[2012] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 20/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**WINSTON PUSEY**	**APPELLANT**
AND	**ASSETS RECOVERY AGENCY**	**RESPONDENT**

Miss Arlean Beckford instructed by Arlean D M Beckford & Company for the appellant

Mrs Nateline Robb Cato, Mrs Susan Watson Bonner and Mrs Charmaine Newsome for the respondent

24 April and 26 October 2012

HARRIS JA

[1] I fully agree with the reasons and conclusions of my sister McIntosh JA. There is nothing useful that I could add.

MCINTOSH JA

Introduction

[2] Subsequent to a hearing on an application under section 79 of the Proceeds of Crime Act (the Act), in the Resident Magistrate's Court for the Corporate Area, the following formal order was entered:

> "UPON THE APPLICATION of Dean-Roy Bernard dated April 24 2008 coming up for hearing today, before Her Honour Ms. J. Anderson, Resident Magistrate for the Corporate Area ...
>
> IT IS HEREBY ORDERED THAT:
>
> 1. The cash in the sum of U.S. $53,950.00 (Fifty Three Thousand Nine Hundred & Fifty Dollars – United States Currency) seized from Scereta Mahabeer-Barrett of Gimme-Me-Bit in the parish of Clarendon and claimed by Winston Pusey be forfeited to the Crown.
>
> 2. Notice of this Order to be given to the person affected by it."

The order was made on 9 December 2009 and is the subject of this appeal.

A brief background

[3] Mrs Scereta Mahabeer-Barrett was accosted by an officer from the Narcotics Division of the Jamaica Constabulary Force on 24 October 2007, at the Norman Manley International Airport, as she prepared to board a flight destined for Panama. She was questioned as to whether she was carrying a large sum of money and she replied that she had only US$12,000.00 to shop in Panama. However, after a search of her luggage and her person, she was found to have in her possession cash

amounting to $53,950.00 in United States currency. She then told the officer that the additional cash was the property of Winston Pusey (hereafter the appellant), also known to her as Juk, at whose request she was taking it to one Carl Brown, a resident of Panama, for the purchase of car parts. At first, she denied knowing Carl Brown but eventually admitted to knowing him as Bobby or Bun. The officer's suspicion was aroused as to whether the cash was recoverable property resulting in its seizure by virtue of section 75(1) of the Act. Mrs Mahabeer-Barrett was then taken to the Financial Investigations Division of the Ministry of Finance and the Public Service, which, under the Act, is synonymous with the respondent, Assets Recovery Agency and there she was questioned by Assistant Superintendent of Police Mr Dean-Roy Bernard who further detained the cash. As the respondent's authorized officer, Assistant Superintendent Bernard, thereafter made applications in the Resident Magistrate's Court for the Corporate Area for the continued detention of the cash, first on 27 October 2007 and then on 23 January 2008. On 24 April 2008, he successfully applied for the cash to be forfeited to the Crown under section 79 of the Act.

[4] On 20 May 2008 a notice of appeal against the forfeiture order was filed on behalf of Mrs Mahabeer-Barrett, as the person from whom the cash was seized and the appellant, as the person affected by the order, inasmuch as he claimed that the cash belonged to him. The complaint was that sufficient notice had not been given for the hearing of the forfeiture application which took place on 24 April 2008 and, on 30 April 2009, this court, agreeing that the notice was insufficient, remitted the

matter to the Resident Magistrate's Court for a new hearing. On 23 June 2009, the appellant filed an application seeking the release of the cash to him. The record indicates that this application came up for hearing, along with the respondent's application, on 24 June 2009 (a course permitted by section 82(2) of the Act).

