

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 24/2009

BEFORE: THE HON. MR JUSTICE PANTON, P.
 THE HON. MR JUSTICE MORRISON, J.A.
 THE HON. MR JUSTICE BROOKS, J.A. (Ag.)

IN THE MATTER of an application by
SALEEMA ANTHONY under Section 79 of the
Proceeds of Crime Act for the Forfeiture of
Seized Cash being seized from SANDRA
MARIE CAVALLIER

BETWEEN: SANDRA MARIE CAVALLIER APPELLANT

AND COMMISSIONER OF CUSTOMS RESPONDENT

Earle DeLisser and Ms Avrine Bernard instructed by Brady & Company for
the appellant

Ms Janet Scotland, Mrs Suzette Harriott-Rogers and Ms Luciana Ramsay for
the respondent

14 April and 4 June, 2010

BROOKS, J.A. (Ag.):

[1] This is an appeal against an order for the forfeiture of US\$21,046.00 in cash which was seized from Ms Sandra Marie Cavallier on 22 February 2009. The seizure was carried out by the Contraband Enforcement Team of the Jamaica Customs Department under the provisions of the Proceeds of Crime Act, 2007 (POCA). This occurred when Ms Cavallier arrived at

the Norman Manley International Airport, having just disembarked from a flight originating in Florida, in the United States of America. The bulk of the money was discovered concealed, in various amounts, in the pockets of several pairs of pants packed in Ms. Cavallier's suitcase.

[2] The Customs Department later applied, pursuant to the POCA, to the Resident Magistrate for the Corporate Area Civil Court for the forfeiture of the monies. On 22 May, 2009, the application was granted by the learned Resident Magistrate, despite resistance from Ms Cavallier's Attorneys-at-Law.

[3] The essence of the appeal before this court is that there was no evidence of any unlawful conduct associated with this money so as to constitute it as recoverable property. The appellant has submitted that the learned Resident Magistrate, therefore, erred in ordering the forfeiture.

Background Facts

[4] An outline of the circumstances of the discovery and what occurred thereafter will assist an appreciation of the submissions made on behalf of Ms Cavallier. Firstly, in answer to the question on the Customs Declaration Form as to whether she was carrying more than US\$10,000.00, Ms. Cavallier said "no". When the first wads of money were discovered she reiterated to the customs official that she was not carrying more than US\$10,000.00. Ms. Cavallier then explained that her cousins were the ones

who put the money there. This was because they did not want her to carry it in her handbag.

[5] After a complete search, US\$19,000.00 was found in the suitcase and US\$2,046.00 found in Ms Cavallier's handbag. When the whole sum was revealed, Ms Cavallier was interviewed. She was cautioned as to her rights and she elected to give a written statement. She stated:

“Within my luggage monies were hidden in several pockets of various jeans pants within my carry-on luggage. I was not aware that monies were concealed in the pockets of the jeans pants with the exception of US\$1,000.00 that I placed in one of the jeans pants. This US\$1,000.00 was given to me by my cousin Mr. Dave Henry. He is also the said cousin who asked me to carry some clothes to Jamaica for him. The clothing that I am now aware of as containing monies. My cousin...did not tell me that the clothing had in it monies....

I was told to keep the clothing and he would (sic) someone would come to my home to pick up the money. I am not sure who would come for the money or the clothing as Dave told me that the clothing belonged to my cousins....

I was travelling with a personal sum of US\$1,900 and some change that was in my purse. The US\$1,900 came about as a result of my cousins and friends who gave me small amounts of money to amount to US\$1,900....

I did not answer or tick the Customs and Immigration C5 card correctly as I just ticked the form without looking carefully. I am now aware that I was carrying in my possession a total US\$21,046...”

