[2012] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 7/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**CLIFTON GRANT**	**APPELLANT**
AND	**ASSET RECOVERY AGENCY**	**RESPONDENT**

Trevor Ho-Lyn and Nathan Robb for the appellant

Mrs Susan Watson-Bonner and Mrs Charmaine Newsome for the respondent

6 October 2011 and 17 February 2012

MORRISON JA

[1] On 23 November 2008, Constable Tessonia Webster-Lawrence, a constable of police assigned to the Narcotics Division, seized a quantity of cash totalling US$20,840.00 from Noel Wright, as he approached the check-in counter at the Norman Manley International Airport for a flight to Panama, allegedly on an errand for the appellant. On 28 October 2009, Her Honour Miss Jennes Anderson, a Resident Magistrate for the Corporate Area, granted the respondent's application, pursuant to section 79 of the Proceeds of Crimes Act ('POCA'), for forfeiture of US$20,000.00 of the

cash so seized, US$840.00 having been returned to the owner on 31 March 2009 by the Resident Magistrate, as not being accounted for on the official receipt.

[2] This is an appeal from the order of the learned Resident Magistrate. On 6 October 2011, after hearing counsel on both sides, the court ordered that the appeal should be allowed, that the order made by the Resident Magistrate should be set aside and that the matter should be remitted to the Resident Magistrates Court "for hearing before another resident magistrate, in accordance with the procedure outlined by this court in ***Metalee Thomas v The Asset Recovery Agency***". There was no order as to costs. These are our reasons for that decision.

[3] It may be helpful at the outset to summarise the relevant provisions of POCA. Section 75 permits an authorised officer to seize any cash if he or she has reasonable grounds for suspecting that the cash is "(a) recoverable property; or (b) intended by any person for use in unlawful conduct". The cash may be detained initially for 72 hours and, pursuant to orders made by a Resident Magistrate's Court, for an aggregate period not exceeding two years from the date of the first order (section 76(1) and (2)). Section 79(1) provides that, while cash is detained under section 76, "the authorised officer may make an application to the Resident Magistrate's Court for the forfeiture of the whole or any part of the cash", and section 79(2) provides that where such an application is made the Resident Magistrate may order the forfeiture "if satisfied" that the cash is either recoverable property or intended for use in unlawful conduct.

[4] In ***Metalee Thomas v The Asset Recovery Agency*** [2010] JMCA Civ 6, this court had to deal with, among other things, the question of the manner in which a

Resident Magistrate could receive evidence in proceedings under section 79. Harrison JA, who delivered the judgment of the court, considered that, in the absence of any specific regulations or rules of court relating to proceedings under POCA (which remains the case at the present time), Resident Magistrates' Courts, as creatures of statute, were obliged to act in accordance with the procedures laid down in their constituent statute, that is, the Judicature (Resident Magistrates) Act ('the RM Act'), or rules prescribed under that Act in the Resident Magistrate's Court Rules ('the RM Court Rules'). Harrison JA went on to point out that, as envisaged by both the RM Act (section 183) and Order XVI rule 3 of the RM Court Rules, "[t]he practice which prevails in the Resident Magistrate's Court is that witnesses must be examined upon oath or affirmation when they give evidence in court" (para. [35]). In these circumstances, the court held, it was necessary for the Resident Magistrate to receive evidence given *viva voce*, and not on affidavit.

[5] This is the legal background against which this appeal arises. The single issue with which it is concerned, despite Mr Ho-Lyn having canvassed a somewhat broader spectrum in his skeleton arguments on behalf of the appellant, is whether the learned Resident Magistrate fell into error in proceeding entirely on affidavit evidence in hearing and determining an application against the appellant by the respondent under section 79.

[6] Although it is unnecessary, and perhaps undesirable, to rehearse the actual facts of the case in the light of the result of the appeal, it is necessary to say something

about how the matter was dealt with when it actually came on for hearing before the Resident Magistrate.

[7] The application for forfeiture against the appellant was supported by affidavits sworn to on 25 June 2009 by Constable Webster-Lawrence and Desmond Robinson, a forensic examiner attached to the Financial Crimes Investigation Unit within the Financial Investigations Division (formerly the Revenue Protection Division). At the hearing before the learned Resident Magistrate, the appellant relied on an affidavit sworn to by him on 27 October 2009 and filed on his behalf by his attorneys-at-law.

[8] When the matter came on for hearing on the following day, 28 October 2009, both the appellant and the respondent were represented by counsel. At the outset of the hearing, counsel who then appeared for the appellant proposed to the court that the matter should proceed on the basis of the affidavit evidence alone. This proposal, which was embraced by counsel for the respondent, was then endorsed by the court. The matter commenced and in due course both counsel addressed the court in detail on the facts as well as the law, after which the court ruled that the respondent had made good the application for forfeiture pursuant to section 79 of POCA and granted the order accordingly. In her written reasons for her ruling, the learned Resident Magistrate observed that, "[o]n a balance of probability between Mr. Robinson's Affidavit and Mr. Grant's; the Court is of the opinion that the cash ought to be forfeited".

