitutes the proceeds or the instrument of a crime

- which brings us to the ultimate questions for this session:
- what are proceeds, and
- what are instruments

### **What are “proceeds”?**

What constitutes proceeds in most cases is fairly obvious

- it’s whatever the defendant acquired as a result of the offense, or stated differently, what he would not have “but for” having committed the offense
- Section 1 says as much:
- “proceeds” means any property that was derived or realized, directly or indirectly, from a criminal offense

If a person sold drugs, the money that he received is the proceeds

- If he robbed a bank, the money that he stole is the proceeds
- If he took a bribe, the bribe money is the proceeds
- If he *paid* a bribe, whatever he got in return would be the proceeds
  - *E.g.*, if a contractor obtains a contract by paying a bribe or kickback, the contract itself would be the proceeds of the crime

### **Appreciation and other traceable property**

The scope of the term “proceeds” can actually be quite broad:

- proceeds include any property traceable to the proceeds,
- if the person who sold drugs or robbed a bank used the money to buy a car, the car can be confiscated as property traceable to, or derived from, the crime
- it can be confiscated as “proceeds”
- and that is true regardless of how much time has passed or how many times the property has changed form
- if a defendant uses the proceeds of his crime to buy a car, uses the car as collateral for a loan, and uses the loan proceeds to buy a boat, the boat is traceable to the crime and is subject to confiscation
- or if he uses criminal proceeds to gamble at the casino and hits the jackpot, the gambling winnings are traceable to the crime and subject to confiscation
  - *United States v. Tolliver*, 949 F.3d 244 (6th Cir. 2020) (commission that a third-party money launderer is paid is forfeitable as property involved in money laundering, and when the defendant uses that money to gamble, his winnings are forfeitable as property traceable to such property);

Traceable property also includes appreciation and income derived from the property

- a person who buys a lottery ticket for one dollar and wins a million dollars forfeits the entire million, because the ticket appreciated in value
  - *United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number);
- Or if he invests his money in a beach house and rents it out, the rental income would be proceeds

Section 1 also defines “proceeds” to include any property “with which proceeds have been mixed”

- So, if the defendant deposits the proceeds of his crime in a bank account with other money
- Or if he combines his proceeds with other money and uses the combined money to buy a boat

- You do not have to determine what part of the bank account or what part of the boat is traceable to the crime
- Because the defendant has “mixed” the proceeds with other money or other property, it is *all* forfeitable as proceeds (§ 1 of PICA)

I mentioned that proceeds includes whatever the defendant would not have “but for” having committed the offense

- Under the “but for” test, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.
  - *United States v. Warshak*, 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant’s business are forfeitable because the business was “permeated with fraud;” but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the “fraudulent beginnings” of the entire operation);
  - *United States v. Smith*, 749 F.3d 465, 488-89 (6th Cir. 2014) (following *Warshak*; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds);

## Net v. Gross

While your law doesn’t address this specifically, and some judges may see it differently, there should be no deduction for the cost of committing the crime

- *United States v. Prasad*, 18 F.4th 313 (9th Cir. 2021) (“proceeds” means gross receipts, not net profits; a contrary interpretation would be inconsistent with the purpose of forfeiture, which is punishment and deterrence; a forfeiture that simply divests a defendant of his profits would have “little deterrent value” and would “hinder [the statute’s] punitive purpose”); *id.* (limiting forfeiture to profits would allow defendants to defeat forfeiture by reinvesting proceeds in the criminal enterprise before conviction rather than pocketing the profits);
- *United States v. Peters*, 732 F.3d 93, 101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; forfeiting defendant’s profits is not punishment because it merely returns him to the economic position he occupied before he committed the offense; therefore, defendant must forfeit the gross receipts);
- The drug dealer does not get to deduct the cost of the drugs
  - *United States v. McHan*, 101 F.3d 1027, 1041-42 (4th Cir. 1996) (gross proceeds forfeitable in drug case);



- A person who embezzles money from his employer, or mismanages someone’s investment plan, or steals money from a Government program does not get to deduct his costs
  - *United States v. Bodouva*, 853 F.3d 76 (2nd Cir. 2017) (forfeiting gross proceeds of embezzlement);
  - *United States v. Uddin*, 551 F.3d 176, 181 (2d Cir. 2009) (affirming forfeiture of gross proceeds under § 981(a)(2)(A) in a criminal forfeiture cases involving food stamp fraud; defendant must forfeit the amount he received from the Government for the food stamps without credit for the amount he had to pay for them);
- The person who obtains business by paying a bribe or kickback does not get to deduct the amount of the bribe or kickback

As I have said, your statute doesn’t address this directly in the provisions relating to criminal or civil forfeiture

- It simply authorizes the forfeiture of proceeds
- But notice that **Section 16**, which talks about the calculation of the benefit the defendant derived from his offense for purposes of the Pecuniary Penalty and Civil Penalty Orders, refers to “any money received as a result of the commission of the offense”
- It does not say “the *profit* derived from” the offense, but rather “any money received”
- This reinforces my view that the forfeiture of proceeds means the forfeiture of the defendant’s gross proceeds without reduction for the costs he may have incurred in committing his crime.

## 2. Instruments

Finally, we have to ask, what are the “instruments” of a crime?

Section 1 says that an “instrument” is any property that was used or intended to be used in connection with a crime, and

- Any property traceable to such property

In the U.S., court read that to mean anything that makes the crime easier to commit or harder to detect

- *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist’s office “provided an air of legitimacy and protection from outside scrutiny,” and thus made the crime of writing false prescriptions less difficult to commit and “more or less free from obstruction or hindrance”);
- *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that “makes the prohibited conduct less difficult or more or less free from hindrance”);

In cases stretching back over decades, courts have upheld the forfeiture of real property, vehicles, and other personal assets as facilitating property

— Sometimes, that the property was used to commit the offense is obvious, like the gun used to commit an armed robbery

— But there are many more subtle situations

— For example:

- *United States v. Diaz*, 413 Fed. Appx. 704, 708 (5th Cir. 2011) (real property where owner allowed drug dealers to park their tractor-trailers while waiting to transport drugs and money across the border forfeited as facilitating property);
- *United States v. Ortiz-Cintrón*, 461 F.3d 78, 80 (1st Cir. 2006) (residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property);
- *United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly to include cows and horses used to make a heroin operation appear to be a working ranch);
- *United States v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes “rights, privileges, interests, claims, and securities”);

— in fact, an entire business and/or all of its assets could be forfeited as facilitating property

- *United States v. \$7708.78 in U.S. Currency*, 2011 WL 3489835, \*3 (S.D. Miss. Aug. 9, 2011) (facilitating property is anything that makes the crime “less difficult or more or less free from obstruction or hindrance;” a pharmacy used as a cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales);

- *United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter);

## Customs offenses

Perhaps most important for purposes of this session, the property that is the subject of a false import or export declaration is considered be the instrument of that offense

- The statute says this expressly only in **Section 30**, which applies to administrative forfeitures – which we’ll talk about when we talk about procedures later
- But there is no reason why property that is the subject of a false import declaration should be considered an “instrument” for that purpose and not for every other purpose
- So, it appears that any property that is intercepted at the border as part of a smuggling offense may be forfeited as an instrument of that offense, if it is a criminal offense.