[2023] JMCA Civ 36

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P**
**THE HON MISS JUSTICE EDWARDS JA**
**THE HON MRS JUSTICE DUNBAR-GREEN JA**

**PARISH COURT APPEAL NO 18/2017**

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| **BETWEEN** | **DORRETTE ANGELLA REYNOLDS** | **APPELLANT** |
| **AND** | **CONSTABLE CAROL KERRIDGE** | **1ST RESPONDENT** |
| **AND** | **ASSETS RECOVERY AGENCY** | **2ND RESPONDENT** |

**Ian Wilkinson QC and Lenroy Stewart instructed by Miss Ann Marie Jordon for the appellant**

**Mrs Alethia Whyte-Tomlinson for the respondents**

**19, 20 May 2022 and 29 June 2023**

**Proceeds of Crime – Civil recovery proceedings – separate applications for forfeiture of seized cash and for release of cash – whether seized cash is recoverable property –whether cash was obtained through unlawful conduct or was intended for unlawful purpose – standard of proof - whether evidence of a specific unlawful conduct or of a criminal conviction must be shown - whether inference can be drawn that cash is recoverable property or is intended for unlawful purpose from the circumstances surrounding the seizure including lies told - Proceeds of Crime Act – sections 55, 56, 75, 76, 79, 84, 101**

**BROOKS P**

[1] I have read, in draft, the reasons of Edwards JA. I agree and would add nothing further.

**EDWARDS JA**

**Introduction**

[2] This appeal has its genesis in an order for forfeiture of cash that was made, in 2016, by a learned Senior Resident Magistrate for the Corporate Area. Since then, as a result of a change in the law, Resident Magistrates' Courts are now known as Parish Courts, and Resident Magistrates, as Judges of the Parish Court. As this matter was heard before the changes were made, the previous terminology will be used in this judgment.

[3] On 10 June 2011, Mrs Dorrette Angela Reynolds ('the appellant'), together with her husband and their friend Dr Terrence Nunes, filed a joint application, which was supported by affidavits from all three, before the Resident Magistrate's Court for the Corporate Area, seeking orders that cash seized by the police, in the amount of US$92,657.00 and TT$11.00, plus interest thereon, be released. An application for the continued detention of the seized cash was made on 1 July 2011, supported by the affidavit of Constable Carol Kerridge (who, at the time of the incident was at the rank of Constable, but had been promoted to the rank of Detective Sergeant by the time of the hearing of the applications before the learned Senior Resident Magistrate, and who will hereinafter be referred to as 'Detective Sergeant Kerridge'). On 10 April 2012, an application was made, by way of notice, supported by the affidavit of Detective Sergeant Kerridge, for an order that the said cash, be forfeited to the Crown.

[4] On 6 December 2016, after a hearing which lasted almost four and a half years, the learned Senior Resident Magistrate made the following orders:

> "1. The Application for Release of the Seized Cash from Dorrette Reynolds, Wesley Reynolds and Dr. Terrence Nunes in the amount of **US$92,657.00** and **TT$11.00** plus interest thereon is denied.
>
> 2. The Seized Cash in the amount of**US$92,657.00** and **TT$11.00** plus interest thereon is recoverable property and is forfeited to the Crown.
>
> 3. Costs to the Applicant to be taxed if not agreed."

[5] The appellant, who was aggrieved by this decision, filed a notice and grounds of appeal on 22 December 2016. An amended notice and grounds of appeal were filed on 28 June 2019, and with the permission of this court, one ground was withdrawn, and two additional grounds were added.

[6] On 20 May 2022, having heard arguments, we made the following orders:

1) The appeal is dismissed.

2) The judgment and orders of the then learned Senior Resident Magistrate are affirmed.

3) Costs of the appeal to the respondent to be agreed or taxed.

[7] At the time of making these orders we promised to put our reasons in writing and we do so now.

**Background**

[8] The background facts, in broad outline, are that, on 8 May 2011, the appellant was at the Norman Manley International Airport ('NMIA') waiting to board an outgoing flight to Trinidad and Tobago. Whilst in the checking queue, she was approached by Corporal Byron McKenzie, a police officer attached to the Transnational Crime and Narcotics Division ('TCND'), who had been conducting random searches of passengers at the NMIA. Corporal McKenzie questioned the appellant as to her intended destination and asked to see her passport. He then advised her that he needed to search her luggage, and instructed her to take them to the search desk. She complied. Before her luggage was searched, Corporal McKenzie further questioned the appellant as to the amount of cash in her possession, whether the suitcases she was carrying belonged to her, whether she had packed them herself and whether she was aware of all their contents. She said the suitcases were borrowed but admitted to packing them herself and that she was aware of all their contents. She was asked if she had anything to declare, to which she replied that "the only thing of concern" was US$8,000.00 that she was travelling with.

When asked where the cash was, she replied that it was in her handbag. She was asked the purpose of the cash to which she replied that she was going to use it to buy a deep freeze in Trinidad. When asked about the source of the cash she said she had mortgaged her house to obtain a loan.

[9] Corporal McKenzie then asked the appellant to open the suitcases, which she did. Corporal McKenzie searched the suitcases, and in the larger suitcase, he observed two concealed compartments with unusual bulges and no zipper. The appellant denied knowing what was in the sealed compartments. Corporal McKenzie cut one of the compartments open with a utility knife and found six parcels wrapped in transparent plastic, each of which contained United States currency. He opened one of the parcels and showed it to the appellant. When asked if she knew how they got there, the appellant said "it's not my money". Corporal McKenzie placed the parcels back into the suitcase and took the appellant and the suitcase to the TCND section of the NMIA, where the appellant was introduced to a female constable. The parcels were removed from the two concealed compartments of the suitcase, in the appellant's presence. A total of 14 separate parcels wrapped in transparent plastic bags and containing United States currency were found and removed from the suitcase. When the cash was counted, it amounted to US$80,157.00.

[10] A search of the appellant's handbag revealed cash totalling TT$11.00 and US$12,500.00, separately parcelled in a brown envelope and in a purse. In total, US$92,657.00 was found in the possession of the appellant, along with the TT$11.00. The appellant denied that the US$80,157.00 was hers and repeated that she had borrowed the suitcase from a close friend. She said all the money in the handbag belonged to her but gave no explanation for the additional amounts found in her purse, other than to say that she may have miscounted.

[11] The Constabulary Financial Unit ('CFU') was contacted and Detective Sergeant Kerridge, along with Corporal Radcliffe Gordon, from that unit, attended the TCND section of the NMIA. They, too, spoke with the appellant, who repeated to them that she was

only aware of US$8,000.00 she had in her possession for her travelling expenses to Trinidad and Tobago. She also told them that the suitcase belonged to Dr Terrence Nunes and that he was not aware that she had taken it. The appellant, the cash, and the suitcase were taken to the TCND headquarters, where, in the presence of the appellant, the cash was again counted and placed in an evidence bag, which was then sealed and labelled. The appellant was also informed that the cash would be detained under the Proceeds of Crime Act 2007 ('POCA (Jamaica)'), because of the circumstances under which the money had been found, and her lack of knowledge of the presence of a substantial portion of the cash. A receipt for the cash was given to her.

[12] That same day, Corporal Gordon and Detective Sergeant Kerridge went to the offices of Dr Nunes, conducted a search of the premises, and interviewed him. He gave them a written statement. A search was also conducted of the home of the appellant. Nothing untoward was found at either premises. Corporal Gordon applied for and received the first order for the continued detention of the cash on 10 May 2011, and the notice to persons affected by that order was duly served.

[13] At the hearing, the appellant raised a defence to the application for forfeiture, that the cash in her handbag was hers, a substantial portion of which was a gift to her by her husband and the rest was purchased by her. It was also asserted that the sum found in the suitcase had been converted from the proceeds of a loan to Dr Nunes, from the bank.

**The statements and affidavits filed in the Resident Magistrate's Court**

[14] In an attempt to account for the cash, found in her possession, the appellant gave a written statement in the presence of her attorney. In that statement, which was exhibit 3 at the hearing before the learned Senior Resident Magistrate, the appellant said that she lived with her husband and children, and that Dr Nunes, who is a medical doctor, also stayed with them. Her husband was a businessman, who had a small share in a supermarket business and a fishing boat. She said that the money that was seized belonged to Dr Nunes and her husband, and that their house had been put up as collateral for a loan from the RBTT bank. She said further, that when she left home (for the airport)

on 8 May 2011, she had US$12,500.00 in an envelope inside her handbag. She bought United States currency from "anybody", and a Cambio, and had been doing so for four months. She said she was carrying the money to Trinidad to buy anything she saw, as well as for vacation and to buy a deep freeze for her catering business.

