

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CIVIL APPEAL NO 27/2014

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)**

**BETWEEN LAURA BARNES APPELLANT
AND COMMISSIONER OF CUSTOMS RESPONDENT**

**Ravil Golding instructed by Lyn-Cook, Golding and Co for the appellant
Mrs Suesette Harriott-Rogers and Ms Janice Neatly for the respondent**

14, 15 April and 6 November 2015

PANTON P

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] I too have read the draft judgment of my sister Sinclair-Haynes JA (Ag) and agree with her reasoning and conclusion.

SINCLAIR-HAYNES JA (AG)

[3] On Sunday, 24 April 2011, Ms Laura Barnes, the appellant disembarked a flight from Antigua at the Norman Manley International Airport. On the customs declaration form, she stated that she was not carrying a sum in excess of US\$10,000.00 or its equivalent. Her bags were scanned and US\$69,900.00 was discovered secreted at the bottom of one of her bags. She repeatedly denied, both orally and in writing, any knowledge of the sum of US\$69,900.00.

[4] A further sum of US\$1,200.00 was also found in her handbag. The total sum of US\$71,100.00 was consequently detained pursuant to section 79 of the Proceeds of Crime Act (POCA). On 5 July 2011, Her Honour Mrs Sonia Bertram Linton (as she then was) granted a further order of detention.

[5] On 7 July 2011, the appellant applied for the release of the said sum of US\$71,100.00. An application for the forfeiture of the said sum was also made by Commissioner of Customs on 23 September 2011. Her Honour Ms Valerie Edwards acceded to the Commissioner of Custom's application. This is an appeal from that decision. We heard the appeal on 14 and 15 April 2015 and promised to put our reasons in writing. This is a fulfillment of that promise.

The evidence before the learned Resident Magistrate

The respondent's evidence

[6] Four witnesses testified for the respondent. Ms Alician Smart, customs officer assigned to the Norman Manley International Airport, testified that she was stationed at

the scanner in the customs baggage hall. The appellant handed her a customs immigration declaration form (C5 form) on which all questions pertaining to the contents of her luggage to be declared were answered in the negative. Her bags were scanned and an anomalous image was revealed in one. Ms Smart notified the contraband enforcement team and on her instructions a thorough search of the appellant's luggage was conducted. When the bag was emptied of its contents, the anomaly was not manifest. The bag was re-scanned and cash was discovered in its lining.

[7] The appellant's permission was obtained to tear the lining of the bag. A probe was used to rip the lining and "stocks of cash" wrapped in green tape were found in a transparent bag. Upon being questioned, the appellant denied knowledge of the cash. She was escorted with her luggage to a room in the airport which provided privacy. Ms Jodi-Ann Gayle, contraband enforcement officer assigned to the Jamaica Customs Department, counted in the clear plastic bag money amounting to US\$69,900.00 and the further US\$1,200.00 amounting to a total of US\$71,100.00.

[8] Detective Inspector Lambert entered the scene whilst the appellant was in the interviewing room of the airport. He was shown several packets of US dollars which were packed in transparent plastic. US\$69,900.00 was taken from the bag and an additional sum of US\$1,200.00 was taken from her handbag. The appellant denied that the money was hers and informed Det Inspector Lambert that the bag was her mother's. He examined her passport. He said she was neither threatened nor accused of transporting drugs.

[9] The appellant was informed that because of her failure to declare the cash it would be detained for further investigation and until she provided proof of the funds. The cash was seized pursuant to the POCA. Ms Smart told the court that she formed the view that the cash was recoverable property and/or was intended for unlawful use.

[10] The decision was taken to seize the said sum for the following reasons:

- (a) the appellant's failure to declare the cash on the C5 form and her failure to orally declare same;
- (b) the appellant's repeated denial of knowledge and ownership;
- (c) the method in which it was transported; and
- (d) the method of concealment.

The appellant was provided with a detention notice and a receipt for the sum seized. She was interviewed by a customs officer and she continued to deny knowledge of the money. She appeared nervous whilst she was in the interview room.

[11] Ms Vivienne Harris, director of investigations at the Jamaica Customs Department, was the investigating officer. Her evidence was that her investigations revealed that the appellant had visited the island six weeks before the seizure of the cash. She concluded that the appellant ought therefore to have been familiar with customs requirements as regards the declarations to be made on the C5 form.

[12] She testified that on 20 July 2011, the appellant's attorney caused to be served on her, documents for the release of the money. On 21 July 2011, she applied to the

court and obtained an order for the further detention of the money. It was stated on the application for the release of the money that the reason the appellant had travelled with such a large amount of cash was that on a previous occasion, she had travelled with a cheque valued at US\$15,000.00 and she encountered difficulties negotiating the cheque.

[13] However, Ms Harris' investigations revealed that on that occasion, the appellant did not declare that she was in possession of a cheque for that sum. In furtherance of her investigations, Ms Harris contacted the Bank of Nova Scotia (Scotia Bank) to verify the account. She has to date received no information.

[14] Ms Harris observed the appellant's averment in her affidavit that the cash seized belonged to her and her sister Dawn. She verified that Dawn Barnes was in fact her sister by contacting the Tax Administration of Jamaica through the Tax Registration Information System. She also observed that the appellant claimed to have paid US\$4,000.00 towards the acquisition of property which her deceased mother had begun purchasing. She contacted the tax operations and titles offices in order to verify the claim but she did not receive any information from the said offices.

[15] Ms Harris also noted that the appellant had stated in her affidavit that the intended use of the money which was seized was for the purchase of a home in Farm Pen, Westmoreland. A sales information form was exhibited. She however rejected the document because it bore no transaction date and there was a discrepancy in relation to the tenancy. The appellant had said the house was being purchased for both her

and her sister but on the form, "sole proprietorship" was ticked. She contacted Mr Thomas, the sales person who allegedly signed the form for verification.

[16] The appellant provided Ms Harris with documents in relation to businesses in Antigua which she claimed were owned by her and her sister, Dawn. She however placed no reliance on those documents as a source of funding because the documents were faxed and they were not notarized. She was unable to establish any connection between the appellant and the documents. The appellant, she said, had not provided bank records, statements or tax returns from Antigua.

[17] Consequently, on 23 September 2011, Ms Harris applied for the forfeiture of the cash on the following grounds:

1. the large sum brought across border;
2. the failure to declare;
3. the mode of transportation, a consideration being that it was checked luggage;
4. the large part of the bag which was sewn over the original; and
5. the absence of any documents verifying the source of funds.

It was also her evidence that she did not rely on the appellant's intended use of funds because of the inconsistencies in the appellant's statements. There was nothing of substance in her application for the release of the seized cash.

The appellant's evidence

[18] The appellant testified that she travelled with US\$71,100.00. The sum of US\$69,000.00 was concealed in the travelling bag. The money was concealed in her bag because she had heard of gruesome tales of airport workers tipping people off and having them followed and robbed. It was also her evidence that in her bag was the sum of US\$1,130.00 which was to support her while in Jamaica.

[19] The US\$69,000.00 belonged to her and her sister Dawn. Of the US\$71,000.00, US\$30,000.00 was hers and the balance, her sister's. It was her evidence that it took them a period of over three years to accumulate the money. That money was not put into the bank because:

- (a) whenever sums exceeding a certain amount are taken to the bank by foreigners, they are subjected to questioning as to the source;
- (b) her sister had lost her investment in Stanford Bank;
and
- (c) they both lost money in the British American Bank.

[20] She said she lost US\$8,000.00 in the Stanford Bank and her sister also lost money in the collapse of Stanford Bank. After their losses, they decided to save at home. It was her evidence however, that she maintains a business account with Corporate Credit Union and a personal account with Scotia Bank (in Antigua).

[21] The purpose of the money (US\$69,000.00) was to purchase a house in Farm Pen in Westmoreland which she and Dawn had seen whilst driving in the area on their visit

to attend their mother's funeral. They had viewed the house and received the necessary information from a Mr Thomas who had given her a document. The purchase price was JMD\$7,500,000.00. They chose a unit which they were purchasing together. They retained Michael Palmer, attorney-at-law, to transact the sale. The balance was to be paid in three months.

[22] She was carrying cash because of the difficulty she encountered in attempting to cash a foreign US cheque for \$15,000.00 on the occasion she came for her mother's funeral. That cheque was drawn in her sister Dawn's name. The difficulty in cashing the cheque was further compounded by the fact that they resided abroad; they did not have an account in Jamaica and they were spending a short period of time.

[23] One of the problems was the requirement that the cheque had to be lodged for 30 days. They were unable to negotiate the cheque whilst they were in Jamaica. In order to cash the cheque, they opened an account at Scotia bank and lodged it. The account was opened in their sister, Nordia Barnes' name as she was resident in Jamaica.