The proceedings before the learned Resident Magistrate

[5] The hearing was conducted on the viva voce evidence of the assistant forensic examiner assigned to the respondent, Mr Cecil Harrison, and the appellant himself. Mr Harrison's evidence was to the effect that based on answers given by the appellant, in an interview at the respondent's offices and subsequent investigations he made to ascertain the truthfulness of those answers, he prepared a forensic profile report (which was admitted into evidence as exhibit one) and expressed his conclusion that the appellant had made misleading statements as to the source of the cash. After subsequently receiving an affidavit and documents from the appellant and carrying out extensive investigations, he came to the further conclusion that there was insufficient evidence to show that the cash seized was from a legitimate source. He had not been told by the appellant that, on the closure of an auto parts business that he operated, he had removed stock to his home. He later received that information but did not visit the appellant's home because of the length of time already spent on the investigations and his heavy workload. By then, so much time had passed since the closure of the business that in his view, it was unlikely that there would have been any stock remaining. When asked what his conclusion would be as a forensic investigator of many years experience concerning

a businessman who for over the space of some 20 years operated several businesses on a cash only basis, he said it would (i) raise concerns in the area of security in today's environment; (ii) pose accounting difficulties; and (iii) provide a basis for tax evasion.

[6] In his testimony, the appellant sought to show that he had several ongoing business ventures from which he generated an income, the inference being that he was thereby able to legitimately acquire the sum seized. He had told the investigators where he worked but had provided no documentary proof as they did not ask for proof (although in one instance he did provide a document in relation to employment with Jamaica Broilers but in cross-examination he said that must have been a mistake as he was not so employed). He had savings from his earnings from work he had done with several companies and from the proceeds of sale of several vehicles he owned and two pieces of land (including one partly owned by minors but the agreement was that title could not be passed until the minors attained the age of 18 years). He had not told the investigator about the sale of vehicles because "I did not have to. That is my business". He also did not tell the investigator that he had moved the auto parts to his home because "him didn't ask me". He further testified that he had bought United States currency from a cambio and persons who came to his business place. None of the funding to purchase his vehicles came from any criminal activity.

[7] The appellant said he did his business mostly on a cash basis and did not agree that a business which deals only in cash transactions would raise any security concerns and he did not agree that he only dealt with cash to avoid paying taxes. He gave cash to Mrs Mahabeer-Barrett because "I have been doing business from 1981 and have been using cash to do business since that time". He had given Mrs Mahabeer-Barrett a list for Carl Brown to buy auto parts, a stand-by Delco plant and clothes (but there was no indication that any such list was produced either to the investigator or to the police). In cross-examination the appellant admitted to being convicted for breaches of the Dangerous Drugs Act in the 1970s and to a conviction in 1997 (a date provided by him), concerning which he paid $2,000.00, but he could not recall any subsequent arrests. However, in re-examination, he said he did not quite remember whether he was arrested after 1970.

[8] At the end of the day, the respondent's case prevailed before the learned Resident Magistrate who, in her reasons for judgment, stated that suspicion was enough to ground seizure of the cash and that the circumstances which presented when the cash was seized gave rise to reasonable suspicion. Additionally, the learned magistrate found that under the Act, the respondent's investigations into the claims of the appellant to be involved in various business ventures need only be sufficient to show reasonable suspicion (clearly, as to the legitimacy of the claims). She accepted Mr Harrison's evidence which indicated that the appellant did not pay income tax and had unlawfully and illegally sold certain property for which he had failed to pay the relevant taxes and fees attendant upon land transactions. He had

also sold property partly owned by minors, without the sanction of the court. All of this was evidence which, the magistrate concluded, amounted to unlawful conduct. The learned magistrate further found that there was sufficient evidence, from the appellant himself, to show that the source of the seized money was activities involving unlawful conduct and that the case for forfeiture was made out.

The grounds of appeal

[9] Seven grounds of appeal were listed in the appellant's notice of appeal. They are as set out hereunder:

> "A. The Learned Magistrate erred in law and in fact in finding that it was not necessary to identify criminal activity for which cash [sic] seized
>
> B. The Learned Magistrate erred in law and in fact in finding that all that is necessary for forfeiture is suspicion
>
> C. The Learned Magistrate erred in law and in fact in finding that money not applied to the payment of one's taxes is money earned from criminal activity and as such, is recoverable property contemplated by the Act
>
> D. The Learned Magistrate erred in the exercise of her discretion in allowing the Respondent to rely on the Appellant's Affidavit setting out his primary evidence to which was appended documentary evidence of the Appellants [sic] source of income, yet disallowing the Appellant from relying on the said Affidavit.
>
> E. The learned Resident Magistrate erred in rejecting the Appellant's documented [sic] evidence of his earnings in excess of the sums seized in favour of non-specified allegations of the source of the

funds and the non-specified unlawful conduct to which the funds were intended.