[15] She also said that she had taken the suitcases from the backroom where Anthony (a worker who also lived with them on their premises) stayed. The small suitcase, she said, belonged to her father, and the large one to Dr Nunes, who did not know she was taking it. She packed them herself. She said her suitcases were searched by a female who "buck up on" the money in the big suitcase. She said she did not know it was there, and apart from the US$12,500.00, she was not carrying any other cash to Trinidad and Tobago.

[16] She stated that she was planning to stay at a guest house, any guest house, and go shopping the next day in Port of Spain. She was planning to stay a week. She had been to Trinidad on at least three previous occasions, but could not recall where she had stayed. She knew nothing about Dr Nunes' medical practice, and had never done any business for him. She did not plan to do business for him in Trinidad. Apart from the US$12,500.00, her husband did not give her any other money. She had not been asked to buy anything special in Trinidad and was not going to meet anyone in Trinidad. She would have known if her family was planning to leave Jamaica, but she knew of no such plans.

[17] Dr Nunes, who lived at the same premises as the appellant and her husband, and who was a lifelong friend of her husband, gave a statement in an attempt to account for the cash found in the suitcase. In his statement, which was exhibit 4 at the hearing before the learned Senior Resident Magistrate, he said that he had known Mr Reynolds for about 35 years, lived at the same house with him, and knew him to be a fisherman with boats which were usually at Old Harbour Bay. Mr Reynolds also collected ackee for the canning industry and may have had a connection to a wholesale. He (Dr Nunes) did not lend the appellant any suitcase, but shared the suitcase with Mr Reynolds. Three years prior, he

had borrowed money from RBTT to do construction at the Reynolds' house and to open a medical practice. He said Mr Reynolds was the one who kept the money for him, but Mr Reynolds' wife "suddenly" got "caught" with it. That portion of the money, which he said was about US$98,000.00, was to buy medical equipment. He was supposed to meet Mr and Mrs Reynolds in Trinidad "on Wednesday". The money was to buy medical equipment from VH Marketing Limited at 58 Mission Road, Freeport, Trinidad. He had found that company on the internet. He had not spoken to anyone at that company and had never done business there. He intended to buy diagnostic equipment, surgical equipment, an operating machine and suction machines, which were expected to cost about US$54,000.00. The balance was to buy household items for the Reynolds' house.

[18] The money, he said, had been accumulated over the last couple of years, using the proceeds of the loan to buy the foreign currency. He had kept the money in a vault in his room and handed it to Mr Reynolds on 7 May 2011. He never used the formal banking system because of the "government and tax thing". The money, he said, was packaged in rubber bands, US$90,000.00 in one pile, and US$8,000.00 in another pile.

[19] The application for the release of cash, which was filed 10 June 2011, was supported by affidavits from the appellant, Wesley Reynolds, Terrence Nunes and Mashinene Reynolds, all filed 10 June 2011. A supplemental affidavit sworn to by Wesley Reynolds was also filed 10 April 2012, in support of the application. In the affidavits, the affiants sought to identify the source of the cash as lawful and to explain the appellant's possession of it.

[20] In her affidavit, the appellant repeated much of what she had said in her statement. She deposed that she did not know the suitcase had a compartment in which her husband had placed the money that he was saving. She had US$12,500.00 in her handbag which she was taking to Trinidad to buy equipment for a business she had intended to open. This sum was a gift to her from her husband. She was subsequently informed that the money found in the suitcase belonged to her husband who had hidden

it there without her knowledge. He did not know she was taking the suitcase. Dr Nunes also did not know she was taking the suitcase.

[21] She said that they had mortgaged their house to RBTT for $16,000,000.00 as security for a loan to Dr Nunes in 2008. Although the loan was in the name of Dr Nunes, it belonged to her husband and was for equipment for a medical business that her husband and Dr Nunes had decided to go into, as well as for her husband's heart surgery. The loan was being repaid by her husband from a supermarket business he partially owned, and by Dr Nunes from his medical practice. The United States currency, she said, was cash bought over a period of several years from several places, including a Cambio, and was also earned when United States currency was spent at the supermarket over the years and was saved by her husband. She also deposed that the bulk of the loan, except for a small portion, was used to buy United States currency over the two years since the loan was disbursed.

[22] In his affidavit, Mr Reynolds claimed the cash found in the suitcase as his, and said that the appellant had not been aware that he had placed it in the secret compartment. He said it was to finance a business between himself and Dr Nunes, who was his foster brother, and also to pay for his heart surgery, due to be done in the United States. He exhibited a medical report. He also said that the US$12,500.00 belonged to his wife.

[23] Part of the cash, he said, was bought using the proceeds of the loan obtained from RBTT in 2008, in the sum of $16,700,000.00, and some came from earnings over several years from customers from the supermarket he operated. He also received United States currency from exchanging Jamaican currency with persons at his supermarket, as well as from Dr Nunes who gave him United States currency, having received same from patients at his practice.

[24] Part of the $16,700,000.00 from RBTT, he deposed, was used to pay off other loans and the balance of approximately $10,765,000.00, was used to purchase United States currency over the years. The proceeds of the loan, he said, was handed over to

him, although the loan was taken out by Dr Nunes. He further deposed that the cash was placed in the suitcase for safekeeping without his wife's knowledge, and he had not been at home when she took the suitcase. The US$12,500.00 belonged to his wife as some of it was bought by her, and the rest he gave to her. He pointed out that the seized cash was said to convert to $7,968,612.00, and that the $10,765,00.00 had been left over from the loan for home improvement. Of that sum, $2,000,000.00, he deposed, was actually used for home improvement. He claimed that he needed the cash to be released as part of it was required for his urgently needed operation.

[25] In his supplemental affidavit, Mr Reynolds indicated that he was in urgent need of life-saving heart surgery which was to cost US$43,000.00. He also said that Dr Nunes had defaulted on the loan, and as at 28 March 2012, the loan debt was $19,774,905.84.

[26] Dr Nunes, in his affidavit, confirmed that Mr Reynolds was his foster brother, and that they had grown up and lived together. He deposed that he and Mr Reynolds had agreed to go into business for several years, so whatever United States currency he earned he would give it to Mr Reynolds to control over those years. Mr Reynolds, he deposed, obtained United States currency from a supermarket he operated and bought United States currency from a Cambio and other persons, with a view to buying medical equipment in the United States for their business venture, as well as to pay for Mr Reynolds' heart surgery. He also earned currency from some of his patients which he gave to Mr Reynolds.

[27] It was agreed between him and Mr Reynolds that he would take out a loan from RBTT bank to pay off certain small mortgages on Mr Reynold's property, to buy medical equipment in the United States and to pay for his heart surgery. After the loan was received, and the small mortgages were paid off, the balance of $10,765,000.00, with his approval, was used by Mr Reynolds to buy United States currency. He had given the proceeds of the loan to Mr Reynolds to procure United States currency for himself, to buy equipment for them and to pay for Mr Reynolds' heart surgery in the future. He said the

money belonged to Mr Reynolds. He also deposed that the appellant had taken his suitcase without his knowledge.

[28] In the affidavit of Mashinene Reynolds, the adult son of the appellant and her husband, he claimed that he had been purchasing United States currency for his father from 2008. Attached to the affidavit was a print out from Prime Trust Cambio which showed that Mashinene Reynolds purchased US$50.00 in 2008, US$6,432.00 in 2010, and a further US$215.00 and US$4,053.00, also in 2010. He also purchased US$4,124.00 in 2011. All totalled US$14,874.00.

[29] There was also, in evidence, a receipt showing that the appellant had purchased US$5,200.00 in 2010 from the same Prime Trust Cambio.

[30] By way of a notice of application, filed 10 April 2012, which was supported by the affidavit of Detective Sergeant Kerridge, the second respondent sought an order for the forfeiture of the seized cash. In that affidavit, Detective Sergeant Kerridge particularized the claim for forfeiture and the circumstances under which the cash was seized, and sought to justify why an order for forfeiture should be granted. He indicated that his investigations revealed that there had, indeed, been a loan from RBTT and that Mr Reynolds' son had paid a portion of the loan. The son, he further indicated, was unable to account for the source of the funds used to pay off that portion of the loan. The rest of the loan was being paid by Dr Nunes, whose income, Detective Sergeant Kerridge deposed, was not sufficient to repay the balance on the loan. He also noted that inconsistent reasons for the loan had been given.