[24] She testified that they were desperate for cash to pay their mother's funeral expenses and the balance on property situate at Dalling Street in Westmoreland which their mother had purchased from the Westmoreland Trust for approximately US\$7,000.00. Her mother died owing a balance on the said property which they paid. In order to pay the US\$4,000.00 towards their mother's property, money had to be wired (from the United States) to the Scotia bank account.

[25] She agreed that wiring was a safe method of transferring money. Her sister, she said, wired money to Jamaica from time to time because they had a mentally challenged brother who resided in Jamaica. It was however her evidence that she did not wire regularly but admitted that it was a quick means of transferring money.

The bag

[26] The appellant's evidence was that she took the bag from her mother's house. The compartment at the bottom was not false. She disowned the money when it was first detected until Inspector Lambert advised her to get a lawyer and return for it. She said she disowned it because she was afraid of going to jail as she was being threatened by Ms Gayle and a man that she would go to jail.

[27] Under cross-examination, it was the appellant's evidence that it was she who packed the bag. There was a cut in the bag which she did not re-sew. She lifted its bottom and placed the money under it. The opening in which she pushed the cash was about four inches in length. There was no flap. The customs officers used a probe to further enlarge and open the place in which the money was pushed. Although she did not seal the opening, the cash was not visible but if her clothes were removed from the bag it would become visible.

[28] The customs officers removed the contents of her bag on a machine; examined it and remarked that there was something abnormal in it. They requested permission to search the bag and she allowed them. The cash was removed from the bag.

[29] She denied that the cash was hers at the baggage hall area but later admitted to Inspector Lambert that it belonged to her. Her evidence was that at the baggage area, there were, apart from travellers, Ms Smart, Inspector Lambert, Mr Griffiths and two other men. After the cutting of the bag, other customs officers came. She said she was terrified. They told her it was "prison work". Her evidence was that she was threatened and that was the reason she denied it was hers. Ms Gayle and a man issued those threats, she said. She then said that at the baggage hall she was not asked if the money was hers, she was asked what it was and she told them it was money.

[30] She was taken to a room. There again, she saw Inspector Lambert. She was questioned for between two to two and a half hours. She was neither cautioned nor informed of the reason for the questions. She was adamant that she was taken to a room and instructed to take off her clothes. It was humiliating, she said, as it was that time of month for her. She said she was questioned by a number of persons. She was first questioned by Ms Gayle who threatened her in the presence of Inspector Lambert. Ms Smart and Mr Griffith were in the room. They all questioned her for about half an hour.

[31] Thereafter Inspector Lambert alone conducted the interview. About an hour or an hour and a half after the questioning commenced, she admitted that the money belonged to Dawn and her. She was only informed by Mr Lambert that she could call a lawyer after she confessed. Ms Gayle and the customs officers all came down on her when she admitted that the money was hers. She was not asked to provide proof of

source of funds. Her evidence in that regard was supported by Inspector Lambert and Ms Gayle.

The respondent's evidence in respect of the bag

[32] Ms Gayle's evidence is that the x-ray revealed that the bag had a false compartment at its base. The appellant was informed that they would cut the base of the bag. Upon being shown the cash by Mr Griffiths and asked what it was, the appellant admitted she knew what it was but denied knowledge of its presence. She told them that the last time she came to Jamaica she got the bag from her mother's house.

[33] She denied that the appellant was asked if she had any more money and that she told them she had in her handbag. On her evidence, she was not present when Ms Smart asked the appellant if she had any more money or anything to declare. She denied that the appellant said that the money was hers and that it was to do business.

[34] Ms Smart's evidence was that the appellant admitted that the bag was hers but denied knowledge of the cash. She was taken to a room by Mr Griffith, Inspector Lambert and Ms Gayle. There, she was questioned by Inspector Lambert about the source and purpose of the funds but she repeatedly denied knowledge of the cash. Consequently the cash was seized.

[35] It was Ms Smart's evidence before the learned magistrate that, upon scanning the bag, the image revealed that the cash was apparently pinned in the lining of the bag. It was her evidence under cross-examination that the lining of the bag was opened

and re-stitched; and that there was a glue-like substance indicating that the lining was removed and replaced. Mr Griffith sought the appellant's permission to tear the lining. She was asked by Ms Gayle about the cash and she denied knowledge. She was taken to a room and she repeatedly denied knowledge and ownership of the cash. The appellant was advised that the cash would be seized because of her failure to declare the cash on the form.

The appellant's source of income

[36] It was the appellant's evidence that she was not asked to provide proof of source of income. She was unable to recall whether she was told that the money would have been detained for further investigation until she provided proof of funds. She recalled receiving a notice but was unable to recall when she had done so.

[37] The appellant's evidence is that she had been residing in Antigua for 15 years. She lived there with her sisters Dawn and Jennifer Barnes and her nephew Ackeem Brown. She is a hairdresser and the sole proprietor of a beauty salon, Shades of Essence which has been in operation for 13 years. She has four employees whom she named. She testified that her business was registered and she provided the court with its address and the directions to the salon.

[38] The business operates six days per week and during the holidays, seven days. The holidays, are in December, Carnival, which is in July/August, Old Year's night and Valentine's Day. She earns US\$2,500.00 per month from the business. She also sells hair extensions, wigs and handbags. From the sale of the extensions, wigs and

handbags, she sometimes earns between US\$500.00 to US\$1000.00 per month which was deposited in the bank. She pays rent monthly for her business in the sum of EC\$1,600.00 or US \$500.00, which includes utilities. Before paying her employees, her income is EC\$6,500.00 to EC\$7,000.00 per month out of which she pays her workers US\$100.00 per week.

[39] She has been involved in 'partners' or 'box' with three saving clubs at different times for about 10 to 12 years to which she pays US\$150.00 each week. She gets about EC\$10,000.00 or US\$4,000.00 per draw/payment. Three names of persons with whom she "throws" partner/box were provided. From that venture, she gets paid every six months to a year, depending on the number of participants.

[40] She was in possession of notarized letters signed by the holders of the three box clubs verifying that she was a participant in the three box clubs. The learned magistrate however did not allow them to be tendered as evidence. She said she saved her 'draw' from the 'box' in her bank account. Her credit union account has over EC\$15,000.00 and her Scotia account about EC\$2,000.00.

[41] Her boyfriend, who is a medical doctor, is also another source of income. He pays her share of the rent, which is EC\$750.00 monthly and gives her money. He is also responsible for her entertainment expenses. She has travelled to Antigua, St Martin and New York. Since 2011, however, she has only travelled to St Martin and the trip was a birthday gift from her boyfriend.

[42] She further detailed her expenses. The cost of the products she used varied between US\$200.00 to US\$500.00 per month. The extensions, wigs and handbags she sold were ordered from a company that shipped them to her, but her sister in the United States sometimes sent them. She spent US\$1,000.00 or US \$2,000.00 to purchase them depending on the time of year. Her grocery bill was US\$150.00 per month. She said she did not purchase clothes because her sister sent her clothes.

Dawn's source of income

[43] Her sister Dawn operated Tropical Dawn, a store which has sold souvenirs, handbags and clothes to tourists for seven years. At that store she employed two persons. She also operated a grocery store called Dawn's Mini Mart for three years. That store had one employee. Dawn earned US\$7,000.00 per month. It was her evidence that she does not pay tax in Antigua. She pays social security, medical benefit and education levy monthly. She said the Pay as You Earn System was implemented recently which is a business tax for persons with businesses.

Evidence regarding the purchase of the house

[44] Mr Leighton Thomas, the construction manager for the housing scheme, testified on behalf of the appellant. He said interested persons selected their lots and the company would construct the unit at a cost of \$7,495,000.00. The appellant and a female whose name he could not recall visited and viewed the model unit in March 2011.

[45] He informed her about the particulars of the sale and gave her a tour of the unit. He regarded her as a prospective customer. The particulars of the sale would have been discussed if they had further interest. The appellant and her female companion expressed an interest in purchasing one of the units.

[46] Each client, he said, had a different payment plan but standard procedure was that the contract would be completed in three months. The appellant told him she would pay in cash. He was unable to recall the period over which payments would be made but he recalled that she indicated that she had the majority of the funds. He was however unable to say how much she had. She also told him that she would be able to meet the three months deadline.

[47] He directed her to the office in Spanish Town. The standard forms were available at the Spanish Town office and at the model unit. It was not he who had given her the standard form. He however acknowledged that the form which she exhibited was one of their standard forms. Under cross-examination, he said he could not recall the exact date he met her. It could have been April, but he believed it was in March. The magistrate however rejected the appellant's evidence and ordered the entire sum of US\$71,100.00 to be forfeited.

