[2024] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL NO COA2022PCC00003

BETWEEN	**KERON CLARKE**	**APPELLANT**
AND	**THE COMMISSIONER OF CUSTOMS JAMAICA CUSTOMS AGENCY**	**RESPONDENT**

Miss Audrey Clarke instructed by Judith M Clarke & Co for the appellant

Miss Krystal Corbett for the respondent

22, 24 November 2023 and 11 October 2024

Forfeiture - Whether order for continued detention of cash seized by customs officers from arriving passenger at airport was procedurally correct - Whether order for forfeiture of cash seized by customs officers at the airport was unreasonable having regard to the evidence - Proceeds of Crime Act, 2007, sections 75 and 76 - the Judicature (Parish Court) Rules, Order 11, Rule 7

F WILLIAMS JA

Background

[1] By notice and grounds of appeal filed on 4 February 2020, Mr Keron Clarke ('the appellant') appealed against a decision of Her Honour Ms Kaysha Grant ('the learned Parish Court Judge') made on 8 January 2020 in the Saint James Parish Court. By that decision, the learned Parish Court Judge made orders on two applications that had come on for hearing before her: one by the appellant for the release of cash that customs officers had seized from him (STJPOCA SJ2019PCA00003); and the other, an application

by the Commissioner of Customs ('the respondent') that the said cash be forfeited to the Crown (STJPOCA SJ2019PCA00009). The following were the orders made:

> "1. In respect to STJPOCA SJ2019PCA00003, judgement [sic] for the Respondent. Cash is not released.
>
> 2. In respect to STJPOCA SJ2019PCA00009, judgement [sic] for the Applicant. The sum of Nine Thousand Two Hundred United States Dollars (US$9200.00) seized on the 30th day of November, 2018, and all interest accrued thereon be forfeited to the Crown.
>
> 3. Costs to be agreed or taxed.
>
> 4. In respect to STJPOCA SJ2019PCA00003, verbal notice of appeal given by the Respondent's Attorney-at-Law."

[2] Having heard submissions in the appeal on 22 November 2023, on 24 November 2023, we made the following orders:

> "(i) The appeal is dismissed; and the orders of the learned Parish Court Judge, made on 8 January 2020, are affirmed.
>
> (ii) Costs in the court below to the respondent in the sum of $60,000.
>
> (iii) Costs of the appeal to the respondent summarily assessed at $75,000."

[3] This judgment has been written in fulfilment of our promise made then to provide brief reasons for the making of those orders.

Summary of the facts

[4] On 30 November 2018, the appellant, who had arrived in the island at the Sangster International Airport in Montego Bay, Saint James, on a flight from New York, United States of America, was found to be in possession of US$9,200.00 ('the seized cash'). Of that amount, the sum of US$4,000.00 was found in a pouch that he had about his person, and the balance of US$5,200.00 was found in an envelope in a pocket of a pair of jeans pants in his luggage. He was also found to have two bank cards. One of these, he

informed the customs officers, belonged to his wife. This was confirmed by someone believed to be his wife by way of a telephone call made with the use of the speaker on his mobile phone, enabling the customs officer to hear the conversation. In respect of the other card, however, which he said belonged to a friend, there was no confirmation of this allegation (and, in fact, a direct rejection of it by the person he named) as the person who allegedly gave him the card denied any knowledge of it when a similar call was made to her.

[5] On the Crown's case, the appellant also alleged to the customs officers that the seized cash was to have been used to help pay for the funeral expenses for someone he said was his aunt, whose name he at first gave as Vera Bell. Further questions, however, revealed the fact that he was uncertain about the correct name of his "aunt".

[6] As a result of the customs officers' doubt about the source and intended use of the funds the appellant was carrying and of the source and intended use of one of the bank cards, they seized the cash and card, requesting the appellant to provide further proof that they came from a legitimate source and were destined to be used for a legitimate purpose.

[7] It is not in dispute that, following the seizure of the appellant's cash and card, the three documents required to be prepared by the Crown pursuant to section 76 of the Proceeds of Crime Act, 2007 ('the Act') were all prepared and signed around 3:30 pm on 2 December 2018; and that the appellant had left the island from around 8:00 am on that said day. Those documents were: (i) First Order for Continued Detention of Seized Cash; (ii) Notice to Persons Affected by an Order for Continued Detention of Seized Cash; and (iii) First Application for Continued Detention of Seized Cash.

[8] On 21 January 2019, the appellant's attorney-at-law filed an application for the cash to be released. On 25 February 2019, the respondent filed an application for forfeiture of the seized cash. Both applications were heard by the learned Parish Court Judge on 8 January 2020 and the orders outlined in para. [1] of this judgment made.