[31] Detective Sergeant Kerridge further deposed that he strongly believed that the cash was recoverable property because of the many irregularities in the stories given. He pointed to the fact that the appellant had at first said she was carrying only US$8,000.00 but the search revealed US$12,500.00; that the appellant had claimed that the purpose of her trip was to purchase a freezer and do shopping; and, that the appellant said she knew nothing about Dr Nunes' medical practice but Dr Nunes claimed that the money

was to be used to purchase medical equipment. Detective Sergeant Kerridge also asserted that the appellant had hidden the money in a compartment and denied having that large sum despite the fact that she packed the suitcase herself; the cash was packed in a manner to deceive; the appellant stated that she was not planning to meet anyone in Trinidad but Dr Nunes stated he was planning to meet her there. Detective Sergeant Kerridge also pointed to the fact that Dr Nunes had stated that the plan was to buy medical equipment from a company, whose address he got from the internet, but never spoke to anyone at the company, had never done business at the company, had no list of the equipment he had planned to buy, and had no proforma invoice. Detective Sergeant Kerridge also deposed that he was given another explanation for the cash, which was that it was for heart surgery for Mr Reynolds.

[32] The various explanations for the cash were seen as irregularities and inconsistencies as to the source of the cash, and Detective Sergeant Kerridge proffered the view that there were reasonable grounds for suspecting that the cash was recoverable property, and that forfeiture was justified.

**The proceedings in the Resident's Magistrate's Court**

[33] At the hearing of the applications for forfeiture and for the release of the cash, the learned Senior Resident Magistrate heard *viva voce* evidence on oath from Corporal McKenzie, Corporal Gordon and Detective Sergeant Kerridge. The appellant stated her defence to the application for forfeiture but chose not to give evidence or call any witnesses. None of the other affiants gave evidence. The learned Senior Resident Magistrate also had before her the statements and documents which were tendered into evidence.

[34] Corporal McKenzie, from the TCND, testified that Mrs Reynolds only declared US$8,000.00 and admitted to borrowing the suitcase from a friend, which she packed herself. She told him the US$8,000.00 came from a mortgage loan. He said that when he opened the suitcase he saw bulges and two sealed compartments within the suitcase. The bulges were obvious to the naked eye. The compartments had no zipper and he

used a knife to cut them open. The cash he found in the suitcase was shown to Mrs Reynolds. She said it was not her money. A total of 14 parcelled packages were removed from the two concealed compartments in the suitcase.

[35] He took the view that the suitcase had been tampered with, as the stitches to the concealed compartments were not factory made. and were not consistent. There were no other entry points to the compartments. No explanation was given by Mrs Reynolds for the difference between US$8,000.00 she admitted to carrying and the US$12,500.00 which he actually found in her handbag. When asked why she had not declared the additional US$4,500.00, Mrs Reynolds told him that maybe she had miscounted. He was cross-examined by the attorney appearing on behalf of the appellant.

[36] The second witness was Corporal Gordon, who was attached to the CFU, and whose duties included financial investigations involving POCA. He gave evidence that he had accompanied Detective Sergeant Kerridge to the office of the TCND at the NMIA and spoke with the appellant. He informed her of her right to counsel and that she need not say anything until she had legal representation. She nonetheless explained to him that she was not aware of all the money and only knew of the US$8000.00 which was to pay her travelling expenses and for household items. She also told him the suitcase belonged to Terrence Nunes who did not know she had taken it. He took the appellant to the TCND office on Spanish Town Road, where he told her the cash would be detained. He made an application to detain the cash. He went to Dr Nunes' office with Detective Sergeant Kerridge and took a statement from Dr Nunes. He made an application for the continued detention of the cash on the basis of:

(a) the large amount of cash;

(b) the manner of concealment of the cash;

(c) the fact that Mrs Reynolds said she was not aware the money was in the suitcase;

(d) the fact that Dr Nunes gave conflicting accounts regarding the cash;

(e) the fact that Dr Nunes was sweating profusely during the interview;

(f) the fact that Dr Nunes' account about the intended use of the money was strange as he had made no order from and contacted no one at the intended supplier of the medical equipment; and

(g) the fact that Dr Nunes, who was an educated man, did not use the formal banking system for such a large amount of cash.

[37] Detective Sergeant Kerridge testified that he went to the NMIA on 8 May 2011, with Corporal Gordon, and met and spoke with Corporal McKenzie. At the TCND, he was shown the appellant, the money, which was on the desk, and two suitcases. He testified that the appellant, at the time, could only account for US$8,000.00 of the total money found. He counted all the money. It amounted to US$92,657.00 and TT$11.00.

[38] The learned Senior Resident Magistrate found that the evidence of the circumstances surrounding the cash led to an irresistible inference that the cash was unlawfully obtained or was intended to be used in unlawful conduct. She held that the cash was recoverable property, and ordered that it be forfeited to the Crown. She refused the application for the release of the cash.

## Grounds of appeal

[39] The grounds of appeal were as follows:

> "a. The learned [Senior Resident Magistrate] erred in law and in fact in finding that the seized cash in the amount of US$92,657.00 and TT$11.00 plus interest thereon was recoverable property in law

and was to be forfeited to the Crown because there was no evidence to demonstrate that criminal conduct had occurred from the commission of a substantive offence and no evidence to show that the appellant had been convicted [of] any offence, further there was no evidence to show that the source of the seized money was activities involving unlawful conduct or that the money was intended for use in unlawful activities.

b. The learned [Senior Resident Magistrate] erred in law in misunderstanding the evidence that was adduced by the respondent and/or failing to realize that the evidence adduced by the respondent was incapable of leading to the inference that the money seized from the appellant was from unlawful conduct or was to be used for unlawful conduct.

c. The learned [Senior Resident Magistrate] erred in finding that the appellant had lied, this error in finding that the appellant lied, led to the finding that the money seized from the appellant was recoverable property.

d. The learned [Senior Resident Magistrate] erred in law in permitting the respondent to adduce evidence as to whether the suitcase in which money was found was tampered with, particularly as there was no evidence that Corporal Byron McKenzie had any expertise in suitcases to enable him to give any relevant evidence about whether the suitcase was tampered with, further, the evidence which he gave about the said 'tampering' amounted to nothing more than his belief and was therefore, irrelevant, inadmissible and should not have been relied upon by the learned parish Judge to draw any adverse inference against the appellant.

e. The learned [Senior Resident Magistrate] erred in law by failing to differentiate between the money seized from the suitcase and the money seized from the appellant's handbag in coming to her conclusion that all the money seized from the appellant was recoverable property.

f. The learned [Senior Resident Magistrate] erred in law in finding that the claim to forfeit the seized cash was validly commenced by notice of application and affidavit and that if it was not validly commenced the participation of the appellant in the trial/hearing cured any defect."

[40] At the hearing of the appeal, ground f was withdrawn, not surprisingly, largely due to the decision made by the Privy Council in the case of **Powell v Spence** [2021] UKPC

5, which held that an application for forfeiture of seized cash which had been commenced by way of notice rather than by plaint was, nevertheless, validly commenced.

**The issues**

[41] The issues and sub-issues raised by these grounds are:

1) whether the learned Senior Resident Magistrate erred in finding that the cash seized was recoverable property or was intended for an unlawful purpose, and therefore, was subject to forfeiture (grounds a to d):

    i. whether it was necessary for the learned Senior Resident Magistrate to first find that the appellant had committed or had been convicted of any offence or that the source of the seized cash was from specific unlawful conduct or was intended for use in specific unlawful conduct;

    ii. whether the evidence led in the Resident Magistrate's court was capable of leading to the inference that the cash seized was the proceeds of unlawful conduct or was intended for unlawful conduct;

    iii. whether the learned Senior Resident Magistrate erred in finding that the appellant had lied, and as a result, erroneously found that the seized cash was recoverable property; and

    iv. whether the learned Senior Resident Magistrate erred in allowing Corporal McKenzie to give opinion evidence on whether the suitcase was tampered with and, as a result, relied on irrelevant and inadmissible evidence.

2) Whether it was necessary for the learned Senior Resident Magistrate to differentiate between the cash seized from the suitcase and the monies seized from the handbag in determining what was recoverable property (ground e).

