

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 1/2011

**BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA**

**BETWEEN HERVEY ANDER PHILLIPS WOOD 1ST APPELLANT
AND SHOWN HERVIE PHILLIPS THOMPSON 2ND APPELLANT
AND THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT**

Wentworth Charles instructed by Archer Cummings and Co for the appellants

Miss Joan Barnett for the Crown

14, 15 December 2011 and 9 March 2012

HARRIS JA

[1] This appeal comes to us by way of a reference from the Governor-General by a petition under section 29 of the Judicature (Appellate Jurisdiction) Act. The appeal originates from an order of the learned Resident Magistrate, Her Honour Mrs Shelly Williams, that a motor vessel, the "Sensation", be forfeited to the Crown.

[2] On 20 December 2011 we made the following order:

“The appeal is allowed. The order of the Resident Magistrate is revoked. The motor vessel ‘Sensation’ should be returned to the owners forthwith. Costs of \$15,000.00 to the appellants.”

We promised to put our reasons in writing. This promise we now fulfil.

[3] The forfeited motor vessel is owned by the appellants. They are residents of Honduras. On 26 December 2010, the vessel was intercepted off Pedro Cays in the territorial waters of Jamaica. The captain and the crew were taken into custody, arrested and charged with various offences under the Fishing Industry Act, the Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act (hereinafter referred to as the “Aquaculture Act”) and the Aliens Act.

[4] The captain, having pleaded guilty to a charge of fishing without a licence, under the Fishing Industry Act, was fined \$800.00 or 30 days imprisonment. The captain, and another member of the crew, were each charged under the Fishing Industry Act for operating an unregistered vessel, to which they pleaded guilty and were each fined \$100,000.00 or a term of one year imprisonment. They were charged under the Aliens Act for illegal entry and were each fined \$10,000.00. They were also charged with breaches of the Aquaculture Act, to which they pleaded guilty and were each fined \$50,000.00 or six months imprisonment. All other crew members pleaded guilty to charges of fishing without a licence under the Fishing Industry

Act, and were each fined \$800.00 or 30 days imprisonment, and for illegal entry under the Aliens Act and they were each fined \$10,000.00 or six months imprisonment.

[5] Following the sentencing of the men, on an application by the Crown, an order for the forfeiture of the vessel, its equipment and cargo was made by the learned Resident Magistrate.

[6] In an affidavit sworn to by the second appellant on 26 January 2011 in support of the petition, he stated that the presence of the vessel "Sensation" was due to it having developed mechanical problems following it having towed a Jamaican motor vessel, "Miss Tiffany", which had earlier developed mechanical problems. On its way back, the "Sensation" ran into difficulties at the Pedro Bank where it was apprehended by the authorities.

He went on to say at paragraphs 18, 19, 20, 25, 26, 27, 28 and 30:

"18. That I had no knowledge that the vessel was going to fish or attempt to fish in the contiguous zone of Jamaica when it left Honduran waters as it was [sic] merely came [sic] to Jamaica on a mission of mercy to assist a Jamaican vessel in need and to save lives.

19. That we could not have predicted that the 'Sensation' would also developed [sic] mechanical problems and not be able to return to Honduras immediately after towing 'Miss Tiffany' back to Jamaica.

20. That there was nothing I could have done

from Honduras to prevent this from happening as the captain is an experienced one and I would never have expected him to seek to violate the maritime laws of any territory.

...

25. That my father and I were not a party to any illicit venture nor did we have any knowledge or could have even imagined that the vessel would be used to commit any offence against the laws of Jamaica or any country.
 26. That we have suffered grave hardship since the forfeiture of the vessel and its equipment and catch.
 27. That we still have to pay our obligations to our bank and our home is also security for this loan and if we fail to pay we stand a real chance of our home being auctioned and I exhibit hereto a copy of a letter from he [sic] bank which speaks for itself with the translation marked 'SP 4'.
 28. That we have no other source of earnings or livelihood and my father is ailing and has had a lot of medical expenses to pay for his diagnosis of esophageal cancer and I exhibit hereto marked 'SP 5' a copy of his medial report.
- ...
30. That since our vessel was our only source of income without it we are not going to be able to meet our every day obligations.

...”

[7] The following grounds of appeal were filed:

- "1) (a) The Magistrate's findings are unsafe, unreasonable and unsupported by the evidence;

(b) The Magistrate erred in law and in fact as on the evidence it was not just to forfeit the Petitioner's motor vessel the 'Sensation';

(c) There is no basis in law for the forfeiture of the motor vessel 'Sensation'.
- 2) The learned Resident Magistrate for the Corporate Area, Her Honour Mrs. Shelly Williams, erred in law as on the evidence, there was no legal basis on which to forfeit the motor vessel 'Sensation'.
- 3) It is just in the circumstances of the case to revoke the Order of the learned Resident Magistrate, as adequate notice of the intention to apply for an order of forfeiture was not given to the owners of the motor vessel 'Sensation'."