[6] The circumstances of the discovery of the money and the inconsistent attempt to explain her possession of it, did not satisfy the customs officer. The officer formed the view that this was money which was unlawfully obtained, or was intended for some unlawful purpose. In other words, it was suspected to be, to use the language of the POCA, "recoverable property". The customs officer seized the money, pursuant to section 75 of POCA, and gave Ms Cavallier a receipt for it. On 24 February 2009 the Customs Department sought and obtained from a Justice of the Peace, an extension, by three months, of the time allowed for retaining the money.

[7] On 24 February, 2009, Ms Cavallier produced documents, in an attempt to demonstrate that the money was not tainted. The documents included a notarized letter from D&H Professional Auto Sales, a company based in Orlando, Florida. The letter stated in part:

"This letter is to certify that we have 3 vehicles over in in (sic) Jamaica. We Sent (sic) the duty on those vehicles to Jamaica with Ms. Sandra Marie Cavalier (sic) **in the amount of \$21,046 Dollars** so that we can pay the duty on our vehicles. The money was then confiscated by customs in Jamaica. This transaction is legal. our (sic) 3 vehicles which have been cleared through Customs are:

We ask (sic) Ms. Cavalier to bring the money to Jamaica and **to take to the bank to exchange it for a check (sic) to pay the Duty** payable to the Collector of Customs...." (Emphasis supplied)

[8] It was signed by Robert J. David. The letter had attached to it, documents aimed at demonstrating that this was a legitimate company trading in motor cars. It is to be noted that none of those documents related to any of the vehicles said to be awaiting the funds, so as to have the customs duty paid. The sections of the letter which have been emphasised, demonstrate inconsistencies with Ms. Cavallier's statement, in which she asserted:

- a. that some of the money belonged to her,
- b. that she didn't know that the money was in her luggage, and,
- c. that someone was to have collected the money from her.

[9] The Customs department was, perhaps understandably, not satisfied. The officer, having conduct of the case, deposed that checks were made of the Customs Department's motor vehicle imports database and it was discovered that there were no import entries for any of the vehicles mentioned in Mr. David's letter. This perhaps was not strictly admissible evidence, but it does not appear that any objection was taken to it before the learned Resident Magistrate. On 22 May 2009 (within the three months authorised by section 76 of the POCA) the Customs Department applied to the Learned Resident Magistrate for the order of forfeiture.

The submissions

[10] Mr DeLisser, on behalf of Ms Cavallier, frontally faced the inconsistencies in Ms Cavallier's submissions to the Customs Department. He submitted that despite the fact that the circumstances were highly suspicious, it, nevertheless, is for the Customs Department to prove that the money is "recoverable property" under POCA. That, he submitted, it has failed to do. He pointed out that the provisions of the POCA made a clear link between "recoverable property" and unlawful conduct.

[11] Learned counsel relied heavily on the decision of ***The Queen on the Application of the Director of Assets Recovery Agency and others v Jeffrey David Green and others*** [2005] EWHC 3168 (Admin) (delivered 16 December 2006). In that case, the question posed for the court to determine was:

"Whether a claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct, this first question to include whether the claimant can sustain a case for civil recovery in circumstances where a respondent has no identifiable lawful income to warrant the lifestyle and purchases of that respondent." (Paragraph 1)

[12] Sullivan, J., after emphasising that the issue was one of statutory interpretation and after reviewing the provisions of that country's Proceeds of Crime Act (some of the provisions of which, are very similar to

the POCA), at paragraph 47 of the judgment, answered the question thus:

“1. In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.

2. A claim for civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle”

[13] The learned judge, at paragraph 50 of his judgment, agreed with the following interpretation of his decision:

“50. [Counsel for the Director] invited me to make it clear that my first answer to the preliminary question meant that the Director need neither allege nor prove the commission of any specific criminal offence, and that she must not merely set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct, but that she must prove that, on the balance of probabilities, the property was obtained by or in return for a particular kind or one of a number of kinds of unlawful conduct.”