**Issue 1- Whether the learned Senior Resident Magistrate erred in finding that the cash seized was recoverable property or was intended for an unlawful purpose, and therefore, was subject to forfeiture (grounds a to d)**

[42] Queen's Counsel (now King's Counsel), Mr Ian Wilkinson, on behalf of the appellant, relied on his written and oral submissions and argued grounds a to d cumulatively. Queen's Counsel submitted that the learned Senior Resident Magistrate fell into error when she found the seized cash to be 'recoverable property' as there was no evidence before her that the cash was the product of any substantive offence. The gravamen of his arguments was that it was a requirement of the law, in this jurisdiction, that the appellant must identify the criminal conduct from which the property was derived, which the respondent had failed to do. Queen's Counsel submitted further, that there was no evidence that the cash was unlawfully obtained or was intended for unlawful use. He also pointed out that the explanation given for the source of the money was not proven to be untrue, and that no one was charged with any criminal offence arising from the cash. The evidence, he argued, showed that the money had been converted from the proceeds of a loan, and that mere possession of large sums of cash, or the fact that the cash may have been concealed, did not, by themselves, provide a proper basis from which a conclusion could properly be drawn that the cash had been unlawfully obtained.

[43] Queen's Counsel also submitted that the statements made by the appellant which were alleged to be lies, and which the learned Senior Resident Magistrate used to draw the adverse inference that the cash had been unlawfully obtained, were not borne out in the evidence to be actual lies. He submitted, therefore, that the learned senior resident magistrate was wrong to have found that the appellant had lied, and *a fortiori*, to have relied on those statements. Queen's Counsel further argued that even if there were inconsistencies in the appellant's evidence, as alleged, that could support a finding of lies,

this would not have been sufficient, as people are known to lie for various reasons other than guilt.

[44] To support his arguments, Queen's Counsel relied on the judicial reasoning in the several cases he cited. These were: **R (on the application of the Director of Assets Recovery Agency and others) v Green and others** [2005] EWHC 3168 (Admin); **The Assets Recovery Agency v Audrene Samantha Rowe et al** [2014] JMSC Civ 2; **The Assets Recovery Agency v Adrian Fogo et al** [2014] JMSC Civ 10; **Laura Barnes v Commissioner of Customs** [2015] JMCA Civ 55; and **Angus v United Kingdom Border Agency** [2011] EWHC 461 (Admin).

[45] Counsel Mrs Whyte-Tomlinson, on behalf of the respondents, denied that there was any requirement to show any specific unlawful conduct in this jurisdiction. Counsel argued that, in cases involving the forfeiture of cash, it was recognised by the authorities that those may be treated differently than cases involving the civil recovery of property, and that the cases relied on by the appellant, were more relevant to an action for civil recovery of property rather than for forfeiture of cash. Counsel maintained that it was clear from the provisions of POCA (Jamaica) that, in cash forfeiture proceedings, there is no requirement to identify specific unlawful conduct. Counsel contended that what must be proved to the satisfaction of a resident magistrate, on a balance of probabilities, was that the cash was obtained from unlawful conduct or was intended for use in an unlawful way. Such proof, she said, may be provided by evidence of the circumstances surrounding the treatment of the cash.

[46] For that proposition, counsel relied on the provisions of POCA (Jamaica) itself, and on the following cases: **R v Anwoir and others** [2008] EWCA Crim 1354; **R v Bo Li** [2010] EWCA Crim 3139; **Sandra Marie Cavallier v Commissioner of Customs** [2010] JMCA Civ 26, **Regina v Ryan Gillies** [2011] EWCA Crim 2140; **Director of Public Prosecutions v Bholah** [2011] UKPC 44; **Fletcher v Chief Constable of Leicestershire Constabulary** [2013] EWHC 3357 (Admin); **Winston Pusey v Assets Recovery Agency** [2012] JMCA Civ 48; **Leroy Smith v Commissioner of Customs**

[2014] JMCA Civ 10; **Laura Barnes v Commissioner of Customs**; and **Gellizeau v State** [2018] 2 LRC 53.

[47] In reply, Queen's Counsel maintained that it made no difference whether it was cash forfeiture or otherwise, as it was one single regime, and that whilst it may not be necessary to prove a specific offence, it was necessary to lead evidence which pointed to particular unlawful conduct from which the cash emanated or for which it was intended.

**Discussion**

[48] Section 56 of POCA (Jamaica) enables the enforcing authority to recover property, including cash, in civil proceedings. The section states, in part, that:

> "56. - (1) This Part has effect for the purposes of –
>
> (a) enabling the enforcing authority to recover, in civil proceedings before the Court, property which is, or represents, property obtained through unlawful conduct;
>
> (b) enabling cash which is, or represents, property obtained through unlawful conduct or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a Resident Magistrate's Court."

It is section 56(1)(b), therefore, which gave the learned Senior Resident Magistrate the power to forfeit the cash seized from the appellant. This power was exercisable, pursuant to section 56(2), regardless of the fact that no proceedings had been brought for an offence in connection with the cash. The issue is to be decided, in accordance with section 56(3), on a balance of probabilities.

[49] The statutory authority and procedure for search and seizure of cash are set out in section 72 onwards of POCA (Jamaica). Pursuant to section 75, an authorized officer may seize and detain cash if he or she has reasonable grounds to suspect that the cash or part thereof is "recoverable property" or is intended for use in "unlawful conduct". The forfeiture of seized cash is provided for under section 79 of POCA (Jamaica). This section

sets out the requirements for a forfeiture order to be granted. It states in part, so far as is relevant to this appeal, that:

> "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."

[50] When cash is detained, an authorized officer may apply to the Resident Magistrate's Court under section 79 for forfeiture of the whole or part of the cash, and the resident magistrate may grant the order if satisfied that it is "recoverable property" or "is intended by any person for use in unlawful conduct".

[51] The definition of "unlawful conduct" in POCA (Jamaica), for the purpose of civil recovery proceedings, is to be found in section 55(1), which states that "unlawful conduct" means:

> "(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."

[52] Section 55(2) also defines "property obtained through unlawful conduct" 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.**" (Emphasis added)

[53] The definition of "recoverable property" is to be found in section 84(1) which defines it as follows:

> "Property obtained through unlawful conduct is recoverable property:
>
> Provided that if such property has been disposed of since it was so obtained, it is recoverable property only if it is held by a person into whose hands it may be followed."

[54] These provisions, considered in the light of counsel's submissions, raise questions as to the nature of the evidence which must be adduced to satisfy the court, on a balance of probabilities, that cash seized is recoverable property or was intended for use in unlawful conduct, before an order for the forfeiture of such seized cash can be properly made. It also begs the question whether counsel for the respondents is correct that it is not necessary to point to specific unlawful conduct, and that it is sufficient to adduce evidence of how the cash was handled which could give rise to an irresistible inference that it was derived from or was intended for unlawful conduct of some sort. In this case, the learned Senior Resident Magistrate held that, based on case law, in proceedings for cash forfeiture, "it was not necessary to identify or prove criminal conduct". She took the view that what was required was "an examination of the circumstances under which the cash was found and any explanation given which may lead to an irresistible inference that the cash was unlawfully obtained or intended for an unlawful purpose". Having examined the circumstances, in this case, she found that they led to the irresistible

conclusion that the cash was unlawfully obtained or was intended to be used in unlawful conduct. The question for our determination is whether she was correct in her approach.

(i) whether it was necessary for the learned senior resident magistrate to first find that the appellant had committed or had been convicted of any offence or that the source of the seized cash was from specific unlawful conduct or was intended for use in specific unlawful conduct

[55] To answer the question posed above, it is necessary to examine how the law in this area has developed and the approach taken in the cases which were cited to this court.

[56] **R (on the application of the Director of Assets Recovery Agency and other) v Green and others** dealt with the interpretation of sections 240, 241, 243, 246 and 304 of the Proceeds of Crime Act 2002 of the United Kingdom ('POCA (UK)'). That case involved a recovery of property order and not a cash forfeiture application. Although both recovery procedures are concerned with civil forfeiture under POCA, the court in that case recognised that there is a difference in the treatment of each. Those sections in POCA (UK) provide for civil recovery of property obtained through unlawful conduct. No proof of any criminal charge or criminal conviction for any offence in connection with the property to be recovered is required under that legislation. Section 241 describes unlawful conduct similarly as it is described in section 55 of POCA (Jamaica). The court, in that case, however, took the view that in civil recovery proceedings, matters alleged to constitute unlawful conduct should be identified in sufficient detail to enable the court to decide whether the conduct so particularised was indeed unlawful, as defined in section 241 of POCA (UK), based on section 242, which reads as follows:

> "it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct".