The learned Resident Magistrate's reasons

[48] The learned magistrate found that the appellant's failure to declare orally and her false declaration on the C5 form that she was in possession of cash in excess of US\$10,000.00 was an indication that she was deliberately concealing the money. She

rejected as untrue and an afterthought her explanation that she had heard gruesome stories of persons being robbed.

[49] The learned magistrate opined that there was no reason for the appellant to have transported the money in that manner because she had access to and was familiar with Western Union and the banking system, which were safer. She noted that it was the appellant's evidence that she had not ceased making lodgments at her Credit Union, they had had money wired to an account at Scotia bank and that the appellant had admitted that that wiring was safe.

[50] The learned Resident Magistrate rejected as unacceptable, her reason that she had lost money in the bank for not lodging the money in the bank. She noted that it was the appellant's evidence that she continued to use the banking system. She drew the inference that she avoided using the banking system or Western Union because the cash was unlawfully obtained. She further rejected the appellant's reason for not using the banking system on the basis that it would have been too much trouble to get the persons to sign letters. She found that it would have been more troublesome to store cash at her house over a protracted period and to conceal same in her checked luggage for overseas travel.

[51] The learned Resident Magistrate disbelieved the appellant's explanation that her sister and her nephew were busy and that she and her sister had lost money in the banking system. She concluded that the appellant continued to place her trust in the banking system by using the credit union and Scotia bank. She drew the inference that

the concealment of such a large sum was evidence that it was unlawfully obtained and thus she would have encountered difficulty accounting for its source.

[52] The learned Resident Magistrate rejected as untrue, an afterthought and a ploy to divert attention from her, the appellant's explanation that a portion of the money belonged to her sister for the following reasons:

- (a) her sister neither gave evidence nor provided an affidavit in support;
- (b) she failed to tell the officers when the cash was seized that a part belonged to her sister; and
- (c) her sister Dawn has not applied for any part of the cash to be released to her although POCA allows her to do so;

The learned magistrate opined that it was not the intention of POCA that the appellant could make a claim on behalf of her sister by "merely calling a name without more". She noted that the appellant waited for one to an hour and a half to disclose that the money was hers and her sister's.

[53] The learned magistrate found it significant that her sister had failed, in spite of the fact that a notice was issued to the appellant which was a notice to all persons affected by the seizure, to make a claim, although the appellant asserted that she owned a part of the cash. The learned magistrate therefore concluded that no part of the cash belonged to the appellant's sister Dawn.

[54] The learned Resident Magistrate remarked that neither the appellant's boyfriend, who supported her, nor her nephew, who is an adult, presented themselves to testify on her behalf or to provide an affidavit. She concluded that the absence of evidence from a family member was an indication that the appellant's story was fabricated. She also found her to be untruthful because, according to her, the respondent's witness asserted in her witness statement that the appellant agreed to the "bag being cut open", but she denied this and stated that there was no need to as the bag had an opening.

[55] The Resident Magistrate however stated that upon reference being made to the appellant's affidavit, "she agreed that she said no". The learned magistrate relied on the bag as supporting the respondent's description and not the appellant's. She held the view that the separation of the cash and the transportation of the significantly smaller sum in her handbag, while the greater sum was placed in her checked luggage, was clearly to divert attention from the larger concealed sum. Had the bag not been scanned repeatedly and searched, it would not have been detected. She concluded that the smaller amount was a part of the larger amount.

[56] The learned Resident Magistrate regarded Mr Thomas' evidence as unhelpful to the appellant as he could only speak to the utilization of the cash in relation to a real estate transaction but not to whether the cash was lawfully obtained. She found it worthy of note that on the real estate form the appellant ticked "sole proprietor" although it was her evidence that the unit was being purchased jointly with her sister.

She said that was an indication that she was to be the sole proprietor and that she was the sole owner of the cash.

[57] The learned Resident Magistrate examined the appellant's income and expenses and concluded that there was a shortfall of between US\$300.00 to US\$500.00 which the appellant did not account for "even with the contributions from her boyfriend". She rejected her evidence of her participation in a "box" as fabricated because the appellant had stated that she had no other source of income and then she said that she threw a partner. The learned magistrate said that she inadvertently omitted that piece of evidence because she was lying and not "because she merely forgot but because it was not true and a mere afterthought fabricated by her after the cash was seized." She said that "[i]t appeared to be a recitation a part of which she omitted and therefore tried to correct by afterwards adding which should have been the most important part and integral part of her defence. This speared through the very heart of the defendant's case". She concluded that the appellant was "blatantly untruthful".

[58] The manner in which money was concealed; the appellant's "divergent explanations"; the inconsistencies in her evidence; and the lack of corroboration led the learned Resident Magistrate to conclude on a balance of probabilities that the seized cash was recoverable under POCA. She considered that there was no evidence to rebut the strong probability that a part or the whole of the cash seized was obtained through unlawful conduct. On the other hand, she found that the evidence of witnesses for the respondent was not discredited on the important and material aspects, that is, in respect of the recoverable cash.

Grounds of appeal

[58] The appellant filed the following grounds of appeal:

- “1. That the Learned Resident Magistrate fell into error in that she failed to properly analyse the evidence by misinterpreting and misdirecting herself on some critical aspects of it.
2. That the verdict is against the weight of the evidence in that the Appellant properly accounted for the source of the money and its intended purpose.
3. Those supplementary grounds will be filed when the notes of evidence and reasons are available.”

[60] Leave was sought and granted at the hearing of the appeal for the following supplementary grounds to be heard. Counsel Mr Golding grouped the grounds of appeal in the following manner and argued them accordingly. For convenience and ease of reference, I have dealt similarly with them.

- “1. The learned Resident Magistrate fell into error when she held that the monies found in possession of the Appellant are tainted monies and therefore recoverable property;
2. The learned Resident Magistrate erred in finding that the cash seized from the Appellant was recoverable property as there was no evidence presented to the court of any unlawful conduct associated with the monies so as to constitute recoverable property;
3. The learned Resident Magistrate fell into error in that she failed to properly analyze the evidence by misinterpreting same and misdirecting herself on some critical aspects thereof, in so far as she:

- a. attached undue weight to the fact that the Appellant did not declare on the Customs Declaration form or make a verbal declaration that she was carrying funds in excess of Ten Thousand United States Dollars;
 - b. failed to attach any or any sufficient weight to the explanation and/or reason advanced by the Appellant for failing to make such declaration notwithstanding the fact that said explanation was corroborated by the evidence of Inspector Lambert;
 - c. rejected the reasons advanced by the Appellant without giving any good reason for rejecting same, specifically, in so far as she found that the explanation given by the Appellant appeared to have been an afterthought deliberately designed to mislead the Court.
4. The learned Resident Magistrate erred in that she placed undue weight on the failure of the Appellant's paramour to give supporting evidence by way of affidavit or otherwise;
 5. The learned Resident Magistrate failed to properly analyse the evidence in so far as she found that based on the evidence of the Appellant in respect of her income and expenditure there was a shortfall of about US\$300.00 to US\$500.00 and that it was quite clear that this shortfall was not being met by any legitimate source of funding;
 6. The learned Resident Magistrate fell into error when she found that Mr. Leighton Thomas' evidence was of no assistance to the Appellant or to the Court;
 7. The learned Resident Magistrate failed to properly analyse the evidence when she found that the evidence of the Appellant as to her involvement in a "partner" was a mere afterthought fabricated after the cash was seized;

8. The finding by the learned Resident Magistrate that the evidence of the Appellant in respect of the throwing of the "partner" was a recitation, a part of which she omitted and which she claimed went to the heart of her defence, was not justified by the evidence and could not be inferred therefrom;
9. The finding by the learned Resident Magistrate that the proceeds of a "partner" constitute an income is erroneous as such proceeds are in fact savings.
10. The learned Resident Magistrate fell into error when she admitted into evidence statements allegedly made by the Appellant in the absence of a caution being administered by any of the witnesses for the Respondent;
 - b. Alternatively, the learned Resident Magistrate attached undue weight to the said statements allegedly made by the Appellant without being cautioned.
11. The learned Resident Magistrate fell into error by failing to apply her mind to the possibility that any lies told by the Appellant might have been for reasons other than concealing any unlawful conduct.
12. The Learned Magistrate improperly had before her prior to her deliberation material to which she was not entitled ie. Witness statements which material may have coloured her decision.
13. In the totality, the evidence before the court did not on a balance of probability [sic] justify the making of a forfeiture order, the Appellant, therefore, seeks an Order from this Honourable Court quashing the Magistrate's Order for the money to be forfeited and making an Order for the said money and all accrued interest to be released to the Appellant."

[61] Grounds 1, 2 and 3 were argued together.