[9] The appellant appealed from this ruling by notice dated and filed on 9 November 2009, on grounds which are no longer relevant. When the matter came on for hearing

before us on 6 October 2011, Mr Ho-Lyn sought and was granted leave to argue the following supplemental grounds of appeal:

> "(a) That the learned Resident Magistrate failed to follow the correct procedure with respect to the requirement of taking of evidence on oath or affirmation from witnesses when they give evidence in Court as specified by sections 183 and 184 of the Judicature (Resident Magistrate's Court) Act and Order XVI Rule 3 of the Resident Magistrate's Court rules.
>
> (b) That the Learned Resident Magistrate failed to make a determination of what unlawful conduct was committed by the Appellant which would cause the property to become recoverable property as required by the provisions of the Proceeds of Crime Act.
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> (c) That the Learned Resident Magistrate failed to disclose in her reasons for judgment the basis on which she concluded that the affidavit evidence of the witness for the Respondent was to be preferred to that of the Appellant and to demonstrate what findings of fact she had come to in making such a decision as a result the Learned Resident Magistrate failed to disclose any proper analysis of the issues in the case and therefore the reasoned basis for coming to her conclusion."

[10] Mr Ho-Lyn supplemented his admirable skeleton arguments covering these three grounds with a succinct oral submission as follows: (i) by virtue of the decision of this court in ***Metalee Thomas***, the Resident Magistrate was obliged to hear evidence *viva voce* before making her ruling under section 79 of POCA (ground one); (ii) the Resident Magistrate ought to have made findings of fact and it was not sufficient for her to say as she did that she preferred one affidavit to the other (ground two); and (iii) the Resident Magistrate failed to disclose in her reasons any proper analysis of the issues and therefore the reasoned basis for her conclusion.

[11] It became immediately clear to us that, as ground one was potentially dispositive of the appeal, it might be helpful to hear Mrs Susan Watson-Bonner, who appeared for the respondent before us, as she had in the court below, on whether the matter was, in law and in fact, covered by the authority of ***Metalee Thomas***, as Mr Ho-Lyn contended. Mrs Watson-Bonner quite properly accepted that, in the light of that decision, the hearing of a section 79 application is now required to be conducted in open court on the basis of oral evidence. However, she sought to distinguish the instant case, on the basis that the appellant had been represented by counsel (and could therefore have been heard had he wished to be) and that in any event, it having been at the request of the appellant's counsel that the matter had proceeded as it had, the appellant should not now be allowed to raise a procedural objection to the conduct of the trial.

[12] One cannot help but be sympathetic to Mrs Watson-Bonner's position. The appellant was, after all, represented in the court below by experienced counsel, whose decision to suggest that the matter proceed on affidavit evidence was obviously a considered one at the time. It is in these circumstances perhaps hardly surprising that it was decided to relieve that counsel of any inhibition or embarrassment before this court by instructing Mr Ho-Lyn to take this point on appeal.

[13] That having been said, however, it appears to us that Mr Ho-Lyn's submission, that the learned Resident Magistrate had no legal basis upon which to determine this matter on affidavit evidence, must be correct. Resident Magistrates' Courts are, as Harrison JA emphasised (at para. [34]) in ***Metalee Thomas***, purely creatures of

statute and as such enjoy no inherent jurisdiction and may only "exercise such powers as are given to them by statute, and…in accordance with the procedures laid down in the statute and not otherwise".

[14] In addition to section 183 of the RM Act, which provides that at the hearing of any civil or criminal proceeding "all persons adduced as witnesses may be examined upon oath, or…on solemn affirmation", there is Order XVI rule 3 of the RM Court Rules, which states as follows:

> "Except where otherwise provided by these rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally on oath; and where by these rules evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally on oath if the Court, on any application before or at the trial or hearing, so directs."

[15] In the absence of any provision in the RM Court Rules for the taking of evidence on affidavit in these circumstances, or of any later rules made under POCA providing for the taking of evidence on affidavit in section 79 proceedings, it appears to us to be beyond debate that the procedure adopted by the Resident Magistrate in the instant case, albeit with the consent of the parties, was not sanctioned by law and cannot therefore be allowed to stand.

[16] In the result, it was not necessary to consider the appellant's grounds two and three. We would however observe that, in any case in which a judicial officer is required to decide between differing versions of the same events, it will inevitably be a matter of considerable difficulty for an appellate court to assess the correctness or

otherwise of the conclusion reached in the court below without the benefit of some form of analytical reasoning, no matter how brief.

[17] These are the reasons for the decision of the court, as set out in para. [2] above.