[57] In para. [27] of that case, the court compared the provisions relating to civil recovery proceedings of property in general with those relating to the forfeiture of cash.

The court cautioned against reading "across" the sections dealing with cash and the sections dealing with other property. It also cautioned that the cases dealing with cash forfeiture must be read in the light of the fact that we live in a "cashless society" and that criminals will find it convenient as an untraceable means of funding crime. In such an event, the court said, conduct consisting of merely having large sums of cash, in certain circumstances, may well provide "reasonable grounds for suspicion".

[58] The court in that case said further, at para. [33], in reference to its consideration of four decisions on the treatment of cash in forfeiture proceedings, that:

> "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. By contrast, conduct consisting of the mere fact of being in possession of other types of property, expensive jewellery, houses, cars and so forth, or the mere fact of having a lavish lifestyle or of living beyond one's apparent means, do not, without anything more, provide reasonable grounds for suspicion demanding an explanation."

[59] **R** (**on the application of the Director of Assets Recovery Agency and other**) **v Green and others**, therefore, based on the *obiter* statements made regarding cash forfeiture proceedings, is more supportive of the respondent's position rather than the appellant's. In that regard, Queen's Counsel, it would appear, would be guilty of doing exactly what the court in that case cautioned against doing, that is, "reading across" the sections in order to apply principles relating to the civil recovery of other property, to forfeiture of cash proceedings. The reasoning behind the caution was that in the context of cash forfeiture, the circumstances surrounding the cash may well establish that the source of the money was from criminal conduct. It was held that, in such circumstances, it would be an incorrect statement of the law to say that it was incumbent on the prosecution to identify the criminal source of the money or the offence which it was intended to be used for (see para. [10] of that case).

[60] In our view, this case was of no assistance to the appellant in a case where we are dealing with a cash forfeiture application.

[61] The appellant also relied on the case of **The Assets Recovery Agency v Audrene Samantha Rowe et al**, a case at first instance, which involved an application for discharge or variation of a restraint order in civil recovery proceedings. Sykes J (as he then was) accepted that there was no need to prove the particulars of the unlawful conduct under section 55(1) of POCA (Jamaica). He concluded that no proof of a criminal conviction was required under POCA, and that all that was required was for it to be established, on a balance of probabilities, that unlawful conduct had occurred, and that the relevant property was obtained through unlawful conduct. He relied on the cases of **R (on the application of the Director of Assets Recovery Agency and others) v Green and others**, **Serious Organised Crime Agency v Gale** [2009] EWHC 1015 and **Director of the Assets Recovery Agency v Szepietowski and others** [2007] EWCA Civ 766, and concluded that, although no specific crime must be proved, evidence of criminal activity or conduct which constitutes an offence must be adduced, but there was no need to do so with specific dates, times or persons. The Asset Recovery Agency, in **The Assets Recovery Agency v Audrene Samantha Rowe et al**, had pointed to some unlawful conduct, and no evidence had been presented by the applicants to provide a basis for the discharge or variation of the restraint order. The application was, therefore, refused. This case did not assist the appellant.

[62] **The Assets Recovery Agency v Adrian Fogo et al** was also a case at first instance, decided by Sykes J (as he then was), on an application for a restraint order in civil recovery proceedings under POCA (Jamaica). Sykes J, in this case, again relied on **R (on the application of the Director of Assets Recovery Agency and others) v Green and others** and section 55(1) of POCA (Jamaica), and concluded that, although specific particulars were not required, there must be some information "that would enable the court to come to its own independent conclusion that the property was obtained through unlawful conduct" (see para. [55]). He maintained that it was not sufficient for

the Assets Recovery Agency to simply state their belief that this was so, as there must be some information which was sufficient to enable the court to come to that conclusion. In that case, he found that the information supplied by the applicant was not sufficient.

[63] Once again, this case did not deal with cash forfeiture and, although Sykes J relied on the judgment of Sullivan J in **R (on the application of the Director of Assets Recovery Agency and other) v Green and others**, he accepted that section 55(1)(b) of POCA (Jamaica) was wider than section 242(2)(b) in POCA (UK).

[64] The appellant also relied on the decision of **Laura Barnes v Commissioner of Customs**, which was an appeal against the decision of a learned Resident Magistrate ordering the forfeiture of cash which had been seized by custom officers. The same argument raised by the appellant, that there must be some evidence of the unlawful conduct, was raised in that case. Counsel for the appellant, in that case, also relied on the case of **R (on the application of the Director of Assets Recovery Agency and other) v Green and others**. Queen's Counsel, in the instant case, relied on para. [77] of **Laura Barnes v Commissioner of Customs** for the proposition that there must be some evidence that the money was obtained unlawfully. Counsel, however, failed to point out that, in that same paragraph, this court indicated that this "[u]nlawful conduct may be inferred in the absence of reasonable explanation or lies", and that the two important issues were the "veracity of the source of the appellant's income and the purpose for the cash".

[65] This court, in that same case, at para. [81], also found that the manner in which the cash was concealed, and the repeated denial by the appellant of any knowledge of its presence, was *prima facie* evidence that the cash was obtained through unlawful conduct, and that the evidential burden, therefore, lay on the appellant to provide evidence that this was not so. Having examined the evidence that was before the magistrate, this court determined, at para. [155], that there was ample evidence on which the magistrate could have found, on a balance of probabilities, that the cash seized was recoverable property. The magistrate's decision in that case, as reproduced at para. [157]

of this court's judgment in that case, was based on the fact that there "was no evidence to rebut the strong probability that a part or the whole of the cash seized was obtained through unlawful conduct". No specific unlawful conduct had been alleged in that case, and it was difficult to discern how this case could assist the appellant.

[66] The respondent relied on a series of cases, starting with **R v Anwoir**. That was a case dealing with money laundering offences under section 328 of POCA (UK), which makes it unlawful for "a person to enter into or become concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person". Criminal property is defined in section 340 of POCA (UK), which also defines criminal conduct. Criminal conduct bears a similar definition to that of unlawful conduct in section 55 of POCA (Jamaica). However, the UK provision speaks to criminal property, and in its terms, is entirely different from section 55, which speaks to property obtained through unlawful conduct. Section 55(1)(b) makes it clear that it is not necessary to show the particulars of the unlawful conduct. POCA (UK) carries a more restrictive provision in its section 242, and requires the prosecutor to show, at least, that the property was obtained from conduct of one of a number of kinds, each of which would have been unlawful.

[67] The court in **R v Anwoir**, at para. 21, held that there were two ways in which the Crown could prove that property was derived from crime. The first was by showing that it was derived from conduct of a specific kind or kinds, and that conduct of that kind was unlawful. The second was by adducing evidence of the circumstances in which the property was handled which could give rise to the irresistible inference that it could only have been derived from crime. This latter approach is consistent with the approach Mrs Whyte-Tomlinson contended ought to be taken in this jurisdiction, especially in light of the fact that section 242 of POCA (UK), as said before, is more restrictive in its terms than section 55(1)(b) of POCA (Jamaica).

[68] In **R v MK and AS** [2009] EWCA Crim 952, (as cited in **R v Gillies**), Hallet LJ said the law is now settled and is as was set out in **R v Anwoir**. The former case involved a

bag of cash, amounting to £22,000.00, which was seen being passed between individuals in a supermarket car park, in suspicious circumstances, and for which the individuals gave conflicting accounts. It was held, applying **R v Anwoir**, that although the nature of the crime, which the cash represented proceeds of, was never specified, it was open to the jury to draw inferences from the circumstances of the transfer of the cash between the individuals, that it was the proceeds of crime.

[69] The respondent also relied on **Regina v Bo Li**, which involved convictions for money laundering under POCA (UK). In that case, large sums of money irregularly passed to, and through, the hands of the applicant Bo Li, with no discernible explanation as to the source of the cash. Her explanation was that the money came from China from various non-criminal sources. The prosecution alleged that the cash had been generated by criminal activity but were not able to say exactly what that was. The court gave a very short judgment. It examined section 327(1)(a), (b), and (c) of POCA (UK) and what the prosecution was required to prove. It looked at the definition of criminal property under section 340, and what comprised criminal conduct, and concluded that it was not necessary for the prosecution to prove which particular conduct or crimes had generated the property, as long as the jury could be satisfied that it had been generated by some sort of criminal activity. In citing **R v Anwoir** with approval, the court concluded that 'the size of the transactions, the absence of any lawful explanation for the cash, the way it had been deposited into students' bank accounts and moved around from account to account, and then moved out to Hong Kong, gave rise to the irresistible inference of the kind the prosecution had to establish' (see para. 5).