1. **The learned Resident Magistrate fell into error when she held that the monies found in possession of the appellant are tainted monies and therefore recoverable property;**
2. **The learned Resident Magistrate erred in finding that the cash seized from the Appellant was recoverable property as there was no evidence presented to the court of any unlawful conduct associated with the monies so as to constitute recoverable property;**
3. **The learned Resident Magistrate fell into error in that she failed to properly analyze the evidence by misinterpreting same and misdirecting herself on some critical aspects thereof, in so far as she:**
 - a. **attached undue weight to the fact that the Appellant did not declare on the Customs Declaration form or make a verbal declaration that she was carrying funds in excess of US\$10,000.00.**
 - b. **failed to attach any or any sufficient weight to the explanation and/or reason advanced by the appellant for failing to make such declaration notwithstanding the fact that said explanation was corroborated by the evidence of Inspector Lambert;**
 - c. **rejected the reasons advanced by the appellant without giving any good reason for rejecting same, specifically, in so far as she found that the explanation given by the appellant appeared to have been deliberately designed to misled the court.**

[62] Mr Golding argued that in order to satisfy the requirements of the POCA, there must be some evidence of unlawful conduct. He relied on **The Queen on the Application of the Director of Assets Recovery Agency and Others v Jeffrey David Green and Others** [2005] EWHC 3168 (Admin) and **Sandra Marie Cavallier**

v Commissioner of Customs [2010] JMCA Civ 26. According to Mr Golding section 79 of POCA is differently worded from the English counterpart as it is not necessary to show particulars. He argued that there must be some information, however slight to enable the court to decide whether conduct relied on amounts to a crime although there is no need to particularize. He also relied on **The Assets Recovery Agency v Adrian Fogo et al** [2014] JMCA Civ 10.

[63] He argued that the Crown proceeded under Part 1V of POCA, section 55(1)(b) (“unlawful conduct”). Unlawful conduct must be unlawful in both jurisdictions, he submitted. There is no evidence as to where the unlawful conduct occurred. The appellant’s travel pattern did not fit the profile of a drug trafficker. There was no allegation that she was involved in any criminal activity. Mr Golding further complained that the learned magistrate misinterpreted the evidence.

[64] The fact that money was concealed is not conclusive evidence that it was obtained unlawfully. The appellant has provided rebuttal evidence; the collapse of the Stanford and British and American banks and her fear of being robbed. He submitted that the magistrate’s conclusion that her evidence was blatantly untruthful is not supported by the evidence.

Submissions by Mrs Harriott-Rogers

[65] Mrs Suesette Harriott-Rogers, on behalf of the respondent, submitted that the statutory requirements to ground an application for forfeiture were complied with. There was sufficient basis to ground the officer’s suspicion that the money was

recoverable property and or intended for use in unlawful conduct. The decision to seize the sum was premised on the appellant's failure to declare either verbally or in writing that she was carrying cash in excess of US\$10,000.00, her repeated denial of any knowledge or ownership of the cash which was discovered in her checked luggage, and the method of concealment.

[66] It was her submission that the provisions of the POCA in respect of seizure were complied with. Customs first applied for and obtained from a Justice of the Peace, an order for the continued detention of seized cash and a notice to persons affected by an order for continued detention of seized cash. Ms Harris investigated the matter at Scotia bank, the Tax Administration of Jamaica and the titles office. Ms Harris' evidence is that the appellant produced documents of businesses in Antigua as to the source of funds but had not established that those businesses were a going concern.

[67] She relied on the cases **Green** and **Cavallier** as providing insight into what constitutes unlawful conduct. She submitted that the conduct of the appellant offered a sufficient premise upon which the learned Resident Magistrate could conclude that the cash was recoverable property. The facts of the instant case are similar to those in the **Cavallier** case in which the court held that the cash had been obtained by unlawful conduct.

[68] In relying on the court's decision in **Cavallier**, counsel submitted that it was unnecessary to show particulars of the conduct. Section 56(1)(b) of Part 1V of the POCA, she said, makes it clear that the proceedings for forfeiture of cash are civil

proceedings. She said section 56(2) of the POCA establishes that the power is exercisable whether or not any criminal proceedings have been initiated concerning the seizure of the cash.

[69] It was her submission that the Resident Magistrate was entitled to find that the cash was recoverable property because of the glaring lies told by the appellant and the circumstances in relation to the discovery of the cash. The appellant's repeated denial of any knowledge of the cash and lack of explanation at the airport, in the context of the issue, may well establish that the source of the money was criminal activity. The appellant, she said, had no income to warrant her life style.

[70] She distinguished cash recovered in civil proceedings from criminal proceedings. She argued that the appellant had no need to travel with such a large sum of cash because she had bank accounts and had agreed that wiring was a safe method of transferring money. She pointed to the inconsistency in the appellant's evidence in respect of the point at which she informed the officer that the cash was hers; at one point she said it was in the baggage hall and at another, in the room. She contended that the appellant's evidence regarding source of the funds was also inconsistent.

[71] Mrs Harriott-Rogers postulated that, by virtue of section 82 of the POCA, a person who claims cash, may apply for its release. She highlighted the inconsistencies in the appellant's evidence regarding how much was in the bag and who packed the bag. In respect of the purchase of the house, she highlighted the discrepancy between the appellant's and Mr Thomas' evidence as to how she obtained the form. She

submitted that the appellant indicated on the form that she was the sole purchaser. At the highest, she submitted, the appellant only expressed interest in purchasing as there was no sale agreement.

[72] Mrs Harriott-Rogers submitted that there was an abundance of evidence for the learned Resident Magistrate to reject her evidence and find on a balance of probabilities that the source of funds was from criminal activity. She contended that the learned Resident Magistrate was entitled to find that her failure to declare the cash was indicative of a deliberate concealment of cash from customs.

[73] The learned Resident Magistrate, she said, considered the explanation proffered by the appellant and having assessed the evidence found her explanation was untruthful. Further, there was no corroborative evidence for the appellant's explanation regarding the reason for her failure to declare the cash. She said Inspector Lambert only indicated an awareness of persons being robbed en route from the airport.

The relevant law

[74] Section 55(1) of the POCA defines "property obtained through unlawful conduct", thus:

"property obtained through unlawful conduct' is property obtained directly or indirectly by or in return for on in connection with unlawful conduct, and for the purpose of deciding whether any person obtains property through unlawful conduct –

- (a) it is immaterial whether or not any money, goods or services were provided in order to put

the person in a position to carry out the conduct;

- (b) it is not necessary to show the particulars of the conduct:

'recoverable property' shall be construed in accordance with sections 84 to 89;

...

'unlawful conduct' means –

- (a) conduct that occurs in, and is unlawful under the criminal law of, Jamaica; or
- (b) conduct that –
 - (i) occurs in a country outside of Jamaica and is unlawful under the criminal law of that country; and
 - (ii) if it occurred in Jamaica would be unlawful under the criminal law of Jamaica.”

[75] The appellant's application was made pursuant to section 78 of the POCA, which provides as follows:

“78. – (1) This section applies while any cash is detained under section 76.

(2) A Resident Magistrate's Court may direct the release of the whole or any part of the cash if the court is satisfied, on the application by the person from whom the cash is seized, that the conditions in section 76 for the detention of the cash are no longer met in relation to the cash to be released.

(3) An authorized officer may, with the approval of the Resident Magistrate's Court or Justice (as the case

may be) under whose order cash is being detained, release the whole or any part of it if satisfied that the detention of the cash to be released is no longer justified.”

[76] The respondent’s application for its seizure was made pursuant to section 79 which reads:

79 – (1) 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.

(2) On an application under subsection (1), the Resident Magistrate’s Court may order the forfeiture of the cash or any part of it if satisfied that the cash or part, as the case may be –

- (a) is recoverable property; or
- (b) is intended by any person for use in unlawful conduct.”

Discussion

[77] The determining issue is whether the sum of US\$71,100.00 which was seized from the appellant is recoverable property; that is, whether the cash was obtained through unlawful conduct whether in Jamaica, Antigua or elsewhere. By virtue of section 55(1), the respondent is under no obligation to particularize the unlawful conduct. That notwithstanding, there must be some evidence that the money was obtained unlawfully. Unlawful conduct may be inferred in the absence of reasonable

explanation or lies. The two important issues are the veracity of the source of the appellant's income and the purpose for the cash.

[78] In the case of **Green** (which was cited with approval by this court in **Cavallier**), it should be noted that the relevant English provisions are similar to ours. Sullivan J made the following observation at paragraph 19 of the decision:

"...it is plain that Parliament envisaged that in civil recovery proceedings the Director would identify the matters alleged to constitute unlawful conduct in sufficient detail to enable the court, not to decide whether a particular crime had been committed by a particular individual, but to decide whether the conduct so described was unlawful under the criminal law of the United Kingdom (or the Criminal Law of the United Kingdom and the foreign country in question."

