

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE BROWN JA
THE HON MR JUSTICE LAING JA (AG)**

APPLICATION NO COA2023APP00021

BETWEEN	MARK ARCHER	APPLICANT
AND	DIRECTOR OF PUBLIC PROSECUTIONS	1st RESPONDENT
AND	CLERK OF COURT	2nd RESPONDENT

John Clarke and Isat Buchanan for the applicant

Miss Donnette Henriques and Miss Afryea Cox for the respondent

23, 24 April and 1 May 2024

Criminal law --order made in 2007 refusing setting aside of forfeiture --appeal filed in Resident Magistrate's Court (now Parish Court) -- Record of proceedings not sent to appeal court - Application for record of proceedings to be so sent or vessel released -- Application for hearing to be treated as the appeal - Whether appeal properly filed -- Judicature (Resident Magistrates) (now Parish Court) Act, section 293 -- Judicature (Appellate Jurisdiction) Act, s 29(1)

ORAL JUDGMENT

P WILLIAMS JA

[1] This is a notice of application filed by Mr Mark Archer ('the applicant') on 28 August 2023 seeking the following:

"1. The Court of Appeal makes an order that the Clerk of Court for the Corporate Area Parish Court transmit to this

court within fourteen days of the court's order the record of the case together with the notes of evidence or a copy of the same certified in a manner mentioned by the court and all documents which had been received as evidence or copies of the same certified.

2. An expedited hearing date be set for the appeal in this matter which has languished before the Resident Magistrate Court since the 17th January 2007.

3. In the alternative, that the vessel "Dolphin Lady" which was order [sic] pursuant to section 24 of the Dangerous Drugs Act be released.

4. Leave be granted for the Appellant to adduce fresh evidence on appeal namely:

a. Affidavit of Mark Archer sworn on 28th day of August 2023

b. Affidavit of Urgency sworn on 28th day of August 2023.

5. The hearing of the application is treated as the hearing of the appeal.

6. Such further and/or other relief as this Honourable Court deems just.

[2] The matter was first before this court on 4 December 2023 and orders were made in relation to paras. 1 and 2. The orders made were for the Court Administrator to cause the Clerk of Court to transmit to this court, on or before 18 December 2023, the relevant documents in the case and for the Registrar of this court to set the matter for hearing on an expedited basis as soon as the response was received. When the matter was again before us, Miss Donnette Henriques ('Miss Henriques'), appearing on behalf of the Director of Public Prosecutions ('the DPP'), raised a preliminary point which raised the question of whether the applicant had properly invoked the jurisdiction of this court for his matter to be heard and determined as an appeal. The resolution of this issue was deemed necessary before any further consideration of this matter is possible.

Background

[3] The background to this matter is to be gleaned from documents shared by the applicant in his bundle, which bear a stamp as being certified true copies of the original and are signed. However, it is unclear who signed the certification. Miss Henriques indicated in her written submissions that, although the office of the DPP appeared in the then Resident Magistrate's Court (now Parish Court) concerning the orders made on 5 January 2007, it did not have records of this matter which are normally retained by that court. These records have never been transmitted to this court and it is this failure that has caused the applicant to make this application.

[4] From the copy of a statement from Detective Corporal Lloyd Richards, dated 17 March 2007, eight men were on a boat with the name 'Dolphin Lady' (alternatively, 'the boat' or 'the vessel') that was driven to the Jamaica Defence Force Coast Guard Headquarters on 8 February 2005. The boat was described as "a 60-foot trawler fishing boat with identification number JMF01003 owned by Mark Archer". Detective Corporal Richards searched it with the assistance of the Jamaica Defence Force Coast Guard ('the coast guard'). Detective Corporal Richards searched a bucket found on the deck and discovered eight parcels wrapped in black plastic, all containing white powdery substance resembling cocaine. When the eight men who were on board were advised of the offences of possession of and dealing in cocaine, one of the men who gave his name as John Groves said "officer a my own, a me carry it pon de boat di other men don't know a thing bout it". All eight men were arrested and charged.