[70] The respondents pointed to the manner in which the issue of cash forfeiture was dealt with by this court in the decision of **Sandra Marie Cavallier v Commissioner of Customs**. That case concerned an appeal against the decision of a then resident magistrate, to forfeit cash as recoverable property. Brooks JA (Ag) (as he then was), in delivering the judgment of this court, commented on section 55(1)(b) of POCA (Jamaica), at para. [25], that:

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

[71] This was a reference to the statement by Sullivan J in **R** (**on the application of the Director of Assets Recovery Agency and other**) **v Green and others** as to the restrictive nature of the provision in section 242(2) of POCA (UK), and how the law makers could have made it more expansive, if they had so desired.

[72] **R v Gillies** was also concerned with a conviction under section 328 of POCA (UK) and the interpretation of criminal property under section 340. On appeal to the criminal division of the Court of Appeal, the appellant Gillies complained that at the close of the prosecution's case in the trial against him for breach of section 328(1), the prosecution had failed to show that the cash found in his possession was the proceeds of any specific criminal conduct. The prosecution's case to the jury was entirely based on the circumstances surrounding the treatment, identification and seizure of the cash, which it was said, gave rise to the inevitable inference that the cash represented the proceeds of criminal conduct. The Court of Appeal agreed that no specific kind of crime need be proved, and that it was open to the jury to draw an inference that the cash was in fact the proceeds of "previous criminal conduct".

[73] In **R v Gillies**, the Court of Appeal quoted from **R v Anwoir**, and from **R v MK and AS**, which approved what was said in **R v Anwoir**. The Court of Appeal then approved the ruling of the lower court judge who had relied on **R v Anwoir**. In affirming the decision in the court below, the Court of Appeal found that the judge was plainly right in finding that "the prosecution [could] succeed...by evidence of the circumstances in which the relevant property is handled which is such as to give rise to the irresistible inference that it can only be derived from crime". There was no need to prove any specific crime.

[74] The issue was further considered in the case of **Director of Public Prosecutions v Bholah**, an appeal to the Privy Council from the State of Mauritius. The Board had to consider whether the Supreme Court of Mauritius was correct when it found that the money laundering provisions in section 17 and 19 of the Economic Crime and Anti-Money Laundering Act 2000 of Mauritius (ECAMLA) were repugnant to the fair trial provisions of section 10 of the Constitution of Mauritius, in so far as section 10(2)(b) required that every person charged with a criminal offence be informed in detail of the nature of the offence with which he has been charged. Section 17(7) of the ECAMLA provided that, in prosecuting any person under the section, it was sufficient to aver in the information that the property was the proceeds of crime without specifying any particular crime, and that the court may infer that the proceeds were the proceeds of crime.

[75] The Board, in coming to its decision, referenced "The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 Council of Europe Treaty Series, No 198". Jamaica, as far as we have been able to discern, is not a signatory to this convention. However, article 9(6) to which the Board referred is instructive. It provides that each party to the Convention:

> "...[S]hall ensure that a conviction for money laundering under this Article is possible where it is proved that the property...originated from a predicate offence, without it being necessary to establish precisely which offence."

[76] The Board also referenced provisions in jurisdictions such as Australia and New Zealand, and authorities from England and Wales, where their anti-money laundering laws do not require proof of a specific predicate offence. The Board then went on to analyse the cases on the issue, including **R v Anwoir,** and concluded that common to all of them, was the determination that proof of a specific offence was not required. This conclusion, was arrived at by the Board, despite having taken note of the fact that there was no equivalent provision to section 17(7) of ECAMLA (the provision before it) in POCA (UK).

[77] The Board further made several significant observations, the first being that, under POCA (UK), suspicion that the property represented a benefit derived from criminal conduct was sufficient. Secondly, the fact that criminal activity had generated the property was not an "element" which required identification and proof of a specific crime, and it need not be shown that a particular offence or offences had generated the property said to be the proceeds of crime. The Board then went on to consider the provisions specific to Mauritius, and concluded that proof of a specific offence was not required in order to establish guilt under section 17(1) of the ECAMLA, and that it was sufficient to show that property represented the proceeds of any criminal activity or any crime.

[78] Of significance to the final determination of that appeal, the Board held that a failure to identify a specific offence was not a breach of the Constitution of Mauritius. The offender was only entitled to be informed of the offence for which he had been charged, which in the case before it was money laundering. Proof of the predicate crime, it said, was not an essential element.

[79] The issue was also raised in **Gellizeau v State**, a case on appeal to the Court of Appeal of the Eastern Caribbean Supreme Court, from Saint Vincent and the Grenadines, on the interpretation of sections of their Proceeds of Crime and Money Laundering (Prevention) Act 2001 (as amended). That case dealt with the charge of money laundering against the owner of a boat on which large sums of money were found concealed aboard the boat. The relevant provisions are in section 41(1) of that Act. That section deals with criminal conduct (which is defined in section 2 as drug trafficking or any relevant offence) and creates an offence where a person deals with the proceeds of criminal conduct in specified ways, with the purpose of avoiding prosecution for a drug trafficking or relevant offence. "Relevant offence" is also defined in the Act.

[80] The appellant in that case argued that, in Saint Vincent and the Grenadines, it was necessary for the prosecution to prove the predicate offence in order to successfully prosecute a money laundering offence. The court disagreed and held that, based on the wide ambit of section 41, proof of a predicate crime was not required. It was accepted

that the decisions in **R v Anwoir, Director of Public Prosecutions v Bholah**, and the case of **Assets Recovery Agency (Jamaica) (Proceeds of Crime: Customer Information Order)** [2015] UKPC 1, were of persuasive authority of general application, which reflected the legal position in Saint Vincent and the Grenadines.

[81] Queen's Counsel, however, sought to rely on **Angus v United Kingdom Border Agency** which was a cash forfeiture case that went in a different direction from all the cases cited by the respondent. Queen's Counsel argued that this case correctly sets out the law to be applied in this jurisdiction.

[82] **Angus v United Kingdom Border Agency** was an appeal to the Queen's Bench Division, by way of a case stated, from a decision of the Lewes Crown Court which had dismissed an appeal from the decision of the magistrate's court which had ordered the forfeiture of cash seized from the appellant. In that case, the appellant was stopped by staff at the Gatwick airport in England on 20 December 2006, at which time, £40,000.00 contained in 13 separate bundles, was found in her handbag wrapped in a dustcover. Of the total sum, £30,000.00 was wrapped in casino wrappings, and £10,000.00 was unwrapped. The appellant gave an account that the money belonged to her mother who had lent money to an uncle, who in turn had given her the cash as repayment of that loan. It was, nonetheless, seized. On 20 February 2007, her solicitors wrote to Her Majesty's Revenue and Customs (HMRC), in an attempt to explain the source of the money. In effect, her solicitors maintained that the sums seized were from the repayment of loans made by the appellant's mother to two individuals, Mr Yong and Mr Yeung. Mr Yong was a keen gambler and had repaid £30,000.00 from his gambling winnings. Mr Yeung had repaid £10,000.00 loaned to him. The monies had been collected from both men by Mr Tse, who was the appellant's uncle.

[83] In an attempt to explain the differences between the appellant's account given at the airport, and that given on her behalf in a letter from her solicitors, her solicitors, in a subsequent letter to HMRC, explained that the appellant had "felt under suspicion"

because she had never been stopped or questioned in that way before, so she gave an account which she thought was plausible, although it was not factual.

[84] From the evidence before the Crown Court, it was determined that the appellant had lied persistently at the airport when the cash was found in her possession. It was also found that in giving evidence, Mr Tse and Mr Yeung were evasive and inconsistent, and, therefore, not credible. Nonetheless, it was accepted that £30,000.00 did come from two different casinos. Mr Yong did not give evidence. The Crown Court found that there was evidence to suggest the £30,000.00 "may well have been the proceeds of money laundering" as there were similarities in the way Mr Yong was gambling and the description given to the court of the money laundering techniques used in casinos. The £10,000.00 from Mr Yeung showed that he had made significant earnings for which he had paid no taxes since he last filed income tax returns, and that the £10,000.00, therefore, "may well have been obtained through unlawful conduct", namely, "cheating the public revenue".