[79] Moses J in **Bujar Muneka v Commissioner of Customs & Excise** [2005] EWHC 495, said:

"...[In] the context of a case where it is not necessary to identify any criminal activity such as drug trafficking; all that has to be identified is that the source was criminal activity or the intended destination was use for criminal activity. A lie in that context may well entitle the fact-finding body to infer what the source or intention for which the cash was to be used was in reality on the balance of probabilities."

[80] Indeed, Sullivan J at paragraph 29 of **Green**, quoting Moses J in **Muneka**, said:

"In my judgment, in that context the fact that there was no explanation for the source of that money, no reasonable explanation as to why he was taking cash to Albania, the fact that there were

discrepancies in his explanations as to the source of the money and as to its destination, taken together, did establish, both source and intention. At least the district judge was entitled to conclude on the balance of probabilities

...but insofar as it is suggested that it is incumbent upon the prosecution to identify the criminal activity, the source of the money or the criminal offence for which it is intended to use the money that, in my judgment, is incorrect. All that has to be shown is that the source [sic] of the money, was a criminal offence in the United Kingdom and that it was intended for a criminal use either in the United Kingdom or elsewhere. In the instant case there was ample evidence of both and no other reasonable explanation."

The evidence of unlawful conduct

[81] The manner in which the cash was concealed and the appellant's repeated denial of any knowledge of its presence, was *prima facie* indicative that the cash was obtained through unlawful conduct. The balance of probabilities is therefore tipped against the appellant. The evidential burden rested with the appellant to provide evidence to rebut that presumption. Careful scrutiny of the evidence and the learned magistrate's treatment of it which resulted in her rejection of the appellant's explanation for concealing and failing to declare as untrue; and her finding that her evidence as to the source and purpose of the seized cash was "blatantly untrue" and of recent concoction, is necessary.

The learned Resident Magistrate's rejection of the necessity to travel with such a large sum

[82] Mrs Harriott-Rogers placed heavy reliance on the following statement of Sullivan J in **Green's** case:

“Just as the law-abiding citizen normally has no need to keep large amounts of bank notes in his possession, so the criminal will find property in that particular form convenient as an untraceable means of funding crime ...By contrast, conduct consisting of the mere fact of being in possession of other types of property, expensive jewellery, houses, cars, and so forth, or the mere fact of having a lavish lifestyle or of living beyond one’s apparent means, do not, without anything more, provide reasonable grounds for suspicion demanding an explanation.” (paragraph 33)

[83] Mr Golding sought however to distinguish **Green’s** case. He contended that Jamaica, unlike the United Kingdom, is not a cashless society. He pointed out that most businesses do not accept cheques from persons they do not know. The possession of a large amount of cash is therefore not proof that it was obtained by unlawful conduct.

[84] He directed the court’s attention to the statement of Brooks JA (Ag) (as he then was) in **Cavallier** that, although Ms Cavallier had falsely declared on the Customs and Immigration C5 form, that alone was not sufficient to deem the cash “recoverable property” as she was not charged under the Customs Act, but rather, under the POCA:

“It should be pointed out, that before the learned Resident Magistrate, the Customs Department sought to rely heavily on the fact that Ms Cavallier had made a false declaration on the Customs and Immigration C5 card to the effect that she was not carrying more than US\$10,000.00. If the intent of the reference was to show that since the false declaration was a breach of the Customs Act, the cash was therefore recoverable property that was a misinterpretation of the provisions of the Act. Clearly, the false declaration did not generate or ‘earn’ the money. If

the intent was to show that the money could have been seized, pursuant to the provisions of the Customs Act that entitlement was of little moment. This is because the application was being made, not under the Customs Act, but under the POCA.” (paragraph [28])

Analysis

[85] The appellant’s evidence was that she operated a business. The credit union account was her business account. From her earning from the salon she lodged EC\$2,000.00 to EC\$4,000.00 per week to that account. It was also her evidence that her earnings from the sale of wigs and hand bags were deposited in the bank. Her evidence is that she had over EC\$15,000.00 in her credit union account.

[86] In respect of the money she derived from her participation in partners/box, the appellant’s evidence was that she saved more at home than at the bank because as a non-national, to deposit over EC\$10,000.00 she would have been required to have the participants sign and that would have been too much trouble. She also proffered as a reason, the fact that she worked long hours and sometimes she could not take a break to make lodgments at the bank. Although Dawn and her nephew were residents, she did not ask Dawn because she too was busy and her nephew also worked. Another reason was the monies (her sister’s and her US\$8,000.00) which were allegedly lost in the Stanford Bank and British and American banks respectively.

[87] The learned magistrate opined that the appellant continued to have faith in the banking system because she maintained bank accounts. This led her to conclude that

the reason the appellant transported such a large amount of cash in the manner she did, thereby exposing herself to risk, was because it was unlawfully obtained.

[88] The learned magistrate's finding that the appellant had access to the banking system and Western Union cannot be faulted. As she noted, the appellant's evidence was that she continued to make lodgments to the Credit Union and Scotia bank. The appellant has in fact admitted that she has wired money from Antigua to Jamaica, albeit not regularly. It was also her evidence that she considered wiring a quick and safe method.

[89] In rejecting her explanation for not banking the money from the box as it would have been too much trouble, the learned Resident Magistrate opined thus:

"This explanation when weighed against the trouble of storing this amount of cash in her house for protracted period of time and then concealing it in checked luggage for travel overseas amounted to far more trouble than had she used the banking system. The reason given by her for avoiding the banking system was rejected by the court."

[90] The learned Resident Magistrate rejected the appellant's explanation that she, her sister and her nephew were too busy to go to the bank. She disbelieved her evidence that she and her sister had lost money to the banking system for the following reasons:

"...she continued to place her trust in the banking system for other monies from her business inclusive of Scotia Bank and the Credit Union, she chose to use the banking system for other money transactions except for the amount of US\$71,100.00. The

inference to be drawn from this is that this large amount of money which was being concealed by her was unlawfully obtained and that she would have had great difficulty in accounting to the bank for its source."

[91] In my view, it was entirely within the learned Resident Magistrate's purview to draw inferences and accept the evidence which she found credible. It was the appellant's evidence that the money was kept at their home because money in excess of "a certain amount" when taken to the bank by non-Antiguans resulted in questioning as to the source. The "certain amount" was EC\$10,000.00. Without more, that answer, could have led the magistrate to draw the inference that the source of the money was unlawful, hence their reluctance to disclose the source to the bank.

[92] The appellant's continued use of her accounts at Scotia bank is not necessarily conclusive evidence that she has faith in the banking system as opined by the learned Resident Magistrate. Bank accounts are necessary for a number of reasons, especially to the operators of businesses. The inference could also be drawn that although she had lost faith in the banking system, a bank account was necessary for her business. She is not the only worker in her business. She named four employees who worked with her between five and 12 years. Her evidence is that she had been operating her business for 13 years.

[93] There is no evidence that she opened the accounts after they (allegedly) lost monies in the failed Stanford and British American banks. However, the fact that according to her, weekly she lodged her income from the salon to the bank, discounts

her excuse of being busy, and begs the following question: could she not do all of her banking on the occasions she made those lodgments?

[94] Her evidence is that she has about EC\$2,000.00 in the Scotia bank account. If she was able to satisfy the court as to the source of her earnings, and that the sum of EC\$2,000.00 represented a small amount of her income, the inference could be drawn that she indeed had little faith in the banking system and that she saved at her house. The crux of the matter is her ability to satisfy the court that cash was legitimately obtained.

Ground 4

The learned Resident Magistrate erred in that she placed weight on the failure of the appellant's paramour to give supporting evidence by way of affidavit or otherwise.

[95] Mrs Harriott-Rogers submitted that the source of income was a material issue. The Resident Magistrate was therefore entitled to treat with the absence of corroboration of the appellant's assertion that her boyfriend was a source of income. There was no evidence before the court of material particulars in relation to the boyfriend inclusive of his name and income. He gave no evidence affidavit or otherwise and there was no explanation for his absence.

Analysis/Discussion

[96] In respect of her boyfriend's contributions, if the appellant is to be believed, it must be noted that he resided in Antigua. He was outside of the reach of the court. He

could not be compelled by either the court or the appellant to attend. In the absence, however, of cogent evidence as to his contributions, it was entirely within the purview of the learned Resident Magistrate to have rejected her evidence in that regard.

Ground 5

The learned Resident Magistrate failed to properly analyse the evidence in so far as she found that based on the evidence of the appellant in respect of her income and expenditure there was a shortfall of about US\$300.00 to US\$500.00 and that it was quite clear that this shortfall was not being met by any legitimate source of funding.