[14] Mr DeLisser submitted that **Green** is authority for saying that although the party seeking forfeiture does, “not have to say what the specific unlawful conduct is, at least, in general terms [it] must set out where the unlawful conduct lies”. He submitted that the Customs

Department had not satisfied the provisions of the POCA and therefore the forfeiture should be set aside.

[15] Ms Scotland, for the Respondent, also relied on **Green**. Learned counsel sought, however, to highlight a distinction which Sullivan, J. referred to, in his assessment of the question which faced him. The learned judge, at paragraphs 31 to 36 of the judgment, made it clear that where cash was concerned, additional principles were applicable. He pointed out, at paragraph 33, that “conduct consisting in the mere fact of having a very large sum of cash in the form of banknotes in one’s possession in certain circumstances (eg at an airport) may well provide reasonable grounds for suspicion and demand an answer”. In support of drawing the distinction, for the purposes of forfeiture, between cash and other types of property, he also cited section 298 of that country’s Act. That section, the learned judge seems to conclude, is a part of a particular statutory regime to deal with the forfeiture of cash. Section 298 is in very similar terms to section 79 of the POCA.

[16] Ms Scotland also relied heavily on the case of **Muneka v Commissioners of Customs and Excise** [2005] EWHCA 495 (Admin) (delivered 2 February, 2005). In that case, Mr Muneka, intending to board a flight in London, *en route* to Hungary, was found, at the airport, in possession of £22,760 cash. He failed to satisfy the Customs officer as to

the legitimacy of the money and an application was eventually made for its forfeiture. Before the district judge Mr Muneka gave a different explanation from that which he gave to the customs officer. The district judge found that he had lied, not only as to the source of the money, but as to its intended use. She ordered the money forfeited.

[17] On appeal, Moses J stated that the issue was whether the Crown had proved that the cash was obtained through unlawful conduct or was intended for use in unlawful conduct. He decided that the fact that Mr Muneka lied, was evidence upon which the district judge was entitled to conclude that the suggestions made to Mr Muneka, that the source and/or intended use of the money was unlawful, were true on a balance of probabilities. Moses J cited, in support of his stance, a passage from the judgment of Sedley, J. in ***Nevin v Customs and Excise*** (unreported 3 November, 1995):

“While the prescribed civil standard of proof would not, of course, allow the justices to act without satisfactory evidence on the intended use of the money, they are not required to direct themselves, for example, in relation to lies told by a defendant, as a judge would direct a jury in a criminal trial. That is not to say that they should overlook the possibility that lies may have the purpose of concealing something other than the misconduct presently alleged. **But a suspect who gives an account of his reasons for carrying the money which the Justices reject as untruthful cannot complain if the Justices go on to infer from other relevant evidence that by itself might not have been enough to satisfy them that the**

true reason was for the use of drug trafficking.”
(Emphasis supplied)

It must be pointed out that **Nevin** was concerned with proceedings pre-dating the Proceeds of Crime Act in the United Kingdom.

[18] Both **Green** and **Nevin** were considered, with approval, by the Court of Appeal of England and Wales in the case of **The Director of the Assets Recovery Agency v Szepietowski & Ors** [2007] EWCA Civ 766 (delivered 24 July 2007). The court, in **Szepietowski**, was mainly concerned with the question of what constituted “an arguable case on an application [by the Assets Recovery Agency] for an interim receiving order under [the United Kingdom’s legislation]”. It did, however, consider the possible effect of untrue statements. Waller LJ, in the context of the question of untruthful statements made by the respondent to the application, said at paragraph 28 of the judgment:

“...finally, if there is some evidence that property was obtained through unlawful conduct, consideration needs to be given to any untruthful explanation or a lack of explanation where opportunity has been given to provide it. **An untruthful explanation or a failure to offer an explanation may add strength to the arguability of the case.**” (Emphasis supplied)

Analysis

[19] It is difficult not to apply, to the instant case, the reasoning of Moses J in **Muneka**. Ms Cavallier and Mr David have contradicted each other in so many areas that it is patent that one or both are not speaking the truth.

