

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL No. 3/82

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice White, J.A.

IN THE MATTER of an application by
GERALD F. MUETHING, Jnr. and
MARCIA MUETHING for the revocation
of an Order of Forfeiture of the
sailing Vessel "Halcyon" made on
or about the 15th day of February
1982

AND

IN THE MATTER of The Dangerous
Drugs Act

Gordon Robinson for appellant

Anthony Smellie, Crown Counsel for the Crown

November 12; December 16, 1982
and March 29, 1985

PRESIDENT:

On December 16, 1982, we dismissed this appeal by holding that there is no right of appeal. We promised to put our reasons into writing. This we now do.

As a result of a conviction in the Resident Magistrate's Court in the parish of Trelawny on a charge of breach of the Dangerous Drugs Law, the vessel "Halcyon" was ordered forfeited. Subsequently, an application was made by Gerald Frederick Muething, Jnr. and Marcia Muething who claimed to be the owners of the vessel, for the revocation of the order of forfeiture. Those persons convicted under the Dangerous Drugs Act for conveying ganja in the M/V "Halcyon" took no part in the proceedings for the revocation of the forfeiture and

Indeed the applicants disclaimed any knowledge of the Identity of those convicted persons. This application was refused by the Resident Magistrate. Then followed the appeal.

The order for forfeiture was made pursuant to s. 24(2) of the Dangerous Drugs Act, which states:

"On the conviction of any person for an offence against this Act, the Court shall, upon the application of the prosecution, order the forfeiture of any conveyance used in the commission of the offence, and seized pursuant to this section, if the Court is satisfied that -

- (a) such person owns the conveyance, or the owner thereof permitted it to be so used; or
- (b) the circumstances are otherwise such that it is just so to order."

The application for revocation of the order was made pursuant to s. 24(3) of the Dangerous Drugs Act, which states:

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

On the hearing of the appeal, the attorney for the Crown, on a preliminary point, argued that there was no right of appeal. It was submitted that the appeal was with respect to criminal proceedings and no provision is made by statute or any law for the right of an appeal.

It was conceded by the attorney for the appellant that if the proceedings were criminal then there would be no right of appeal. However, it was submitted that the proceedings were civil and therefore there was a right of appeal. It is to be observed that the notice of appeal and grounds of appeal were filed as if the appeal were one in civil proceedings.

In view of the decision of the Court it is not intended to consider the merits of the application.

The issue that was before this Court was whether the proceedings before the Magistrate for revocation of the order for forfeiture was criminal or civil proceedings.

The order for forfeiture is part of the sentence. If the application for revocation of the order is refused the effect of this is that, the forfeiture, which is part of the sentence, remains intact. Section 24(3) gives the Resident Magistrate an opportunity to re-consider that part of the sentence dealing with forfeiture. When the order for forfeiture is made, it is usually made having regard to the evidence which is led at the trial of the person charged with the offence under the Dangerous Drugs Act.

It therefore follows that there would be a right of appeal against conviction and sentence and this appeal would include a challenge as to the order for forfeiture, which is part of the sentence. However, if the application is being made by a person other than the person convicted, is there a right of appeal? The Judicature (Resident Magistrates) Act, s. 293 states:

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

The Judicature (Appellate Jurisdiction) Act, s. 22 states:

"Subject to the provisions of this Act, to the provisions of the Judicature (Resident Magistrates) Act, regulating appeals from Resident Magistrates in criminal proceedings and to rules made under that Act, an appeal shall lie to the Court from any judgment of a Resident Magistrate in any case tried by him on indictment, or on information in virtue of special statutory summary jurisdiction."

The word "judgment" is defined in s. 2 of the Act as

"including any order of a court made on conviction with reference to the person convicted"

In the case of R. ats. Gunter v. Tucker 10 J.L.R. 12 It was held that the court had no jurisdiction to hear an appeal by a complainant where an accused party was acquitted as the word "judgment" meant "conviction". At page 15 Fox J.A. (ag.), (as he then was), said:

"When the provisions governing criminal appeals are examined as a whole, it is obvious that a basic consistency of meaning can be maintained only by limiting the right of appeal to cases in which there has been a conviction, and by modifying accordingly the meaning of the word 'judgment' - which is the key word in the provisions. Such an examination was made by the learned President of this Court in the judgment which was delivered in R.M. Court Misc. Appeal No. M (c) 1/66 - In the Matter of an Application for the adoption of a child. The judgment states the conclusion finally, that s. 305, which sets out the powers of the Court of Appeal, 'makes it clear beyond doubt that the only powers which the court has in respect of appeals under s. 293 concern criminal cases in which there has been a conviction.' This conclusion is in harmony with the provisions of the Judicature (Appellate Jurisdiction) Law, 1962, Law 15 of 1962, s. 21 which gives the right of appeal 'from any judgment' of a resident magistrate in any case tried by him on indictment, and s. 2 which defines 'judgment' to include 'any order of a court on conviction with reference to the person convicted.'"

It is clear that there can be no right of appeal unless such a right is granted by statute. If the proceedings in the instant case were criminal then there would be no right of appeal because no such right of appeal is ^{given} under the Judicature (Resident Magistrates) Act read in conjunction with the Judicature (Appellate Jurisdiction) Act.

In Ex Parte Alice Woodhall [1888] 20 Q.B.D. 832, the Court of Appeal held that it had no jurisdiction to hear the appeal as it was from an order of the Divisional Court given in a criminal cause or matter within the meaning of s. 47 of the Judicature Act 1873, and therefore, no appeal would lie to the Court of Appeal.

Lord Esher M.R. at p. 836 said:

"I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. Applying that proposition here, Was the decision of the Queen's Bench Division, refusing the application for a writ of habeas corpus, a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham? I am clearly of opinion that it was, and I think it is impossible to say that what took place before him was not a proceeding the subject-matter of which was criminal. If the proceeding before the Magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of habeas corpus, which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal. It follows, therefore, that this Court has no jurisdiction to hear the appeal."

In the same case Bowen L.J. at pp. 838. 839 said:

"How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law, and competent to decide what is sufficient evidence to justify a committal. The questions upon which the application for a writ of habeas corpus depend, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not the evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of habeas corpus is a judgment in a criminal matter."

The Court of Appeal in McGann v. United States of America, 12 J.L.R. 565, approved the decision in Ex Parte Alice Woodhall, supra, and held that the proceedings, before the Full Court of the Supreme Court which was for an order for a writ of habeas corpus ad subjiciendum, were criminal proceedings in respect of which no right of appeal was conferred by Law and the Court of Appeal had no jurisdiction to hear the appeal.

In support of the submission that the proceedings in the instant case were civil proceedings, Counsel relied on the cases of A.G. v. Radloff 156 English Reports 366 and A.G. v. Bradlaugh [1885] 14 Q.B.D. 667. We found no assistance from these cases for the conclusion that the instant case is one of civil proceedings.

In the instant case the proceedings giving rise to the application for revocation started as criminal proceedings. The order for forfeiture was part of the sentence imposed. There was a right of appeal by the prisoner convicted against conviction and the sentence.

In making the order for forfeiture the Resident Magistrate would have considered the evidence which led to the conviction for a breach of the Dangerous Drugs Act.

In our opinion the matter remained criminal from first to last and originally were and remained criminal proceedings. It is not appealable.

It is for these reasons that we held that there was no right of appeal.