[5] On 17 February 2005, the attorney-at-law who appeared in the court below for the applicant, Mr Ernest Davis ('Mr Davis'), filed an application for the release of the boat and its cargo of fish. This application was to be heard on 21 February 2012. In an affidavit in support of this application, the applicant asserted that he was the agent for the boat which operated between Andres Islands and Jamaica. On 8 February 2005, the captain and crew were returning to Jamaica with about 6000 pounds of fish to have the certificate of fitness renewed when the boat and its contents were seized by the coast guard. The

applicant asserted that he had no knowledge that any drugs or anything illegal were on the boat and he did not give anyone permission to carry any narcotic drugs or anything illegal onto the boat. It is noted that there is a document next to the application for the release of the boat that has what appears to be an endorsement, which states: "ON 21.2.2005 Application refused. R. M. Corp Area". There is however, no signature affixed to this endorsement.

[6] From copies of the two informations that are before the court, it is gleaned that on 31 March 2005 Mr Groves pleaded guilty to the charges for dealing in cocaine and importing cocaine. No evidence was offered against the other men and they were dismissed. Mr Groves was fined in relation to each charge and in addition was sentenced to five year's imprisonment at hard labour in relation to the charge for dealing in cocaine. Endorsed on the information for importing cocaine is the following:

"Order for forfeiture made for boat and equipment and also the fishing catch (fishes)."

[7] The Resident Magistrate signed a forfeiture order under the Dangerous Drugs Act ('the DDA'). This order indicated that it was upon the application of the Clerk of the Courts, prosecuting on behalf of the Crown on 31 March 2005, that the order was made for the fishing boat along with the fishing gear and six thousand pounds of fish to be forfeited to the Crown. The Resident Magistrate also signed another order that indicated that on 31 March 2005, pursuant to section 24(2) of the DDA, "the vessel known as 'Dolphin Lady' with registration number K-452 presently in the custody of the police be forfeited to the Crown".

[8] Mr Davis filed another application on behalf of the applicant to have the boat and the cargo of fish released. This was dated 1 April 2005 and was set for hearing on 4 April 2005. On 5 January 2007, the application for revocation of forfeiture was refused. In the order signed by the Resident Magistrate, it was indicated that this order was made after hearing from Mr Davis for the applicant and Mrs Caroline Williamson Hay instructed by the DPP.

[9] On 17 January 2007, the applicant filed a notice and grounds of appeal against “the decision” of the Resident Magistrate “to make an order for forfeiture dated and made on 31st day of March, 2005 and on the 5th day of January 2007 respectively as follows: 1. That the vessel known as “Dolphin Lady” with registration number K-452 presently in the custody of the police be forfeited to the Crown and 2. The application for revocation of forfeiture is refused”.

[10] In written submissions, filed on behalf of the DPP, Miss Henriques submitted that the issue being disputed does not fall under section 293 of the Judicature (Parish Court) Act (‘the Act’) but rather the issue arose from an order of the court and not a judgment as required by the section. It was submitted that this distinction is evident in that section 251 of the Act that treats with appeals in the civil jurisdiction provides for appeals “from the judgment, decree, or order of a Court”. Section 293, it was further submitted, is specific in its language. **Ex parte Chinery** [1881-85] All ER Rep Ext 1429 was relied on in support of the proposition that there is a distinction between an order and a judgment.

[11] It was noted by Miss Henriques that the applicant was not a defendant before the court for the offences that engendered the application under 24(2) of the DDA, and as such, he lacks standing to make any application pursuant to section 293 of the Act. It was submitted that if the applicant is to engage the court for a remedy it would be by way of section 29(1) of the Judicature (Appellate Jurisdiction) Act (‘JAJA’). Reference was made to **Bertram Sears v The Director of Public Prosecutions** (unreported) Court of Appeal, Jamaica, Resident Magistrates’ Court Appeal No 12/2006, judgment delivered 18 December 2006 and **Hervey Ander Phillips Wood and Shown Hervie Phillips Thompson v The Director of Public Prosecutions** [2012] JMCA Misc 1 which are cases that were heard by this court by virtue of section 29(1) of JAJA.