The findings of the learned Parish Court Judge

[9] In her written reasons, the learned Parish Court Judge indicated, among other things, that she took into account several matters in coming to the conclusion that the seized cash ought to have been forfeited. Among them were:

> (i) the method by which the cash was being transported;
>
> (ii) the fact that the appellant had a bank card not belonging to him and for which he could not properly account;
>
> (iii) his conflicting explanations as to the source of the cash; and (iv) the conflicting explanations as to the intended use of the seized cash.

[10] Three examples of the conflicting testimony and pre-trial assertions made by the appellant, as found by the learned Parish Court Judge, were:

> (a) a customs officer testified that the appellant had told her that the seized cash was for the repayment of a loan that his family had obtained and used to pay for his aunt's funeral, yet the funeral was postponed, he stated, due to non-payment, the cash that he had having been seized.
>
> (b) The appellant contended that he was close to the deceased, yet he told at least one customs officer that he did not know her name, and also referred to her in his evidence by eight different names.
>
> (c) The taxi driver who picked him up from the airport, who he said was the son of the deceased, denied any knowledge of any funeral or of any of the appellant's affairs.

The appeal

[11] Being dissatisfied with the orders of the learned Parish Court Judge, the appellant appealed, his notice and grounds of appeal filed on 4 February 2020, disclosing the following grounds and prayer:

> "1. THAT the Learned Parish Judge's decision was unreasonable having regard to the evidence.
>
> 2. That the Learned Parish Judge failed and/or refused to treat with [the] pertinent issues raised by the Plaintiff in respect of service of the **First Order for Continued Detention of Seized Cash** in keeping with the law.
>
> 3. That the Learned Parish Judge [sic] assessment of evidence/issues was unbalanced.
>
> 4. That the Learned Parish Judge erred in making an order for cost [sic] in the all [sic] circumstances.
>
> WHEREFORE THE APPELLANT HUMBLY PRAYS:
>
> 1. THAT the appeal be allowed and Judgment be entered for the Plaintiff/Appellant and the cash seized be returned.
> 2. THAT he be granted leave to argue additional grounds as soon as the notes of evidence are available.
> 3. THAT there be cost [sic] to the Appellant.
> 4. THAT he be granted such further and other relief as may be just."

Summary of submissions

For the appellant

[12] Before us, Miss Clarke, on behalf of the appellant, while informing the court that she was not formally abandoning grounds 1, 3 and 4, focused her submissions on ground 2, and did not orally submit on the other grounds. The main thrust of her contention on this ground was that the procedure that section 76 of the Act requires was not followed.

[13] Counsel submitted that the time for service of the notice had to be before the order was made. Although the customs officers interacted with the appellant on 1 and 2 December 2018, there is no evidence of any approach or attempt to provide him with notice of the application, she argued. The appellant was unaware of any basis for the continued detention of his cash, she submitted. The specific requirement in the law is that notice "shall" be given. The court below did not address this issue, it was argued.

[14] Miss Clarke further contended that nothing was presented to the appellant to indicate that there were any further queries after the seizure. Additionally, the notice of application for an extension of time for the seizure was required to be served within 72 hours of the seizure, and the appellant was to have been notified that he could seek an attorney-at-law. That, however, was not done.

For the respondent

[15] On behalf of the respondent, Miss Corbett submitted that, a judge of the Parish Court is a creature of statute, and so all powers exercised by someone holding that office must emanate from statute or rules made thereunder. She developed this point by further submitting that, there being no rules made under the Act, guidance as to procedure in the applications that fell to be considered by the court below had to be taken from the Judicature (Parish Court) Act and Rules ('the Parish Court Rules'). She further submitted that Order 11, Rule 7 of the Parish Court Rules ('the relevant order'), dealing with interlocutory and interim orders and proceedings, would be relevant. The statute and the relevant order, she submitted, do not require an *inter partes* hearing at the stage of the application for an order for continued detention. In this regard, she referred, in particular, to section 76(7) of the Act. That provision, she contended, required a party to be notified of the order, and not the application.

[16] Even with that being the law, counsel contended, this issue raised by the appellant had no merit, as the first order for an extension was, in fact, served on the appellant's attorney-at-law, though not on the appellant himself, he having left the jurisdiction before the order was made. That made personal service impossible.