[85] The Crown Court had found that, based on the context in which the lies had been told at the airport, along with the other pieces of evidence, on a balance of probabilities, it was established that the source of the money was criminal activity.

[86] Before the Queen's Bench Division, on the case stated, the issue was whether it was sufficient for the Crown Court to find that the cash seized was obtained from criminal activity, pursuant to section 242(2)(b) of POCA (UK), without that activity having been specified or identified. At para. [12], Lady Justice Davies, in giving the judgment of the court (Lord Justice Thomas agreeing), outlined what she had to consider as follows:

> "Section 240 distinguishes between two sets of proceedings: recovery in civil proceedings before the High Court and forfeiture of cash proceedings in the magistrates' court. Cash forfeiture proceedings are civil proceedings. The burden of proof rest [sic] upon the officer seeking forfeiture of cash. The court has to be satisfied on the balance of probability that the cash, or part of it, is recoverable property or is intended by any person for use in unlawful conduct. Recoverable property,

> as defined in s 304, is property obtained through unlawful conduct. Unlawful conduct is defined in s 242(2). For the purpose of this appeal the relevant provision is s 242(2)(b), in deciding whether any property was obtained through unlawful conduct "it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."

[87] In looking at the issue as to whether a particular type of criminal conduct has to be identified, Lady Justice Davies considered the decision in **Muneka v Commissioners of Customs and Excise** [2005] EWHC 495 (Admin), and concluded that the latter case had not considered section 242(2)(b) at all. She also considered the civil recovery cases of **R** (**on the application of the Director of Assets Recovery Agency and other**) **v Green and others** and **Director of the Assets Recovery Agency v Szepietowski and others**, as well as **R v Anwoir** which involved criminal proceedings. She found **R v Anwoir** to be of limited applicability to the case before her as that case had involved a different section in a different part of the legislation. She found that **R** (**on the application of the Director of Assets Recovery Agency and other**) **v Green and others** had not decided the issue, it being a decision from proceedings involving the civil recovery of assets and not cash forfeiture proceedings. In her view, it could not be relied on as a decision which interpreted and gave proper effect to the wording of section 242 of POCA (UK).

[88] Having considered all the cases cited, Lady Justice Davies concluded that none of them specifically considered section 242(2)(b), in the context of cash forfeiture. She concluded that section 242(2)(b) related to both civil recovery and cash forfeiture and a single test was to be applied to both. Therefore, she declared, at para. [29], that the answer to the case stated was that "in a case of cash forfeiture, a customs officer does have to show that the property seized was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct".

[89] It is perfectly clear why the appellant would rely on **Angus v United Kingdom Border Agency** as, at first blush, it may well be seen to support her position that the

respondent must specify the unlawful conduct. That case, however, is an outlier when compared to the statements in the other cases on the same point. Furthermore, even if it is a correct interpretation of section 242(2)(b) of POCA (UK), that provision, as we have shown, is wholly different from that in section 55(1)(b) of POCA (Jamaica). The latter section states shortly that "it is not necessary to show the particulars of the conduct". It is worth repeating that this is to be compared with section 242(2)(b) of POCA (UK), which states that:

> "(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."

[90] Therefore, section 242(2)(b) is the reverse of section 55(1)(b). Section 242(2)(b) requires "conduct of one of a number of types which would be unlawful" to be shown. This seems to suggest that it is possible to simply provide a whole list of possible unlawful conduct without particularising any specific kind. In the case of **Angus v United Kingdom Border Agency**, itself, "cheating the revenue" and "money laundering" were suggested as possible unlawful conduct. Section 55(1)(b) does not require that any particulars be shown as long as unlawful conduct is alleged.

[91] In **R v Gillies**, the court had declined to reconcile decisions in civil recovery proceedings under the different provisions of POCA (UK), as it considered those provisions to be irrelevant to what it had to decide. To the extent that **Angus v United Kingdom Border Agency** has sought to do so, we are not persuaded by the approach taken to cash forfeiture proceedings in that case, for the reasons given above.

[92] It would appear, therefore, from the approach taken in the cases cited by the respondent, and this court's interpretation of the effect of the wording in section 55(1) of POCA (Jamaica), that proof of a specific or any specific type of unlawful conduct is not required for an order for the forfeiture of cash under POCA (Jamaica) to be properly made.

[93] The authorities cited by the appellant do not appear to cast any gloss on these authorities. POCA (Jamaica) does not require evidence of particulars of any specific unlawful conduct with respect to cash seized, and whilst specific criminal conduct is to be shown, if known, it will be sufficient to show evidence of the circumstances in which the cash was handled, such as to lead to an irresistible inference that the said cash was derived from unlawful conduct of some sort or was intended for some unlawful activity.

[94] The answer to sub-issue (i) would, therefore, be that there was no requirement for the learned Senior Resident Magistrate, in this case, to first find that there had been criminal conduct from a substantive offence or that the appellant had committed or been convicted of any offence. Furthermore, in cases involving cash forfeiture, in this jurisdiction, unlawful conduct is not restricted to a specifically identifiable category of conduct.

[95] Accordingly, we agreed with the respondents that the learned Senior Resident Magistrate did not err in not requiring proof of a specific unlawful conduct before making the order for the forfeiture of the cash which had been seized from the appellant. What the authorities have made clear is that there is a requirement for evidence to be adduced that is sufficient to satisfy the court, on a balance of probabilities, that the cash which had been seized was obtained from unlawful conduct or was intended for use in unlawful conduct.

(ii) <u>whether the evidence led in the resident magistrate's court was capable of leading to the inference that the cash seized was the proceeds of unlawful conduct or was intended for unlawful conduct</u>

[96] Queen's Counsel complained that even if it was not necessary to point to specific unlawful conduct, the mere evidence of the concealment of large amounts of cash and the evidence of lies told were not enough to support a finding that the cash was recoverable property or was intended for unlawful purpose. Queen's Counsel argued that there was no evidence to show that the source of the seized money was from activities

involving unlawful conduct, nor was there sufficient evidence, circumstantial or otherwise, to show that a case for forfeiture had been made out.

[97] The respondent pointed to the authorities she cited, including **Sandra Marie Cavallier v Commissioner of Customs**, **Laura Barnes v Commissioner of Customs** and **R v Anwoir**, which, she contended, clearly establish that evidence of the circumstances surrounding the seizure of cash could be sufficient to lead a court to conclude that the cash was derived from crime or was intended for unlawful activity. In this case, the respondent submitted, there was more than enough evidence for the learned Senior Resident Magistrate to draw the inference that she did, that the cash was recoverable property or was intended for an unlawful purpose.

[98] What we do know from section 56 of POCA (Jamaica) is that there is no requirement for evidence to be led tending to show or which shows that the appellant had been convicted of an offence in relation to the cash or even that there were criminal proceedings pending in relation to that cash, before a forfeiture order can be made. Section 56 deals with both proceedings brought in the Supreme Court to recover property obtained through unlawful conduct, and proceedings brought in the Parish Court to forfeit cash obtained through unlawful conduct or intended to be used in unlawful conduct. Section 56(2) states:

> "The powers conferred by this Part are exercisable in relation to any property (including cash), whether or not any proceedings have been brought for an offence in connection with the property."

[99] This section was considered by this court in the case of **Winston Pusey v Assets Recovery Agency**. In that case, an acquaintance of the appellant was found to be in possession of US$53,950.00 at the Norman Manley International Airport, which she said, belonged to the appellant. The appellant's own explanation as to the source of the cash (personal business ventures) showed evidence of unlawful conduct in the evasion of tax laws. The fact that the appellant had not been convicted of tax fraud or tax evasion, and

that no proceedings had been brought against him in respect of those, was held to be of no moment in light of the provisions of section 56(2) of POCA (Jamaica).

[100] Moreover, this court went on to identify other relevant evidence which had been before the magistrate in that case, which she could have properly relied on to determine that the cash seized was recoverable property. This evidence included the circumstances surrounding the concealment of the cash; failure to declare the cash and lies told by the appellant's acquaintance as to knowledge of the cash, as well as its quantum and source; the initial denial of knowledge of the intended recipient of the cash; the appellant's preference for cash transactions as an avid business person; and the appellant's past history of drug-related criminal activities.