[12] In response, Mr Clarke submitted that none of the cases from this court makes any direct finding that an appeal in relation to forfeiture orders cannot be advanced under section 293 of the Act. Mr Clarke submitted that the applicant was not a convicted person nor was he seeking the exercise of His Majesty’s mercy. Thus, there was no basis in law,

on a true construction of section 29(1) of JAJA on which he could seek to have his case referred to the court. It was further submitted that in light of the facts of this case, the matter could be heard as a criminal appeal.

[13] It was Mr Clarke's submission that the applicant employed a statutory right to appeal pursuant to section 50 of the Drug Offence (Forfeiture of Proceeds) Act. He contended that the applicant, "as a person who has an interest in property against which a forfeiture order is made, is able to appeal against that order 'in the same manner as if the person had been convicted of the prescribed offence in respect of which the order was made, and the order were or were part of a sentence imposed on that person in respect of that offence'."

[14] Mr Clarke noted that rule 3.16 of the Court of Appeal Rules provides that in relation to criminal appeals the court may on application suspend the operation of the forfeiture order until the determination of the appeal. Counsel submitted that by implication there must be a right to appeal, in a criminal division of this court from forfeiture orders.

[15] Mr Clarke submitted that **Ex parte Chinery** was concerned with the interpretation of bankruptcy legislation and is of limited assistance in construing the term "judgment" as used in this case. He submitted that the court might need to have regard to the dictionary definition of judgment and also to consider the definition given in other cases. He referred to the definitions given in **Ex parte More In re Faithfull** [1885] QBD 627 at page 632, **Lake v Lake** [1955] All ER 538 at page 541E and **Allen v Byfield No. 2** (1964) 7 WIR 69 at page 75. Mr Clarke acknowledged that none of these cases were criminal matters but submitted that they were persuasive since they demonstrate that even in civil proceedings, when an order disposes of the proceedings in dispute, it is construed as a judgment.

[16] Mr Clarke contended that it does not matter whether the term order or judgment is used to describe the order finally disposing of the applicant's boat. Based on the special statutory jurisdiction of the Resident Magistrate, the applicant would have an interest in

the boat and if aggrieved by the final order/judgment he can apply pursuant to section 293 of the Act. Counsel submitted that the term judgment is wide enough to contemplate any order a criminal court can make in light of its special statutory jurisdiction, including orders for forfeiture and refusal of applications to revoke those orders.

[17] Mr Clarke submitted that if the submissions made by Miss Henriques are correct that section 293 cannot ground the appeal, this court would also have to find that the order that was made was not a part of the Resident Magistrate's criminal judgment or the criminal proceedings. If this was found to be correct, Mr Clarke's further submission was that the proceedings for forfeiture could not have been commenced by oral words or even without adequate notice to the owners, and this would call out for urgent relief from the court. Counsel referred to **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6 at paras. [33] to [36]. Mr Clarke contended that if the matter was in the civil proceedings realm of the Act, then this court would have to consider **Powell v Spence** [2021] UKPC 5 and "the Board's exhortation that the Jamaican Court both appeal and RM, should have utilized express statutory power to remedy any defects in proceedings and decide the real issue between the parties".

[18] Mr Clarke concluded that the applicant would be faultless just like the appellant in **Ray Morgan v The King** [2023] UKPC 25. He urged that this court will have to take into account the wider public interest in exercising any statutory power it has, in relation to the applicant.