F. The Magistrate erred in the exercise of her discretion by asking of the Appellant his willingness to pay the expenses of the Respondent's witness Dean Roy Bernard, whom the Respondent indicated was out of the jurisdiction when the Appellant applied for the evidence of that witness to be excluded under the Evidence Act.

G. In light of all the circumstances and the totality of the evidence presented, the Learned Magistrate erred in law and in the exercise of her discretion in making an order for forfeiture."

In her arguments before the court, however, Miss Beckford submitted that these grounds could all be subsumed under C. above and did not separately address the other grounds. It seems to me that there was much wisdom in that approach.

The arguments

[10] Miss Beckford contended that there was only one issue to be determined and that was whether in all the circumstances, unlawful conduct should be interpreted to include breaches of Jamaica's income tax laws. Counsel referred to the learned magistrate's findings at page 141 of the record where she concluded that non-payment of taxes is a criminal offence amounting to unlawful conduct and that, by virtue of section 84(1) of the Act, property obtained by unlawful conduct was recoverable. It was counsel's contention, however, that by the use of the words "unlawful conduct" the legislators did not intend to embrace every act with a criminal sanction. She submitted that the fundamental rule of interpretation of

statutes is based on the intention of the legislators so that one needs to look for that intention in the words used and in support of this submission she cited the case of **Canadian Wheat Board v Hallet & Carey Ltd and Anor and The Attorney General of Canada v Jeremiah Nolan and Anor** (1951) SCR 81.

[11] Counsel submitted that there is nothing in the Act which suggests any intention to include our tax laws in its reach and the Act should be interpreted to mean that a forfeiture order cannot be made unless it can be shown that the laws to which the learned magistrate referred are expressly incorporated in it. Counsel pointed to section 139 of the Act, which she contented referred to the Dangerous Drugs and the Money Laundering Acts and to section 140, which refers to other pieces of legislation, arguing that if Parliament had intended to include other Acts in its reach, it would have made that abundantly clear. No matter how reprehensible it would be for the appellant not to file income tax returns or to sell land to which minors were entitled, without the court's approval, these matters were not within the contemplation of Parliament when the Act was drafted and there was no evidence that the appellant was ever even brought before the court for tax evasion. Counsel asked the court to accept that the focus of the Act was on seizing money derived from unlawful acts and that the magistrate erred in her conclusion that unlawful conduct includes breaches of the tax laws. Further, she contended, the Income Tax Act specifically provides penalties for breaches of that Act and referred for instance to sections 90 – 104 of that Act.

[12] The learned magistrate also erroneously placed reliance on a conviction recorded against the appellant in 1978, Miss Beckford submitted, but, in accordance with section 2(1) of the Act, no reliance can be placed on criminal conduct occurring prior to the Act's appointed day, which was 30 May 2007. This meant, in effect, that there was no evidence before the learned magistrate showing any unlawful conduct on the part of the appellant. Rather, Miss Beckford argued, what the learned magistrate had before her, which she failed to adequately consider, was the appellant's financial profile showing evidence of his business concerns involving a chicken farm, an auto parts store, a clothing store, as well as payments to him by LC Bennett Haulage Contractors and payments from the sale of a tractor. There was no evidence of the appellant obtaining property by unlawful conduct, counsel contended and she therefore urged the court to make an order for the return of the seized cash to him.