[17] Miss Corbett also submitted that the issue of non-service now being raised was not raised in the proceedings in the court below, in which the appellant was represented by counsel. She submitted additionally that that issue had no bearing on the decision and orders of the court below, and so the learned Parish Court Judge would not have been required to consider service in the matters before her. Miss Corbett further argued that the order for forfeiture was properly made pursuant to section 79(2) of the Act, the learned Parish Court Judge having been satisfied that the cash seized was recoverable property, within the meaning of the Act.

For the appellant in reply

[18] In response to Miss Corbett's reference to the relevant order, Miss Clarke submitted that it must be read "subject to" the statute and that the Act uses the mandatory word "shall". Failure to comply with the mandatory requirement was, therefore, fatal, she submitted.

Discussion

[19] The best place to begin a discussion of the various provisions of the Act is, of course, the Act itself.

The Act

[20] The most relevant sections of the Act are sections 75 and 76. The parts of those sections that are most germane to the issues in this case are set out below, beginning with section 75:

> "75. – (1) An authorized officer may seize any cash if the officer has reasonable grounds for suspecting that the cash is –
>
> (a) recoverable property; or
>
> (b) intended by any person for use in unlawful conduct.
>
> (2) Subject to subsection (3), where –

(a) an authorized officer has reasonable grounds for suspecting that a part of cash is –

(i) recoverable property; or

(ii) intended by any person for use in unlawful conduct; and

(b) it is not reasonably practicable to seize only that part, the whole of the cash may be seized by the officer.

(3) This section does not authorize the seizure of an amount of cash if that cash or, as the case may be, the part to which the suspicion relates, is less than the minimum amount."

[21] Also relevant is section 76 of the Act, which governs steps to be taken once the cash or other item has been seized. It reads thus:

"76. – (1) While the authorized officer continues to have reasonable grounds under section 75(1) or (2), cash seized under that section may be detained initially for a period of seventy-two hours.

(2) The period for which cash or any part thereof may be detained under subsection (1) may be extended by an order made by a [Parish Court]:

Provided that no such order shall authorize the detention of any of the cash –

(a) beyond the end of the period of three months beginning with the date of the order, in the case of an order first extending the period; or

(b) in the case of a further order under this section, beyond the end of the period of two years beginning with the date of the first order.

(3) A Justice of the Peace for any parish (whether the seizure takes place within the limits of the jurisdiction of that Justice of the Peace of elsewhere in Jamaica outside of that jurisdiction) may also exercise the power of the [Parish Court]

to make an order first extending the period mentioned in subsection (1).

(4) An application for an order under subsection (2) may be made by an authorized officer.

(5) On an application under subsection (4), the Court or Justice of the Peace, as the case may be, may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met –

(a) there are reasonable grounds for suspecting that the cash is recoverable property and that either –

(i) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in Jamaica or elsewhere) proceedings against any person for an offence with which the cash is connected; or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded; or

(b) there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and that either –

(i) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in Jamaica or elsewhere) proceedings against any person for an offence with which the cash is connected; or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

(6) Where an application is made for an order under subsection (2) in the case of cash seized under section 75(2), the Court or Justice of the Peace, as the case may be, shall not make the order unless satisfied that –

(a) the condition in subsection 5(a) or (b) is met in respect of part of the cash; and

(b) it is not reasonably practicable to detain only that part.

(7) An order under subsection (2) shall provide for notice to be given to persons affected by it."

[22] As the relevant order has also been referred to in counsel's argument, it may be useful to set out its provisions here. It states as follows:

"7. Practice on Interlocutory Applications.

7. Where by any statute or by these Rules any interlocutory application is expressly or by reasonable intendment directed to be made to the Judge, then subject to the provisions of the particular statute or of the particular Rule applicable thereto, and so far as the same shall not be inconsistent therewith the following provisions shall apply: -

(a) The application may be made either in or out of Court, and either ex parte or on notice in writing; when made on notice, the notice shall be served on the opposite party two days at least before the hearing of the application, unless the judge gives leave for shorter notice.

(b) No affidavit in support shall be necessary, but the Judge may if he shall think fit adjourn the hearing of the application and order an affidavit or affidavits in support to be filed.

(c) The Judge upon the hearing or adjourned hearing of the application may make an order absolute in the first instance, or to be absolute at any time to be ordered by him, unless cause be shown to the contrary, or may make such other order, or give such directions as may be just.