[19] Miss Henriques, in responding to the submissions made in relation to the Dangerous Drugs (Forfeiture of Proceeds) Act, submitted that section 50 that deals with appeals is specific to that act. She pointed out that forfeiture order is expressly defined as an order made under section 7 of the Dangerous Drugs (Forfeiture of Proceeds) Act and therefore is inapplicable to the order that was made in this case which was governed by the provisions of the DDA. Miss Henriques submitted that there is presently no appeal before this court to engage this court in making any decisions relative to the matter.

Discussion

[20] It is useful to first recognise the statutory regime of the proceedings, which was before the Resident Magistrate pursuant to section 24 of the DDA.

"24. (1) If any constable has reasonable cause to suspect that any conveyance is being or has been used for the commission of any offence against this Act, he may without a warrant search and, if such search reveals evidence that the conveyance is being used or has been used for the commission of any offence as aforesaid, seize and detain such conveyance.

(2) Where any conveyance is seized pursuant to this section and-

(a) any person is convicted of an offence against this Act; and

(b) the Court is satisfied that –

(i) that person owns the conveyance used in the commission of the offence; or

(ii) the owner of the conveyance permitted it to be so used; or

(iii) the circumstances are otherwise just so to do,

the Court shall upon the application of the prosecution order the forfeiture of the conveyance.

...

(8) If, upon the application of any person prejudiced by an order made by the Court under subsection (2) or (3), the Court is satisfied that it is just to revoke such order, the Court may revoke the order upon such terms and conditions as it deems appropriate ...

(9) An application to the Court under subsection (8) for the revocation of the order shall be made within thirty days of the date of the order or within such greater time, not exceeding six months after the date of the order as the Court may allow."

[21] The provisions of the legislation provide not just for the order for forfeiture but for the court to entertain an application to revoke that order which may well be viewed as being tantamount to an appeal of the order made for forfeiture. This represents a unique feature about this legislation.

[22] In any event, in the submissions made on behalf of the applicant in response to the preliminary objection, it was stated that the applicant "employed a statutory right to appeal pursuant to sec 50 of the Dangerous Drugs (Forfeiture of Proceeds) Act". That section provides as follows:

"50(1) A person who has an interest in property against which a forfeiture order is made may appeal against that order-

(a) in the case of a person convicted of the prescribed offence in which the order was made, in the same manner as if the order were made or were part of a sentence imposed on that person in respect of that offence; or

(b) in any other case, in the same manner as if the person had been convicted of the prescribed offence in respect of which the order was made and the order were, or were part of, a sentence imposed on that offence."

[23] This legislation defines a forfeiture order as an order made under section 7 (see section (2)(1)). Section 7 falls within Part II of the legislation which deals with forfeiture orders, pecuniary penalty orders and related matter. Under that part, section 3 provides:

"3-(1) This section shall have effect without prejudice to the operation of the provisions of the Dangerous Drugs Act which relate to seizure and forfeiture.

(2) Where a person is convicted of a prescribed offence committed after 15th day of August, 1994, the Director of Public Prosecutions may apply to a Judge of the Supreme Court (hereinafter referred to as the Judge for one of the following orders-

(a) a forfeiture order against any property that is tainted property in relation to the prescribed offence.

..."

Section 7 provides:

"7-(1) Where an application is made to the Judge against property in respect of a person's conviction for a prescribed offence and the Judge is satisfied that the property in respect of the offence, the Judge may order that the property or such part thereof as the Judge may specify in the order, be forfeited to the Crown."

[24] It is pellucid that the regime for forfeiture under the DDA is a distinct regime from that under the Dangerous Drugs (Forfeiture of Proceeds) Act. The applicant had no statutory right of appeal from the order made by the Resident Magistrate by virtue of the Dangerous Drugs (Forfeiture of Proceeds) Act that speaks to orders made by a Judge of the Supreme Court.

[25] The question remains as to whether the applicant can rely on the right to appeal under the Act. When the applicant filed that notice of appeal on 7 January 2007, section 293 of the Act provided inter alia:

"An appeal from any judgment of a Magistrate in any case tried by him on indictment, or on information in virtue of a special statutory summary jurisdiction, shall lie to the Court of Appeal:

..."