[13] Mrs Robb-Cato submitted on behalf of the respondent that the Act was designed to deprive persons of any benefit being derived from their crime. Counsel argued that tax evasion is a crime under the laws of Jamaica and falls under the Act. She referred to the case of **The Queen on the application of the Director of Assets Recovery Agency and Others v Jeffrey David Green and Others** (hereafter referred to as **Green**) [2005] EWHC 3168 (ADMIN), as authority for the proposition that it is not necessary to look at the particular kind of unlawful conduct as long as it can be shown that the property was obtained by unlawful conduct of one kind or another. She referred particularly to paragraph 8 of the judgment

where it was pointed out that in a civil recovery action, the court is concerned with establishing unlawful conduct and not criminal guilt. Counsel argued that what the court must decide is whether any relevant unlawful conduct has taken place to the civil standard of proof and this was purely for the purpose of identifying property with a sufficient relationship to that unlawful conduct to render it recoverable. It was counsel's contention that what was in the contemplation of the legislators was sufficiently clear from the definition of "unlawful conduct" and, by virtue of section 56(3), it is for the court to decide whether on a balance of probabilities it is proved that any matters alleged to constitute unlawful conduct have occurred or whether any person intended to use any cash in unlawful conduct.

[14] It was Mrs Robb-Cato's further contention that our legislators contemplated any form of criminal act, once it is indicated what form of criminal act was involved, so that, by virtue of the definition given to "property obtained by unlawful conduct" under section 55(1)(b) of the Act, it was not necessary to show the particulars of the criminal conduct and not necessary to show that the property came from any particular criminal activity. What is required, counsel submitted, was a general reference to what the alleged criminal conduct might be and it does not have to be specifically related to the property in question. In this regard she referred to the case of **Carol Angus v United Kingdom Border Agency** [2011] EWHC 461 (Admin). Clearly, the intention of Parliament and the legislators was to deprive persons of the benefits of their unlawful activity, counsel submitted and, although the legislation has been described as draconian it also contains provisions in section

83 for compensation to be paid in the event that a forfeiture order is not made or is found to be unwarranted. Placing reliance on **Green** she submitted that there was a need for civil recovery to embrace all crimes without discrimination as it would be difficult at times to establish what property had been derived from which crime.

[15] In her written submissions, Mrs Robb-Cato pointed out that the money seized is recoverable property inasmuch as the appellant failed to substantiate a legitimate source of the seized cash. She contended that the money purportedly earned by the appellant has not amounted to the cash that was seized. There were inconsistencies in his statement to the police as to his source of the cash and, in this regard, she referred the court to the cases of **Bujar Muneka v Commissioners of Customs & Excise** [2005] EWHC 495 (Admin) and **Sandra Marie Cavallier v Commissioner of Customs** [2010] JMCA Civ 26. Counsel reviewed the evidence of the respondent's forensic investigator and submitted that his findings were not consistent with the claim of the appellant that the cash had a legitimate source.

[16] Counsel argued that the evidence was concerned not only with non-payment of taxes, as the learned magistrate was also entitled to have regard to the evidence before her of the appellant's previous criminal activities and the inconsistencies in the statements he made. Mrs Robb-Cato also argued that by virtue of section 55(3) of the Act, for the purposes of deciding whether or not property is recoverable under Part IV, it is immaterial that the legislation came into effect after the person's conviction. Neither was it material, by virtue of section 56(2), whether or not any

proceedings were brought for an offence in connection with the property, counsel argued. She further argued that, by virtue of section 6, the appellant is deemed to have a criminal lifestyle and therefore the property, that is, the cash, in all the circumstances, qualified as recoverable property.

[17] It was counsel's contention that, contrary to the appellant's submissions, the learned magistrate did consider the evidence of his financial affairs and she was entitled to draw adverse inferences based, for instance, on the weak explanation which the appellant gave about purchasing auto parts in order to be able to sell parts which were left over after the closure of his auto parts business. She had clearly accepted the evidence of the respondent's investigator that that business had long ceased and, based on his conclusion, was entitled to find that the probabilities did not favour the existence of any left-over parts at the time. It was her further contention that investigations had also revealed that the haulage business in which the appellant said he was engaged was not in fact his business but the business of a company to which he was sub-contracted. The learned magistrate correctly found the evidence as a whole to be sufficient for her to come to the conclusion, on a balance of probabilities, that the cash seized was recoverable property, Mrs Robb-Cato submitted and her decision ought to be affirmed.