(d) The allowance of the costs of and incident to the application shall be in the discretion of the Judge; and no such costs shall be allowed on taxation without special order." (Emphasis added)

[23] Customs officers are designated "authorized officers" pursuant to the Act, by section 55(1) thereof, which states:

"'authorized officer' means a constable, a customs officer or any other person designated as such by the Minister by order for the purposes of this Act;"

[24] A perusal of section 76 of the Act, and, in particular, subsection 76(7), makes it unmistakably clear that, in the plain words of that subsection: "An order under subsection (2) shall provide for notice to be given to persons affected by it" (emphasis added). The wording of the subsection does not suggest that the notice must be given before the hearing. Had that been so, the subsection would likely have been differently phrased. The plain meaning is that it is the order, after it has been made, that is to be served, not notice of the application.

[25] Looking at the relevant order, it is also clear in its terms. It gives a judge of the Parish Court hearing any interlocutory application a very wide discretion whether or not to order that the application be served. It is true that the relevant order specifically states that it must be read: "subject to the provisions of the particular statute or of the particular Rule applicable thereto, and so far as the same shall not be inconsistent therewith…". However, as the foregoing discussion shows, there is no section in the Act or any rule that stands in conflict with the relevant order. This is further proof that a careful reading of the legislation does not support the appellant's contention of the need for notice prior to the consideration of the application for the first order. This point is further reinforced when one considers that section 76(7) also gives the authorised officer a wide discretion whether to make the application to a judge or a justice of the peace. A requirement for notice would be even more unlikely where the application is made to a justice of the peace, given the nature of matters dealt with by a justice of the peace, when not sitting with others in court pursuant to the provisions of the Justices of the Peace (Jurisdiction) Act.

[26] During the course of the hearing, it was also brought to our attention that the first application for continued detention, the First Order for Continued Detention of Seized Cash and Notice to Persons Affected by an Order for Continued Detention of Seized Cash, were emailed to the appellant's attorney-at-law on 27 December 2018, with the original documents being delivered by bearer on 7 January 2019.

[27] It is also not without significance that the appellant was issued with a receipt when the cash was seized. The receipt bears the following information:

> "The cash may have to be forfeited under the Proceeds of Crime Act 2007. The Authorised Officers will apply to a Resident Magistrate or Justice of the Peace within 72 hours from the time of seizure for an order to detain the cash for up to 3 months.
>
> You may attend the relevant hearings, and may wish to consult a solicitor for advice on your rights.
>
> At any time while the cash is detained, you may claim that it is not liable to detention or forfeiture."

[28] From the very time of the seizure of the cash, therefore, the appellant was issued with this receipt which informed him of the course that possible subsequent proceedings could take. He was also advised of his right to consult with an attorney-at-law, which he did shortly after, and that attorney-at-law began to communicate with the respondent on his behalf. In the subsequent hearing of his application and that of the respondent, the record of proceedings shows that he was not hindered in his presentation of the issues that he took with the seizure of the cash. He suffered no prejudice. In the end, the appellant failed to make good his contention regarding the interpretation of section 76(1) and (2) of the Act. In our view, on a proper interpretation of the section, there is no requirement for notice to be given before the first order is made. It is only when an application is going to be made for a second extension that prior notice is required to be given.

[29] This non-requirement for the giving of notice before a decision at an early stage of proceedings, is not unique. There is at least one other generally similar statutory arrangement that exists. In **Ivey (Robert) v The Firearms Licensing Authority** [2021] JMCA App 26, it was held (see para. [36]) that section 26B of the then-existing Firearms Act, which empowered the Firearm Licensing Authority to revoke firearms licences and permits, did not require that notice be given prior to revocation; but only after. (That provision is similar to section 84(3) of the current Firearms (Prohibition,

Restriction and Regulation) Act, 2022.) It may very well be that in some circumstances that may arise under the Act and section 84(3) of the current Firearms (Prohibition, Restriction and Regulation) Act, quick action on the part of the authorities may be necessary, and the giving of notice may thwart or hinder planned action. In the circumstances, we found the interpretation that the respondent urged us to accept, to be a reasonable and logical one.

[30] It may also be observed that, from a perusal of the notes of evidence in this matter, it was not borne out that the point relating to service was raised during the hearing of the applications. This observation supports the point raised by Miss Corbett, and so, strictly speaking, we were not required to have considered the ground at all, but, on this occasion, did so, as it was, in effect, the appellant's only ground that was argued.

[31] In all these circumstances, therefore, we found that the appellant had not made out this, his principal ground, which we found to be wholly unmeritorious.

The other grounds of appeal

[32] With respect to the other grounds of appeal, we found that they were all inextricably linked to the principal ground (ground 2). That ground not having been made good, the remaining grounds also failed.

[33] It was for the foregoing reasons that we made the orders set out at para. [2] of this judgment.