Miss Henriques is entirely correct that this is distinguishable from section 251 of the Act governing civil appeals, which permits appeals from "the judgement, decree or order of a court in all civil proceedings...". In respect of criminal matters, appeals lie only from any judgment. This recognises the different types of decisions that the Resident Magistrate can make and appeals lie from three in civil proceedings and only from one in criminal proceedings.

[26] In **Re D C, An Infant** [1966] 9 J L R 568, this court was concerned with an appeal from a Resident Magistrate's Court, in which a preliminary point arose as to whether the

court had the jurisdiction to hear the appeal. This court concluded that the right of appeal given by section 293 of the Act did not apply to an adoption order made by the Magistrate under the relevant provision of the Adoption of Children Law, as it then existed. Duffus P, writing on behalf of the court, said at page 569E:

“No person has an automatic right of appeal from a court. The right of appeal must be given by the legislature and it is usual to set out in the relevant statute in clear language the right of appeal and the powers vested in the appellate court.”

[27] A demonstration of the setting out of the right to appeal a forfeiture order is seen in the Dangerous Drugs (Forfeiture of Proceeds) Act on which the applicant relied to bring his appeal. That reliance was shown to be misplaced. The applicant had no right of appeal to this court from the forfeiture order made pursuant to the DDA. However, by our decisions, this court has not turned away with finality, an appellant who wishes to appeal such an order. The provisions of section 29(1) of JAJA permits an appeal to this court by way of a reference from the Governor-General. As Miss Henriques highlighted, this was the procedure followed by the appellants in **Bertram Sears v The DPP** and **Hervey Ander Wood and Shown Hervie Phillips v The DPP** that permitted this court to hear and determine their appeal against forfeiture orders.

[28] Section 29(1) of JAJA provides:

“The Governor-General on the consideration of any petition for the exercise of Her Majesty’s mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may if he thinks fit at any time, either –

(a) refer the whole case to the Court and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted...”

[29] Mr Clarke contended that the applicant was not a convicted person nor was he seeking the exercise of His Majesty's mercy and thus could not seek to have the matter referred to this court by virtue of this provision. However, in **Bertram Sears v The Director of Public Prosecutions** this court considered an appeal relative to the forfeiture of an aircraft pursuant to section 24 of the DDA in circumstances similar to this. In that case, Mr Bradley McKay pleaded guilty to several breaches of the DDA and illegal entry. An aircraft had been seized and detained by the police during investigation into the case, as the conveyance that had been used in the commission of the offences. After hearing evidence including that of Mr Sears who was the owner of the aircraft, the Resident Magistrate granted the application for the aircraft to be forfeited to the Crown. Mr Sears sought to appeal the forfeiture of the aircraft. In the judgment from this court, it was noted how the matter came to be before this court, namely: "[b]y petition, to the Governor General, the application was referred to the Court of Appeal for re-hearing pursuant to section 29(1) of the Judicature (Appellate Jurisdiction) Act" (see page 2).

[30] It is to be regretted that some 17 years have passed since the applicant embarked on his quest to overturn the order of the Resident Magistrate so that the vessel can be released. It is truly egregious that this delay was largely occasioned by the non-production of the record of proceedings in the court below. The application before this court is for the hearing of the application to be treated as the hearing of the appeal so that the "Dolphin Lady" can be released. There is no proper appeal before us and as such we have no choice but to refuse the application. In **Powell v Spence**, the Board identified the power in the Act which permitted the Resident Magistrate to cure the defects in the proceedings that had occurred. There is no such express statutory power that can remedy the situation that has arisen here. The applicant is encouraged to move expeditiously to take the necessary steps to properly approach this court.

[31] Accordingly, we make the following order:

Orders sought in paras. 3, 4 and 5 of the notice of application
filed 28 August 2023 are refused.