[18] In her reply to Mrs Robb-Cato's submission as to the effect of section 55(3) of the Act, Miss Beckford's contention was that this provision is retrospective, seeking to deprive the subject of a right which existed before the coming into effect of the Act and, as such, it is repugnant to the Constitution. Additionally, counsel sought to

distinguish the present case from the cases of **Angus** and **Cavallier** cited by the respondent. It was her contention that in **Cavallier** there were certain findings of fact for which the appellant gave no explanation and on a balance of probabilities, the court rightly decided that the property was recoverable thereby making the seizure lawful. Counsel further submitted that on the facts of **Angus** the parties had agreed that the funds were from criminal activity. In the instant case, however, the appellant was able to assert that the funds were from lawful activities.

The relevant provisions of the Act and the issues resolved

[19] Under the scheme of the Act, cash is first seized by an authorized officer who has reasonable grounds for suspecting that the cash is recoverable property or intended by any person for use in unlawful conduct (section 75). If that authorized officer continues to have the reasonable suspicion required by section 75, the cash thereby seized may be detained for an initial period of 72 hours and under certain conditions that period may be extended by order of a Resident Magistrate's Court or by a Justice of the Peace (section 76). The magistrate or the Justice of the Peace is only authorized to grant the extension, by virtue of section 76(5), if satisfied 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."

[20] Section 78 provides for the seized cash to be returned by a Resident Magistrate's Court to the person from whom it was seized if the conditions in section 76 no longer obtain or by the authorized officer with the approval of the court or of a Justice of the Peace if its detention is no longer justified. This is followed by section 79 which provides for forfeiture of the cash and reads as follows:

"79.---(1) While cash is detained under section 76 the authorized 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

(3) ...

(4) ..."

[21] The terms "unlawful conduct" and "recoverable property" are dealt with in sections 55(1) and 84 of the Act, the former being defined as:

> "(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." (section 55(2)).

while the latter is described as property obtained through unlawful conduct (section 84(1). This clearly underpinned the learned magistrate's conclusion that "as tax evasion is an unlawful and illegal practice ... money which Mr Pusey has in his possession which can be traced back to his Auto Parts business as its source, as was given in his own evidence, can be seen as being obtained indirectly or in connection with unlawful conduct" and was therefore recoverable property.

[22] At the very outset of her reasons for judgment, the learned magistrate stated that the issue for her determination was concerned with "the cash that was obtained by unlawful conduct or intended to be used in unlawful conduct". The Act defines "property obtained through unlawful conduct" in section 55(1), as follows:

> "... 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."

Accordingly, the learned magistrate reasoned that the seized cash could be seen as being obtained indirectly or in connection with the unlawful conduct inherent in tax evasion.

[23] I am unable to agree with the submissions of Miss Beckford in which she seeks to restrict the scope of the criminal law referred to in section 55(1). The very wording of the subsection makes it abundantly clear, it seems to me, that there is no such restriction, referring as it does not only to the criminal law of Jamaica but also, in the alternative, to conduct unlawful under the criminal law of other jurisdictions where that conduct would also be unlawful under the criminal law of Jamaica. Further, the reference to the Drug Offences (Forfeiture of Proceeds) Act (and not the Dangerous Drugs Act as submitted) and the Money Laundering Act is not in any way to be interpreted as confining criminal activity to drug and money laundering offences in construing unlawful conduct. Section 6 of the Act and the second schedule thereto list several offences, not, in my view, as confining the scope of conduct unlawful under the criminal law of Jamaica, referred to in section

55(1)(a) but to identify offences the commission of which entitle the court to regard a defendant as having a criminal lifestyle. To my mind what the legislators sought to do in sections 139 and 140 was to streamline the law in this area, deleting provisions now covered by the Act and amending, in some cases other pieces of legislation as there was some degree of overlapping, with the objective of bringing them in line with the Act and there is no indication that this was intended to be to the exclusion of other Acts with a criminal sanction.