[97] Mr Golding contended that the method by which the learned magistrate arrived at her finding is based on an undisclosed calculation. It was however Ms Harriott-Rogers' submission that in the face of the absence of any documentation to establish the source of the seized cash it was open to the court to find that any shortfall was not being met by any legitimate source of funding.

Analysis of income and expenditure

[98] Although the learned Resident Magistrate's calculation was indeed based on an "undisclosed calculation", on the appellant's evidence however, there would indeed have been a shortfall of approximately US\$220.00. For convenience and ease of reference, her income and expenditure are set out hereunder in tabular form.

Monthly income and expenditure

LAURA BARNES v COMMISSIONER OF CUSTOMS			
Monthly income and expense			
Income			
Salon Sales	\$ 2,500.00		p112 & p113 - Salon earnings EC\$6500 - \$7,000pm. US\$2,500
Handbags and wigs	\$ 750.00		p112 - earns US\$500 pm; p117 - Witness states earns average US\$500 - \$1000 per month. Average of both used.
Box	\$ 600.00		p116 - Witness states draw is either US\$2,000, \$4,000 or \$10,000. However, if the draw is once during the life time of the box and she pays US\$150 per week (p112), then the maximum she can get is \$150 per week * 4 weeks per month * 12 months = \$7,200. Hence the amount per month is \$7200/12=\$600
		\$ 3,850.00	
Expenses			
Rent (Home)	\$ 280.00		p113 - Rent EC\$750 - Approx US\$280 included as part of her expenses.
Rent (Shop)	\$ 590.00		p117 - EC\$1600 per month
Salaries	\$ 1,600.00		p117 - 4 employees * US\$100 pw *4 weeks = \$1,600
Products	\$ 350.00		p117 - Average of US \$200 to \$500 per month
Handbags and wigs	\$ 500.00		p117 - Witness states she spends US2000 or \$1000 depending on the time of year. No evidence as to frequency of spend. Assumption made that average of \$1500 (which is average of \$2000 and \$1000) is spent based on the holiday and busy period in her evidence and a monthly figure derived. Therefore, US\$1500*4 quarters / 12 months = \$500
Food	\$ 150.00		p117
Box	\$ 600.00		p114 - Box US\$150 per week
		\$ 4,070.00	
		\$ (220.00)	
Surplus/(Deficit)			
*Exchange rate used EC\$2.70 : US\$1			

Her Income

Salon sales

[99] The appellant's evidence was that she earned between EC\$6,500.00 and EC\$7,000.00 per month from her salon. Her uncontroverted evidence was that the exchange rate was EC\$2.70 to US\$1.00. This equated to US\$2,500.00 per month.

Handbags and Wigs

[100] In respect of the income generated from the sale of the handbags and wigs, the appellant's evidence was that her earnings fluctuated between US\$500.00 and US\$1,000.00 per month. Calculated, on an average basis, her earnings would amount to US\$750.00 as reflected in the analysis above.

Box

[101] The "box" is similar in nature to the partner system in Jamaica. The website Real Jamaica Vacations (<http://www.real-jamaica-vacations.com/jamaican-customs.html>) explains the operations of a partner.

"Jamaican Customs - Pardner

One of our most widespread customs is '**Pardner**' (partner), an established method of saving outside the formal banking system. It works like this:

A group of individuals agree that each will save a set amount (called a hand) at regular intervals, usually weekly or monthly. This money is collected by one member of the group who has been designated as banker. So, for example, if 8 pardners throw a hand of \$1000 weekly, over the next 8 weeks the banker will pay \$8000 (the draw) to one pardner each week until every pardner has gotten a draw."

Indeed it was the appellant's evidence that:

"The money from the box I get is what I put in. It does not generate." (page 116 of the record of proceedings)

[102] Her evidence was that her "draw" could range from US\$2,000.00, US\$4,000.00 to US\$10,000.00 She said:

"I throw per week. I get a draw for a period of 6 months or it might last a year or over a year depending on how many people. I get a draw, it is one time during the lifetime of the box...I have been in the box for thirteen (13) years." (page 116 of the record of proceedings)

[103] She testified that she paid US\$150.00 per week. However, the period could vary from six months, 12 months or longer. It must be borne in mind that the appellant would probably have received a draw in its entirety. For the purpose of this analysis, a monthly figure was derived as follows:

*Amount paid per week US\$150.00 X # of weeks in one month (4) =
US\$600.00*

[104] Annually, the maximum the appellant could have received would have been \$7,200.00 and over six months, \$3,600.00. However, the monthly average would be the same US\$600.00 ($\$7,200/12 = \600.00 and $\$3,600.00/6 = \600.00). Irrespective of the length of the period of the box and the number of participants, the appellant could not get more than the amount paid into the box. For the purpose of this illustration, the figures were generated on a monthly basis and the monthly amount of US\$600.00 was used.

Her expenditure

Rent for her home

[105] The appellant testified that her boyfriend paid her monthly rent for the premises she resided. Her boyfriend however gave no evidence. This amount was therefore included in the computation as a part of her expenses.

Rent for her salon

[106] Her evidence was that the rental per month for the shop was EC\$1,600.00 per month which was inclusive of utilities. This equated to approximately US\$593.00 per month. Rounded to the nearest tenth for presentation purposes that figure would be US\$590.00.

Salary

[107] The appellant testified that she employed four persons at the salon and paid them US\$100.00 per week (page 117). Therefore, over a one month period, salary was calculated to be US\$1,600.00 as follows:

*Salary per week US\$100.00 X # of employees 4 X # of weeks per
month 4 = US\$1,600.00*

Products

[108] It is the appellant's evidence that the cost of products used in the salon varied between US\$200.00 to US\$500.00 per month. For the purpose of the illustration, the average of both was used in the computation.

$$(US\$200.00 + US\$500.00) / 2 = US\$350.00$$

Handbags and wigs

[109] The appellant's evidence was that she spent US\$2,000.00 or US\$1,000.00 depending on the time of year to purchase supplies. There was no evidence as to the frequency of this expenditure and this therefore made it difficult to derive a figure for this expense. It was also her evidence that her sister in the United States sometimes provided her with these items. In the absence of this information, assuming that the amount of US\$1,500.00 (which is the average of US\$2,000.00 and US\$1,000.00) was spent at the holiday intervals stated in her evidence, a monthly figure was calculated as follows:

$$(US\$1,500.00 * 4 \text{ holidays} / 12 \text{ months} = US\$500.00)$$

Food

[110] Her evidence was that her food bill was US\$150.00 per month.

Box

[111] An expense for the box was included as the amount saved is actually a "withdrawal" to set aside as savings in the box. See narrative above under the Box heading under revenue.

Analysis

[112] No account was taken of the contribution she alleged her boyfriend made to her rent. The above calculation generated a deficit/shortfall of US\$220.00. Assuming

her boyfriend paid her rent, the surplus would have been approximately US\$60.00. Even if the entire sum of US\$60.00 was saved, it would have been impossible to accumulate her portion of US\$30,000.00 in the three years she said it took her to accumulate the money. Importantly also, she said in 2008 she had lost US\$8,000.00 in the failed Stanford bank.

Ground 6

The learned Resident Magistrate fell into error when she found that Mr Leighton Thomas' evidence was of no assistance to the appellant or to the court.

[113] Mrs Harriott-Rogers submitted that the learned magistrate adequately dealt with the evidence of the witness for the appellant, Mr Leighton Thomas. The source of the cash seized was a critical issue and the court rightly found that his evidence at best, only amounted to a mere expression of interest in a real estate transaction.

Discussion/Analysis

[114] The learned magistrate correctly found that Mr Thomas was only able to speak to the utilization of the cash in relation to a real estate transaction but not whether it was unlawfully obtained. Her finding that his evidence was of no assistance to the appellant or the court was again wholly within her purview. The purport of Mr Thomas' evidence was to provide supporting evidence as to the purpose of the cash. That is, whether the appellant's evidence that the money was to purchase a house was a recent fabrication.

[115] It was Mr Thomas' evidence that the appellant was accompanied by another female. They toured the model unit and he spoke with both ladies about the particulars of sale. The appellant expressed an interest in purchasing a unit. It was also his evidence that she told him that payment would have been in cash and that she had most of the funds and would pay over three months.

[116] It was open to the learned magistrate to have considered him as a witness of convenience and thereby reject his evidence as falsehood. She evidently accepted him as a witness of truth. Mr Thomas' testimony materially supported the appellant's evidence that on the occasion she visited Jamaica in March 2011, she viewed the development and expressed her interest to him about purchasing a unit. His evidence was supportive of the appellant's assertion that the purpose of the cash was to purchase a house.

[117] The learned magistrate expressed the following view:

"I rejected this document as well as I questioned it for reasons that there was not a transaction date on the document there was inconsistency in regards to the tenancy based on what she said because she stated that the house was for herself and her sister, but sole proprietorship was ticked on that form. I also made contact with Mr. Leighton Thomas the sales person that claimed to have signed that sale information form."