The following findings are, in our view, inescapable:

- a. there was an attempt to conceal the presence of the money from customs officials;
- b. Ms Cavallier did know that the money was in her luggage;
- c. Ms Cavallier was party to the attempt to conceal the money;
- d. there was no explanation for the use of cash to pay the import duty on motor vehicles as Mr David alleges;
- e. there were no vehicles on the wharf, which that money was intended to secure;
- f. there was no clear demarcation between the money in the suitcase and the money in Ms Cavallier's handbag as she claimed some of her money was in the suitcase while Mr David said the entire US\$21,046.00 (which sum included the money in her handbag) was given to Ms Cavallier to be used for paying the import duty for the vehicles.

[20] In the face of the manner that the money was concealed, the divergent explanations proffered by Ms Cavallier and Mr David and the lack of corroboration from the Customs Department's database, it is not surprising that the learned Resident Magistrate found that the money was

recoverable property. It is also not surprising that the learned Resident Magistrate did not draw any distinction between the money in the suitcase and the money which Ms Cavallier had in her handbag. The learned Resident Magistrate, as Sullivan J did in **Green**, pointed to the relevant statutory provision (Section 79(2)) which referred to the Resident Magistrate's court being entitled to find that cash was "recoverable property". She concluded her reasons for judgment thus:

"The Court was satisfied that the mandate of the POCA had been fulfilled and that the defendant had shown no evidence to rebut the strong probability which attached to either a part or the whole of the seized cash."

It is necessary to quote the relevant part of Section 79 of the POCA:

- "(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."

[21] By section 84 of the POCA, property obtained through unlawful conduct is "recoverable property".

[22] It is also necessary, out of an abundance of caution, to point out an important difference between sections 242 of the English Act and section 55 of the POCA, with respect to the matter of defining property obtained through unlawful conduct. Section 242(2) states in part:

“In deciding whether any property was obtained through unlawful conduct–

- (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,
- (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.”

[23] In assessing section 242(2) of the English legislation, Sullivan J in **Green**, considered a submission by counsel for the Assets Recovery Agency and dismissed it with these words:

“20. ...Mr Crow submits that paragraph (b) [of section 242(2)] sets out what the Director need not show. It does not say that she must show that conduct was of any particular kind.

21. I am unable to accept that submission, since **the draftsman could have achieved that objective by omitting all the words after “kind”** where it first appears in the paragraph, so that subsection (2)(b) simply read: “in deciding whether any property was obtained through unlawful conduct – (b) it is not necessary to show

that the conduct was of a particular kind.” I do not consider that the remaining words in paragraph (b) should be treated as though they were otiose.” (Emphasis supplied)

[24] Section 55(1) of the POCA, in defining “property obtained through unlawful conduct” states that it:

“is property obtained directly or indirectly by or in return for [or] 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;” (Emphasis supplied)

(“Unlawful conduct” is also defined in section 55(1), but it need not be quoted for the present purposes.)

[25] It may, therefore, be said that, by that portion of section 55(1), our legislature has achieved what Sullivan J thought was required to secure the position that the Director of the Assets Recovery Agency need not show conduct of a particular kind.

Conclusion

[26] It is our view that the learned Resident Magistrate was entitled to arrive at the conclusion that the money which Ms Cavallier had in her possession should be forfeited as being recoverable property. Two main bases existed for that finding:

- a. the circumstances in which the money was found (concealed in various articles of clothing in Ms Cavallier's suitcase, and,
- b. the varying and untrue statements made by Ms Cavallier and Mr David in attempting to explain the presence of the money in those circumstances.

[27] The instant case is on all fours with the case of **Muneka**, mentioned above and in supporting the finding of the learned Resident Magistrate, we agree with the reasoning of Moses J.

[28] 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.

[29] The appeal is therefore dismissed and the judgment of the learned Resident Magistrate affirmed.