[24] It is generally agreed that the purpose of the Act is to separate persons from their ill-gotten gains resulting from their criminal activity and, accordingly, as stated in **Green**, there was a clear need for civil recovery to embrace all crimes without discrimination. If Parliament had intended to do otherwise and to limit the criminal law referred to in section 55(1) it would have made that intention clear by specific references to the targeted criminal offences especially when it was reaching out to criminal offences in other jurisdictions. It is my view that the learned magistrate cannot be faulted for taking into account the appellant's admitted non-compliance with Jamaican tax laws in arriving at her conclusion that the cash seized was subject to a forfeiture order. **Angus** seems to support a conclusion that cheating the public revenue by non-payment of taxes could be regarded as unlawful conduct. It should be noted too that it is of no significance that the appellant had not been taken before the court for tax evasion as section 56(2) specifically provides that in relation to civil recovery of the proceeds of unlawful conduct the powers conferred on the court in relation to any property (including cash) are exercisable whether or not

proceedings have been brought for an offence in connection with the property. And even if taken before the court it is of no moment whether or not a conviction resulted (see **Green**).

[25] In any event, as counsel for the respondent submitted, that was not all that the learned magistrate had for her consideration. It does appear to me that she was entitled to have regard to the circumstances attendant upon the seizure of the cash, namely, (i) the lies that were told by Mrs Mahabeer-Barrett in seeking to hide the cash, first by stating that she had only US$12,000.00 for shopping (an account which the appellant at no time confirmed or sought to explain as he claimed all of the cash), (ii) initially denying knowledge of the person who was to receive the cash in Panama, (iii) the misrepresentations in the information given to the investigators by the appellant to show the source of the funds and (iv) his past history of drug related criminal activities which in my view were clearly relevant for the purposes of determining whether property was recoverable (see Section 55(3)). The authorities would seem to indicate that reliance may properly be placed on those factors to support an order for forfeiture of cash.

[26] The learned Resident Magistrate found support for her conclusions in the cases of **Nevin v Customs and Excise Commissioners** (unreported), delivered on 3 November 1995; **R v Dover and East Kent Magistrate Court Ex p Gore** (unreported) delivered in May 1996; and **Muneka**. **Nevin** and **Muneka** were referred to in **Green**, the former being a case where Nevin was stopped en route to Amsterdam with English and Scottish banknotes in excess of £90,000.00 in his

possession and gave unsatisfactory explanations for possession of the cash, while in **Muneka**, the amount of cash in his possession was in excess of £22,000.00 and different explanations were given to the customs officers who interviewed him and to the district court judge before whom he appeared. The district judge did not believe his explanation. The report indicated that the other evidence was limited, but it included an explanation from a customs and excise official "that there was no proper explanation in supporting documentation as to the source of the cash or as to why the banking system had not been relied upon".

[27] When the matter went before Moses J, as he then was, on appeal from the district judge, he reiterated the principle that facts may be proved from inferences. This had been illustrated, his Lordship said, by the cases relied on by counsel for the respondent, such as **Bassik and Osborne v Commissioners of Customs and Excise** [1993] 161 J P 377 where Bassik was stopped by a customs officer when he was passing through Gatwick Airport with a one way ticket to Amsterdam and over £21,000.00 in his possession. The money had been supplied by Osborne and when they were asked for their explanations, their demeanour was evasive and the magistrate did not believe them. The court in **Green** also referred to **Butt v Her Majesty's Customs & Excise** (2001) 166 JP 173 where Butt's nephew was stopped en route to Amsterdam with a one way ticket and $695,000.00 in his possession wrapped up in brown paper packages. The court in these cases had relied on the inferences drawn from lies and evasive conduct of the appellants but

Moses J in his judgment in **Muneka** made it clear that there was no reverse burden involved, when he said:

> "... it is plain that there was no reverse burden of proof properly so-called; all that happened on the facts was that the facts were so startling that they called for an explanation. No truthful explanation was given. That does not amount to a shift in any burden of proof."