[118] Although it was Mr Thomas' evidence that he did not hand her the form, the form bore his signature which he has not disavowed. Mr Golding submitted that the fact that on the form she ticked the slot indicating that the property was being

purchased by one person is not a clear and conclusive indication that she would have been the sole proprietor. The form was merely a document on which interested persons indicated their interest. It was not an agreement for sale.

[119] This court is of the view that the fact that sole proprietor was ticked is not by itself conclusive evidence that the property was not being purchased jointly. The inference drawn by the learned magistrate however is not against the weight of the evidence which she accepted, to wit, her rejection of the appellant's evidence that US\$40,000.00 belonged to her sister. In analyzing the totality of her evidence, it was entirely her prerogative to find that the appellant ticked the box which referred to sole proprietor because indeed she intended to be the sole purchaser.

[120] Grounds 7, 8 and 9 were argued together.

Grounds 7, 8 and 9

- 7. The learned Resident Magistrate failed to properly analyse the evidence when she found that the evidence of the appellant as to her involvement in a "partner" was a mere afterthought fabricated after the cash was seized.**
- 8. The finding by the learned Resident Magistrate that the evidence of the appellant in respect of the throwing of the "partner" was a recitation, a part of which she omitted and which she claimed went to the heart of her defence, was not justified by the evidence and could not be inferred therefrom.**
- 9. The finding by the learned Resident Magistrate that the proceeds of a "partner" constitute an income is erroneous as such proceeds are in fact savings.**

[121] Mr Golding submitted that the learned magistrate's finding regarding the appellant's involvement in "partners" was not supported by the evidence. He submitted that the persons could not depone to affidavits because the trial was not on affidavits, viva voce evidence was required. Those persons would have had to travel from Antigua.

[122] Mrs Harriott-Rogers however submitted that the learned magistrate properly analysed and treated with the evidence of the appellant that she was involved in a partner. There was no finding of fact by the learned magistrate that the proceeds of a partner constituted an income. It was the appellant's assertion and the learned Resident Magistrate treated adequately with it.

Analysis

[123] Inspector Lambert, who was the supervisor of the "operation", testified that the appellant informed him about her involvement in partner/box. Although the issue of credibility is within the purview of the learned magistrate, she has not rejected the inspector's evidence that the appellant told him about her involvement in partners. Had she left the airport or waited until the trial, to make that assertion, the conclusion that it was an afterthought and recent concoction would have been reasonable.

[124] Mr Golding complained that affidavits and notarized letters from the persons involved in the partner/box were excluded. This matter was not heard on affidavit evidence. It was a trial in open court. His argument that similar letters were accepted into evidence in the case of **Cavallier** is without basis as Brooks JA (Ag), in examining the evidence regarding the discovery made, stated that there were no import entries for

any of the vehicles to which Mr David referred in his letter and remarked that the letter was perhaps “not strictly admissible evidence”. Furthermore, as Mrs Harriott-Rogers pointed out, in **Cavallier**, the documents were put forward to highlight the contradictions, and not for the truth.

[125] Mr Golding complained that the learned magistrate’s rejection of the appellant’s evidence that she was involved in partner/box as ‘untrue’ and ‘afterthought’ because immediately after testifying that she had no other source of income, she said she threw a box, was done without giving any consideration to the totality of the evidence.

[126] There is merit in this complaint. The rationale for rejecting the appellant’s evidence on that basis was in my view unwarranted. Partner/box is not income. It is savings. The fact that the appellant sought to categorize it as such is not sufficient to conclude, without more that she was not involved in partner/box. That fact notwithstanding, the import of that finding on the decision was immaterial in light of the fact that her “draws” do not affect her income.

[127] For convenience both grounds 10 and 10b will be considered together.

Ground 10

The learned Resident Magistrate fell into error when she admitted into evidence statements allegedly made by the appellant in the absence of a caution being administered by any of the witnesses for the respondent.

Ground 10b

Alternatively, the learned Resident Magistrate attached undue weight to the said statements allegedly made by the appellant without being cautioned.

[128] Counsel Mrs Harriott-Rogers argued that, in the circumstances, there was no need for a caution to be administered in respect of the seizure of cash which resulted in forfeiture. She relied on the English case **The Queen on the Application of Commissioners of Her Majesty's Revenue and Customs v Pisciotto** [2009] EWHC 1991. The appellant's denial of ownership provided no grounds for suspecting that the appellant had committed any offence.

[129] She submitted that there was no factual basis for the officers to caution the appellant given the posture she adopted. The questions which were put to the appellant were relevant to the institution of civil proceedings for the forfeiture of the seized cash. In the circumstances, there would be no need to administer a caution as there was no evidence that the appellant was considered a suspect and no criminal proceeding was contemplated to trigger the issuance of caution in accordance with the Judge's Rules.

Discussion

[130] In the case **Pisciotto**, the appellant was stopped at the airport and asked if he was carrying cash on him. He declared that he was carrying £2000.00 in £20.00 notes and €1000.00 which he told them was the proceeds of the sale of his motor car which he had sold for £2900.00 He was not cautioned.

[131] Checks were made which revealed that he had a criminal record for serious offences. The officer concluded that he was involved in drugs and money laundering. He was not informed that his statement would not be used in proceedings other than civil proceedings. There was the concern that his statement could be used in future criminal proceedings.

[132] It should be pointed out that the applicable law in that matter was the PACE Code for which there is no counterpart in Jamaica. Under the Judges' Rules however, officers are obliged to administer the relevant caution in circumstances where the prerequisites of a crime are made out. It was the view of the court that in civil investigations in which answers might lead to criminal prosecution, persons ought to be told at the outset (see **Pisciotta**).

[133] Although in the instant case, the detention and seizure of the cash was civil recovery pursuant to section 55 of the POCA, the appellant ought to have been informed that her answers would not be used in criminal proceedings. By virtue of the Act, the cash was recoverable because it was unlawfully obtained. Her answers and investigations could likely have resulted in criminal proceedings being instituted. Notwithstanding the failure to so inform her, grounds 10 and 10(b) must fail because these are civil proceedings and her statements have not been used in a criminal proceeding.

Ground 11

The learned Resident Magistrate fell into error by failing to apply her mind to the possibility that any lies told by the appellant might have been for reasons other than concealing any unlawful conduct.

[134] Mr Golding submitted that the appellant's denial of knowledge of the cash was out of fear because she was mistreated and threatened to be locked up; and questioned by several persons at the same time in breach of police procedure. The appellant complained that after the money was discovered, persons came down on her and she was terrified. He contended that the learned magistrate's rejection of the appellant's explanation for concealing and failing to declare the cash because of "gruesome stories" she had heard of persons being trailed from the airport and robbed, as "untruthful and an afterthought" was without due consideration of Inspector Lambert's evidence. Inspector Lambert's evidence was that he knew of passengers being trailed from the airport held up and robbed. He knew of the specific case of passengers who were trailed from the Norman Manley Airport to Frankfield in Clarendon and robbed.

[135] Mrs Harriott-Rogers submitted that the learned magistrate was correct to find on a balance of probabilities that the lies told by the appellant was evidence upon which she could conclude that the source of the cash seized was unlawful and therefore was recoverable property. The circumstances in which the cash was discovered together with her glaring lies in the context of the issue could establish that the source of the

money was criminal activity. She pointed to the appellant's repeated denial of knowledge of the cash upon its discovery.

[136] Mrs Harriott-Rogers enumerated the inconsistencies in the appellant's evidence as follows:

- (a) her statement that she admitted that the money was hers in the baggage hall and her statement that her admission was made in the room;
- (b) her statement that she was carrying US\$71,000.00 inside her bag and some in a false compartment. Her insistence that it was not US\$69,900.00;
- (c) her evidence that she placed the money in the bag was at variance with her affidavit evidence that it was her sister who did;
- (d) her evidence that she travelled with her sister to Jamaica on the occasion they attended their mother's funeral;
- (e) her evidence that they had brought a cheque and experienced difficulty negotiating it which resulted in them having to lodge the cheque when neither of them opened an account;
- (f) her evidence that she obtained the document from Mr Thomas is at variance with Mr Thomas'.

She relied heavily on the decision of this court in the matter of **Cavallier**.

Analysis

[137] It is useful to examine the facts of **Cavallier**. In **Cavallier**, the sum of US\$21,046.00 was seized from Ms Cavallier. A sum of US\$19,000.00 was discovered concealed in her suitcase in the pockets of pants which were therein packed and US\$2,046.00 in her handbag. Ms Cavallier, having entered the island with the cash, falsely declared both in writing on the C5 form and verbally to the customs officers that she was not carrying a sum more than US\$10,000.00.