[8] Mr Charles submitted that the captain was charged under sections 25 (b) and 26 of the Aquaculture Act and the order endorsed on information no. 301/11 shows that the forfeiture order was made under that Act. That order, he contended, was made in contravention of the procedure laid down in section 35 of the Act, and the failure to notify the owners of the intended application for forfeiture or to give them a hearing, deprived the learned Resident Magistrate of an opportunity to properly exercise her discretion, she not having the benefit of any evidence as to the conduct of the appellants. In the circumstances, he argued, it would be just for the order to be revoked.

[9] Miss Barnett argued that the learned Resident Magistrate had sufficient material before her on which she could have arrived at a decision. She conceded, however, that in the interests of justice, the forfeiture order should be set aside as the learned Resident Magistrate ought to have heard the owners. The matter, she submitted, should be remitted to the Resident Magistrate's Court for the application for forfeiture to be heard.

[10] On 13 October 2011 an affidavit was filed by Mr Hansurd Lawson, the clerk of courts who conducted the prosecution on the day on which the occupants of the vessel were sentenced. To this affidavit were exhibited, the forfeiture order as well as a copy of the court sheet showing the record of the proceedings. The order was couched in these terms:

“IN THE MATTER OF FORFIETURE [sic] ORDER
UNDER THE FISHING INDUSTRY ACT SECTION
27

AND

IN THE MATTER OF REGINA VS
ANTOLIN MEJIA (Captain) ERNESTO SUAZO
(First mate)
OMAR LINO
MIPOLITO WILLIE
ABENICO HENRY
VICTOMARO CULLY
BLASÉ GARDEMAZ
RAMON RODRIQUEZ
FREDIE PEINEDA
FREDDIE LOPEZ
ERNARD WEBB

AND

IN THE MATTER OF AN APPLICATION
FOR THE FORFEITURE OF MERCHANT VESSEL
NAMED

(1) SENSATION ALONG WITH ALL FISHING
GEAR, FISH AND LOBSTER THEREON.

...

IT IS HEREBY ORDERED THAT:

MERCHANT VESSEL NAMED 'SENSATION'
ALONG WITH FISHING GEAR AND FISH AND
LOBSTER SEIZED BY THE POLICE BE
FORFEITURE [sic] TO THE CROWN."

It is observed that the order is entitled as being made under the Fishing Industry Act. However, the endorsement on information no. 301/11 laid against the captain of the motor vessel bears an order which has been executed by the learned Resident Magistrate showing that the forfeiture was made under the Aquaculture Act. The entry in the court sheet in respect of information no. 301/11 indicates that the order was made under that Act.

[11] In an affidavit sworn to by Miss Jacqueline Cummings on 28 November 2011 she stated that on 6 January 2011 she attended the Horizon Adult Remand Centre where the learned Resident Magistrate and clerk of the courts were present to conduct proceedings in respect of the charges laid against the occupants of the vessel. She further averred that after the fines were imposed on them, the clerk of the courts made an oral application for the forfeiture of the vessel.

[12] At paragraphs 7, 8, 9 and 12 of her affidavit she went on to state as follows:

" ...

7. That I inquired on what basis he was seeking this application and he said under to [sic] provisions of the AQUACULTURE, INLAND AND MARINE LICENSING AND EXPORT) ACT.
8. That I advised the Court that I was in the process of being retained by the owner of the vessel who was making arrangements to come to Jamaica the following week and requested that the application be adjourned to next week when the owner of the vessel would be present to respond to the application.
9. That Her Honour Mrs Shelly Williams was persuaded by the Clerk not to grant such adjournment and she Ordered that the shipping vessel 'The Sensation' be forfeited to the Crown pursuant to the conviction of the accused men under the provisions of the AQUACULTURE, INLAND AND MARINE LICENSING AND EXPORT) ACT.

...

12. That to date neither the Applicant herein, who are the owners of the shipping vessel the Sensation nor I have not [sic] been served with any written or Formal Order of the Court for forfeiture herein."

[13] In view of the fact that the order on information no. 301/11 depicts that the forfeiture was made under the Aquaculture Act, which has been confirmed by the entry in the court sheet, and in light of Miss Cummings'

averment that the clerk of the courts had advised her that the order had been made under that Act, it would not be correct to say that it was made under the Fishing Industry Act. It must be taken that the pronouncement was made under the Aquaculture Act. This being said, it will now be necessary to look at such sections of that Act as are relevant for the purpose of the appeal. Section 34(2) permits the forfeiture of any equipment seized in contravention of the Act. It provides as follows:

“(2) Where a person is convicted of an offence under this Act in relation to which any specified equipment seized and detained under subsection (1) is used in committing the offence, the Court may, on an application by the Director of Public Prosecutions order that the specified equipment be forfeited to the Crown.”

Section 35 of the Act lays down the procedure in relation to the making of an order for forfeiture. It reads:

35. (1) Where the Director of Public Prosecutions proposes to apply to the Court for an order of forfeiture under subsection (2) of section 34 the Director of Public Prosecutions shall, subject to subsection (4) of this section, notify in writing the owner of and any person (if known) having an interest in the specified equipment that he proposes to apply for such an order.