Therefore, in the instant case, when the respondent submitted that the appellant failed to prove that the source of the funds was legitimate, this was not an indication that there was any burden of proof on the appellant but that the circumstances called for an explanation and no truthful explanation had been given.

[28] Commenting on the cases cited by counsel for the Director of Assets Recovery in **Green** (namely, **Bassik**, **Nevin**, **Butt** and **Muneka**) Sullivan J said at paragraphs 32 and 33:

> "32 ... The decisions are no more than a reflection of the fact that in today's 'cashless society', the ordinary law abiding citizen does not normally have any need to keep large numbers of banknotes in his possession. It will almost always be safer (bearing in mind the risk of loss through accident or crime), more profitable (bearing in mind the opportunity to earn interest) and more convenient (bearing in mind the many other ways of paying for lawful goods and services) not to be in possession of a large sum of money in the form of banknotes...
>
> 33. Just as the law-abiding citizen normally has no need to keep large amounts of banknotes in his possession, so the criminal will find property in that particular form convenient as an untraceable means of funding crime. ... The four decisions do no more than recognize 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."

[29] In paragraph 34 Sullivan J went on to say that the circumstances in which the cash was found may well be sufficient to require an explanation because, for example, without an explanation, "the large amount of cash is being unnecessarily exposed to the risks necessarily inherent in transit and/or is being transported to a particular destination and/or is being transported in a particular manner". He accepted the argument that although the burden of proof on a balance of probabilities rested throughout on the Director of the Assets Recovery Agency, facts may be proved by inference and the absence of (or an untrue) explanation where one is called for, may be sufficient to discharge that burden.

[30] In cross-examination the appellant indicated a preference for cash in the conduct of his business operations for various reasons, none of which would allay suspicion, and when to his knowledge, investigations were being carried out to determine if he had a legitimate basis for the funds, his answers were decidedly evasive. For instance, in response to questions about whether he thought it important to inform the police that his money came from the sale of land and vehicles (as he was maintaining before the court), he said, "I did not have to. That is my business." In another instance he said "But they did not ask," and he thought

it more important to speak to his lawyer on the matter rather than to reveal the source of his funds to the respondent's investigator.

[31] The decision of this court in **Cavallier** is of much assistance to an analysis of the circumstances of the instant case. In that case the court approved and applied the principles to be distilled from **Green**, **Nevin** and **Muneka**, relying particularly on **Muneka** as **Cavallier** was regarded as being on all fours with it. Miss Cavallier had been found with just over US$21,000.00 on her arrival into the island on a flight from Florida on 22 February 2009. The cash was to a large extent secreted in the pockets of several items of clothing in her suitcase and had not been declared on the relevant customs form. She lied to the customs officer as to the amount of cash she was carrying and, in an interview after the cash was found, she gave a statement to the effect that she was not aware that it was in her suitcase. The circumstances of the discovery of the cash and her inconsistent attempt to explain her possession of it, failed to satisfy the customs officer who formed the view that the cash was unlawfully obtained or was intended for some unlawful purpose and seized it pursuant to section 75 of the Act.

[32] Miss Cavallier subsequently produced a letter from a Florida based auto sales company indicating that the cash had been sent to Jamaica to cover the duties on three vehicles it had imported into the island. The letter indicated that Miss Cavallier was to take the money to Jamaica and exchange it for a cheque to pay the duties. This was inconsistent with the assertions of Miss Cavallier to account for the cash being in her possession and, on a consideration of all the circumstances attendant

upon the seizure of the cash, it was ordered to be forfeited to the Crown. An order or forfeiture of the cash was subsequently granted in the Resident Magistrate's Court for the Corporate Area and Miss Cavallier appealed the order essentially on the ground that there was no evidence of any criminal conduct associated with the cash so as to bring it within the ambit of the definition of recoverable property under the Act.