[138] She later recanted and explained that her cousins had placed the US\$19,000.00 in the various pants pockets because they did not want her to travel with it in her handbag. Under caution she denied knowledge of all but US\$1,000.00 given to her by the said cousin which she concealed in the pocket of a jeans pant. According to her, he asked her to take clothing which someone would collect. She however, also made the following damning statement:

"I am not sure who would come for the money or the clothing as Dave told me that the clothing belonged to my cousins."

[139] She stated that she also had US\$1,900.00 which belonged to her. Her cousins and friends had pooled small sums and given her the US\$1,900.00. She attributed her failure to correctly declare on the C5 form to inadvertence. Her unsatisfactory and inconsistent response led the officer to the conclusion that the money was unlawfully obtained or was intended for some unlawful purpose and therefore recoverable property under the POCA.

[140] Two days after, Ms Cavallier provided a letter among other documents, purportedly from an auto sales company in Florida, which stated that they had given Ms Cavallier the sum of US\$21,046.00 to pay duty on three vehicles which they had in Jamaica and which had cleared customs. The documents which were attached to the letter were unrelated to the vehicles referred to in the letter. The letter was at variance with her statement. Brooks JA (Ag) noted the inconsistencies in her evidence:

“that some of the money belonged to her;
that she didn’t know that the money was in her luggage; and
that someone was to have collected the money from her.”

[141] Checks made at the Customs Department revealed that there was no record of any import entry for the vehicles which were referred to in the letter. This court dismissed Ms Cavallier’s appeal. Brooks JA (Ag), on behalf of the court, concluded that the manner in which the money was concealed and her “varying and untrue statements” together with Mr David’s entirely different version, were matters on which it could be found that the property was recoverable property.

[142] In the instant case, on the respondent’s evidence, the appellant was indeed bombarded with questions from different persons. Inspector Lambert admitted that the appellant was interviewed in breach of police procedure. There were at least four persons present in the room. Other persons were interviewing her alternatively and simultaneously. On the occasions he paused, Ms Gayle questioned her. Ms Gayle’s and Ms Smart’s evidence was replete with discrepancies and inconsistencies as to whether

they or other persons were present and questioned the appellant; and whether Inspector Lambert and Mr Griffith were present during the entire question and answer.

[143] Although it is palpable on the respondent's evidence that the manner of questioning could have driven terror in the appellant, on her evidence, she had denied the cash before she was subjected to that treatment. Ms Gayle's and Ms Smart's evidence regarding the body search was manifestly unreliable. It is however unnecessary to enumerate the various inconsistencies and discrepancies. While it is manifest that she was subjected to humiliation in the manner in which she was searched and the fact that the treatment which was meted out to her is to be deplored, in respect to the matter at hand, as aforesaid, she lied before she was so treated.

[144] At the point when the cash was first sighted, or at least when it was rescanned, she had the opportunity to accept ownership as there is no evidence at that point that she was threatened or ill-treated. She had the opportunity of explaining that the cash was not declared because of the fear of being robbed. It was entirely within the learned Resident Magistrate's discretion to reject her evidence that she lied out of fear of being locked up as well as the manner in which she was treated.

[145] Regarding the bag, it was her evidence that she packed the bag. She was confronted with her affidavit in which she said it was her sister Dawn who had placed the cash in the bag. She told the court that that was also the truth as she was present. On re-examination she said they both packed the bag. Dawn placed the money and she packed the clothes. In considering the totality of the evidence, the learned magistrate

cannot be faulted, in my view, for taking her lies as to who packed the bag into account.

Whether she travelled with her sister to Jamaica

[146] The appellant had deponed in her affidavit that:

“On March 13, 2011 my sister and I traveled to Jamaica to bury our late mother... We brought a cheque in the sum of US\$15,000.00. We had great difficulty in negotiating same and...we had to open an account and lodge the cheque to it in order to negotiate it.”

Under cross-examination, her evidence was that on the occasion of her mother’s death, she came to Jamaica on 13 March 2011 with her sister. She then retracted that statement and said she remembered that they did not travel on the same flight. Dawn arrived a couple days after. She said it was a ‘tough’ period she did not remember if they travelled together. She said she and her sister did not travel together.

[147] Issues of credibility were entirely for the learned magistrate. In assessing and weighing the evidence, the evidence must be considered in its totality. Mr Thomas’ evidence was that he saw the appellant and she was accompanied by another woman about that time. He said:

“It was April...could have been March.”

[148] There was no evidence from him that the woman was her sister. The burden of proof is, however, on “he who asserts”. Except for the appellant’s *ipse dixit*, there is not a scintilla of evidence that Dawn was that woman. In the absence of Dawn’s own

evidence, certainly the production of a plane ticket might have provided support that she was in fact in Jamaica at that time.

[149] It was the appellant's evidence that it was neither she nor Dawn who opened the account. She explained that their sister Nordia was entrusted with opening an account to deposit the cheque. It is curious that Nordia did not testify nor was the bank book or a bank statement provided. It is helpful to quote the appellant. In evidence in chief she said:

"It is true when I said we had great difficulty in negotiating the cheque and so we opened an account at Bank of Nova Scotia and lodged it. I did not open any account. There was no joint account that was opened. My sister, Nordia Barnes opened an account. My sister Dawn did not open an account."

[150] She told the court that the cheque was required to be lodged for 30 days. Consequently, they were unable to access the funds whilst they were in Jamaica. Money had to be wired to them to defray the funeral expenses and for payment towards the land that was being purchased by their mother. A sister who resided in the United States wired the money to them. Apart from having money wired from a sister abroad, they also borrowed money. The learned Resident Magistrate was the finder of fact. In the absence of cogent evidence, she cannot be faulted for rejecting the appellant's evidence in that regard.

[151] The appellant's prevarications as to where she admitted that the money was hers, were noted by the learned magistrate. Under cross-examination she said:

"I saw them take out money from the bag. They asked if the money belonged to me. I told them it did not. At the baggage hall area, at first I said no and then after, I admitted to Mr Lambert, Ms Gayle was there. Yes I told them in the baggage hall area. I told them the money belonged to me." (page 117 of the record of proceedings).

[152] Later in her evidence she told the court she admitted that the money was hers after she was informed by Inspector Lambert to return with a lawyer. It was entirely within the province of the learned magistrate, in weighing the evidence to consider her evidence in its totality and reject her explanation for lying.

Ground 12

The learned Resident Magistrate improperly had before her prior to her deliberation material to which she was not entitled ie witness statements which material may have coloured her decision.

[153] Mr Golding complained that the Rodney Griffith documents were filed and were in the learned magistrate's possession. He was not called as a witness therefore his statement ought not to have been available to or seen by the magistrate because the proceedings were conducted in open court. Mrs Harriott-Rogers however, argued that there was nothing to support the contention that the magistrate considered material to which she was not entitled in arriving at her decision.

Ruling

[154] Although I consider that it was inappropriate to have placed his statement before the learned magistrate, there was however, no indication from the learned magistrate that she adverted her mind to the statement in arriving at her decision. This ground is also without merit.

Ground 13

In the totality, the evidence before the court did not on a balance of probabilities justify the making of a forfeiture order, the appellant, therefore, seeks an order from this honourable court quashing the magistrate's order for the money to be forfeited and making an order for the said money and all accrued interest to be released to the appellant.

[155] There was ample evidence upon which the learned magistrate could find that the cash seized from the appellant was recoverable property on a balance of probability. The appellant has not justified her ability to accumulate either the sum of US\$30,000.00 or the US\$40,000.00 The Resident Magistrate's observation that her sister Dawn, whom she alleged to be a part owner of the greater portion of the money, did not provide supporting evidence, nor has she made an application pursuant to section 82(1), cannot be faulted. These are valid observations. Section 82(1) of the POCA provides:

"A person who claims that any cash detained under this Part belongs to him may apply to a Resident Magistrate's Court for the cash to be released to him."

[156] It would have been expected that Dawn would have claimed her portion of the cash which she would have laboured to acquire or at least provided supporting evidence. Her absence is indeed baffling. It was entirely within the learned magistrate's right, as arbiter of the facts, to reject her evidence that US\$40,000.00 belonged to Dawn.

[157] Having failed to satisfy the learned magistrate that Dawn was part owner, the learned magistrate's finding on a balance of probabilities that the entire sum of US\$71,000.00 was the appellant's cannot be faulted. The learned magistrate was therefore correct to find as she did that:

"There was no evidence to rebut the strong probability that a part or the whole of the cash seized was obtained through unlawful conduct."

[158] In light of the forgoing, there is no basis to disturb the learned Resident Magistrate's findings. I would therefore dismiss the appeal with costs to the respondent to be agreed or taxed.

PANTON P

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.