(2) The owner or other person notified under subsection (1) may appear before the court at the hearing of the application and show cause why the specified equipment should not be forfeited.

(3) Where the Director of Public Prosecutions is unable to ascertain the owner of or any person having an interest in any specified equipment to which this section applies, he shall publish a notice in a daily newspaper circulating in Jamaica regarding the intention to apply to the Court for an order for forfeiture, not less than thirty days prior to the application.

(4) Notice shall not be required under subsection (1) if the seizure or detention of the specified equipment was made in the presence of the owner or person having an interest in the specified equipment.

(5) If, upon the application of a person prejudiced by an order made under subsection (2) of section 34, the Court is satisfied that it is just in the circumstances of the case to revoke such order, the Court may revoke such order upon such terms and conditions, if any, as it deems appropriate, and without prejudice to the generality of the foregoing, may require such person to pay in respect of storage, maintenance, administrative expenses, security and insurance of the specified equipment, such amount as may be charged by the person in whose custody the specified equipment was kept.”

[14] As can be readily observed, section 35(1) outlines the process to be adopted prior to the making of a forfeiture order. Where the seizure of the equipment is not made in the presence of the owner or any person having an interest therein, the Director of Public Prosecutions is under a duty to convey to such person a written notification of the proposed application for an forfeiture. Section 35(2) permits an owner of the equipment, who has been

notified that an application for an order of forfeiture is contemplated, to appear to show cause why it should not be forfeited. Under section 35(4) a notice is not required if the seizure is made in the owner's presence.

[15] Although the appellants had not been notified of the application for forfeiture, on the day of the application for the order, as disclosed by Miss Cummings, she informed the court of her desire to secure an adjournment for a week to enable the appellants to attend in order to offer a response to the application. Despite this, the order was made.

[16] The principles of fairness and natural justice are appropriate in this case. Fairness dictates that the appellants should have been notified of the intention on the part of the Director of Public Prosecutions to apply for the order.

[17] The modern doctrine of fairness has been eminently pronounced by Lord Mustill in ***R v Secretary of State for the Home Department ex parte Doody*** [1993] 3 WLR 154 at page 168 where he said:

"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

Since the person affected usually cannot make worthwhile representations without knowing

what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.”

[18] In the circumstances of this case, the learned Resident Magistrate was duty bound to have observed the rules of natural justice. The seizure of the vessel, having not been made in the appellants’ presence, it would have been incumbent on the Crown to have served them with due notice of their intention to make the application. The requisite notification having not been transmitted to the owners of the vessel, the power of making an order for forfeiture under the Aquaculture Act could only have been exercised after the appellants had been given an opportunity to respond to the application.

[19] An order made in breach of the principles of natural justice is void. In

Ridge v Baldwin and others [1964] AC 40, Lord Reid, at page 80 said:

“Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in ***Wood v Wood***. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.”

As a matter of law, a void act is a nullity. The court, in ***MacFoy v United***

Africa Co Ltd [1961] 3 WIR 1405, speaking to this proposition, at 1409,

stated:

“If an act is void, then it is in law a nullity, it is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

[20] In keeping with the tenets of natural justice, the appellants were entitled to a hearing. The order made being contrary to the procedural regime prescribed by the Act, renders the decision of the learned Resident Magistrate void. The forfeiture order is a nullity and must be set aside.

[21] The order having been declared a nullity and set aside, the question which now arises, is whether as Miss Barnett urges, the matter of the forfeiture ought to be remitted to the Resident Magistrate’s Court for hearing. We think not. It is perfectly true, as Miss Barnett submitted, that the Resident Magistrate is endowed with discretionary power to make an order for forfeiture under the Fishing Industry Act, section 27 of which states as follows:

“27. Any boat, net, fishing equipment, implements or appliances used in the commission of any offence against this Act in respect of which there is a conviction may, in the discretion of the Court, be forfeited to the Crown.”

[22] A forfeiture order could have been automatically made under the Fishing Industry Act. However, the order was not made under that Act. As earlier indicated, it was invalidly made under the Aquaculture Act. As a consequence, that Act would be the only statutory instrument to which this court is required to direct its attention in respect of the order.

[23] There is evidence from the appellants that they were unaware that the vessel would have been involved in any illicit venture which would have offended the laws of Jamaica. The vessel's presence on the Pedro Cays was as a result of mechanical problems after assisting with the towing of "Miss Tiffany". The vessel is the appellants' only source of income. They have been experiencing great hardship since its forfeiture. They are indebted to the bank and now run the risk of losing their home if they fail to repay the loan. If the learned Resident Magistrate had been privy to the evidentiary material, as disclosed by the appellants, it is likely that the order for forfeiture would not have been made. In these circumstances, the interests of justice demanded that the forfeiture order be set aside and the vessel be released.

[24] The foregoing are the reasons for having made our order.