[33] Counsel for Miss Cavallier had contended that **Green** was authority for the proposition 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 and that this requirement had not been met. The respondent, also placing reliance on **Green**, had argued however that Sullivan J had said that the mere fact of having a large sum of cash in the form of banknotes in one's possession in certain circumstances (for example at an airport) may well provide reasonable grounds for suspicion and demand an answer. Reliance was also placed on **Muneka**.

[34] In its analysis of the evidence, the court referred to **The Director of the Assets Recovery Agency v Szepietowski & Ors** [2007] EWCA Civ 766 (delivered on 24 July 2007) in which Waller LJ had this to say in the context of the question of untruthful statements made by the respondent to the application:

> "...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."

The court then concluded that the learned Resident Magistrate was entitled to find that the money in Miss Cavallier's possession should be forfeited as being recoverable property on two main bases, namely:

1. the circumstances in which the money was found, and
2. the varying and untrue statements made by Miss Cavallier and the person claiming ownership of the cash in attempting to explain the presence of the cash in those circumstances.

[35] I am of the view that the factors which informed the learned Resident Magistrate's decision in the instant case are akin to those highlighted in **Cavallier**. Chief among them would have been the following:

1. the circumstances in which the cash was found (concealed in clothing in Mrs Mahabeer-Barrett's suitcase);

   In this regard I agree with the observations of Sullivan J at paragraph [28] above and add that in today's society with the uncertainties inherent in international air travel and the chance of luggage going astray, that one should take the risk of packing a large sum of money in one's luggage raises definite red flags about

the legality of those funds which are being hidden at such risk and the explanation given for that course of conduct must be closely scrutinized.

2. the failure to declare the cash and the lies told as to the quantum;

3. the initial untruth about knowledge of the person in Panama to whom she was to deliver the cash;

4. the various reasons given for its purpose - to purchase car parts; to purchase a Delco plant; to purchase clothing for a store, which investigations revealed was not operated by the appellant; and to purchase gansey and shoes. The list of items to be purchased which the appellant said he gave to Mrs Mahabeer-Barrett for Carl Brown was never produced although it should have been readily available;

5. Mrs Mahabeer-Barrett's claim that US$12,000.00 belonged to her for shopping in Panama yet the entire sum was claimed by the appellant and no explanation was provided for this discrepancy;

6. the appellant's evidence of his preference for cash transactions which was a cause for suspicion, he being a person with so many alleged business interests; and

7. his past criminal drug activities which are relevant and may even give rise to an inference as to the intended use of the cash.

In my opinion, these factors provided a sufficient basis for the learned Resident Magistrate's forfeiture order.

[36] The other application which the magistrate had for her consideration was the appellant's application for the return of the cash. That application was made under section 82(1) which provides:

> "82.–(1) 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.
>
> (2) An application under subsection (1) may be made in the course of proceedings under section 76 or 79 or at any other time.
>
> (3) On an application under subsection (1) the Court may act in accordance with subsection (4) or (5).
>
> (4) ...
>
> (5) If the applicant is not the person from whom the cash to which the application relates was seized and ---
>
> (a) it appears to the Court that the cash belongs to the applicant;
>
> (b) the court is satisfied that the conditions in section 76 for the detention of the cash are no longer met or, if an application has been made under section 79, the Court decides not to make an order under that section in relation to that cash; and

(c) no objection to the making of an order under this subsection has been made by the person from whom that cash was seized,

The Court may order the cash to which the application relates to be released to the applicant or the person from whom it was seized."

The learned magistrate did not specifically state what the outcome of this application was, but its refusal was implicit in the order she made.

Conclusion

[37] In the final analysis, after giving due consideration to all the foregoing factors I would dismiss this appeal and affirm the learned Resident Magistrate's order made on 9 December 2009 that the cash in the amount of $53,950.00 in the currency of the United States of America, be forfeited to the Crown.

BROOKS JA

[38] I have read, in draft, the judgment of McIntosh JA and agree with her reasons and conclusion. I have nothing further to add.

HARRIS JA

ORDER

Appeal dismissed. Order of the learned Resident Magistrate affirmed. Costs of $15,000.00 to the respondent.