[101] It is clear, therefore, that evidence of criminal activity, if available, is relevant. However, it is also clear that the evidence of the circumstances surrounding the seizure of the cash, from which proper inferences may be drawn, is sufficient (see para. [35] of **Winston Pusey v Assets Recovery Agency** for a summary of the circumstances in that case).

[102] Of course, the circumstances of each case may vary. Counsel for the respondent pointed this court to the case of **Fletcher v Chief Constable of Leicestershire Constabulary**, where cash had been found in an unoccupied flat by a contractor who had been doing repairs. The cash was found hidden in a metal box in the kitchen under a kitchen unit, and consisted of £20.00 notes in £1,000.00 bundles wrapped with elastic bands, totalling £17,940.00. The 'finder' brought the cash to the police and the Crown made an application for the cash, which had not been claimed by the owner, to be forfeited as being the proceeds of criminal activity. There was no suspicion against the finder that he was anything other than an honest man. The Crown Court ruled in favour of forfeiture but sent the matter by way of case stated to the Queens Bench Division. Lewis J considered the relevant provisions in POCA (UK), and concluded that the legislation contemplated two situations. These are, firstly, where property is obtained through unlawful conduct, and secondly, where it is intended to be used in unlawful

conduct. The provision for forfeiture of cash is set out in section 298 and provides that cash is subject to forfeiture where it is recoverable property (section 298(2)(a)), or where it is intended by any person for use in unlawful conduct (section 298(2)(b)).

[103] Lewis J found that two issues arose in the case. The first was "whether the Crown Court was entitled to draw the inferences it did regarding the origins of the cash and the intentions of the hider of the cash", and the second was whether the cash was capable of being forfeited. Lewis J found that the Crown Court was so entitled. He pointed to a number of features in the case which supported that position. These were:

i. the large amount of cash;

ii. the circumstances of its concealment;

iii. that it remained unclaimed by its owner;

iv. that the notes were all in one denomination; and

v. that the money had no fingerprints.

These factors, he said, pointed to the conclusion that the money had no legitimate source, were unlikely to have been the profits from a legitimate trade, and that, despite the possibility that there may have been some other honest explanation, the Crown Court was entitled, on a balance of probabilities, to infer from the facts that the cash represented the proceeds of some unlawful criminal conduct. Lewis J also held that the Crown Court was entitled to find that the hider had not abandoned the intention to recover the money, as it was not a "historic hoard", and that the hider intended to use it in an unlawful way. Lewis J found that, the money having been unlawfully obtained, any use of it by the hider would inevitably have been unlawful.

[104] With regard to the issue of whether the cash was subject to forfeiture, Lewis J, having earlier referred to the case of **Angus v United Kingdom Border Agency** and its interpretation of section 242 (2)(b) of POCA (UK), found, at para. [23] that, given that

the money was found to be 'criminal property by the Crown Court, as it was entitled to find, any further use of it, such as spending it (conversion), or transferring or removing it from the jurisdiction, would have amounted to a criminal offence under section 327 of POCA (UK). The learned judge concluded, therefore, that the cash was subject to forfeiture under section 298(2)(b) of POCA (UK), as being intended for use in "unlawful conduct", where the hider of the cash had the intention (at the time of hiding it) to recover it and use it for such purposes, notwithstanding that the innocent finder had no such intention. Lewis J further found that the cash was subject to be forfeited under section 298(2)(b) of POCA (UK) as being intended for use in "unlawful conduct".

[105] In the case of **Sandra Marie Cavallier v Commissioner of Customs**, a total of US$19,000.00 was found hidden in the pockets of several pairs of pants in Ms Cavallier's suitcase, and US$2,046.00 was found in her handbag after she had declared (on her Customs Declaration Form, as well as verbally to a customs official) that she was not carrying more than US$10,000.00. Her explanation for the false declaration was that she had ticked the declaration form without looking carefully. Her explanation for the cash in her suitcase was that the clothes in which the money was concealed had been given to her by her cousins to take to Jamaica and she did not know it was there, except for the sum of US$1,000.00 which a particular cousin had given to her to take to Jamaica for him, along with some clothes. She personally had only US$1,900.00 in her purse. No account was given of the extra US$146.00 which was also found in the purse. The cash was seized by custom officers who formed the view that it had been unlawfully obtained or was intended for some unlawful prupose.

[106] In order to have the cash released, Ms Cavallier produced documents, including a notarized letter, which claimed that the cash had been sent with her by its rightful owner, an auto sales company, in order to conduct the legal business of paying the necessary duties to clear three vehicles at Jamaica Customs. The intention was for Ms Cavallier to exchange the cash for a cheque from the bank. The letter claimed that the total cash seized was so intended, and documents were attached attempting to support those

assertions. The documents, however, did not relate to any of the vehicles said to be awaiting clearance, and their production directly contradicted Ms Cavallier's claim that some of the cash belonged to her. It also contradicted her claim that she did not know that the cash was in her suitcase. This court found that, in the circumstances of that case, certain findings were "inescapable". It found that, faced with the manner of concealment of the monies, the divergent explanations and the lack of corroboration from the custom database of the reason asserted for the funds, it was not surprising that the magistrate had found that the cash was recoverable.

[107] **Leroy Smith v Commissioner of Customs** was a case in which the appellant was found with £14,000.00 after declaring on the relevant form that he was not travelling with more than US$10,000.00. He also declared the same thing to a customs officer when questioned. He maintained he had only £8,000.00 and offered a bribe to the customs officer to not search his luggage. He was travelling with a large suitcase, a small carry-on bag and a laptop computer case. He was ultimately found to have more cash in his possession than he had admitted. This consisted of £5,000.00, which was found in a plastic bag in one section of the suitcase, and £3,000.00, found in an empty camera case in another section of the suitcase. At that point, the appellant declared that he had no more cash, but a search of the laptop case revealed a further £3,000.00. He was again asked if there was any more and he said no. A further search of Mr Smith's person revealed £3,000.00 hidden under clothes in his groin area.

[108] Mr Smith gave a written statement to the customs officer in which he said that the money was from his earnings and from family members, and was to be used to construct a house on family land for which he had a building plan. Some, he also said, was to pay for expenses connected to his wife's immigration application, and the rest was for his personal expenses. He explained that the money was concealed for reasons of safety and security. In his affidavit in support of the release of the cash, he said the money was from a "partner draw", earnings and a loan from his cousin. Customs and immigration were unable to verify the "partner draw", and the building plans turned out not to belong

to Mr Smith and were not done for his house. In relation to his denial on the customs form that he was not carrying more than US $10,000.00 or its equivalent, he said he did not see the question as he had only read the first two questions, nor did he know the conversion rate between the two currencies.

[109] The magistrate relied on the circumstances surrounding the seizure of the cash to conclude that it was recoverable property. The total cash of £14,000.00 was forfeited to the Crown. Mr Smith appealed.

[110] On appeal of the order for forfeiture of the cash, this court said, at para. [21], that:

> "In order for the learned Resident Magistrate to conclude that cash recovered in circumstances such as these is recoverable property, there must first be some evidence that suggests that the cash has been unlawfully obtained or is intended to be utilised in an unlawful enterprise (see **Szepietowski**). Where the person in possession of that cash gives untruthful explanations concerning the source or use of those funds, however, the learned Resident Magistrate considering the issue of forfeiture is entitled to place significant weight on that prevarication in arriving at the conclusion that the cash is recoverable property under section 55 of the Act (see **Nevin v Customs and Excise**)."

[111] This court found that there was ample evidence, in that case, for the customs officer to have suspected Mr Smith of unlawful activity and seize the cash. It found that the evidence of the circumstances that first caused the customs officer to become suspicious, together with the other evidence before the learned magistrate (which included the inconsistencies in the accounts as to the source of funds; its manner of concealment; the unsatisfactory explanation regarding the building plans; the frequent travels to Jamaica in the absence of proof of income to support such travels; and his refusal to answer certain questions in cross-examination), were sufficient to support the learned magistrate's finding that the property was recoverable property.

[112] The issue of the treatment of lies found to have been told, which would form part of the evidence of the circumstances surrounding the cash, was dealt with in the case of **Muneka v Commissioners of Customs and Excise**, which was an appeal in the Queen's Bench Division by way of case stated. The district judge in the court below had concluded that cash found in the possession of Mr Muneka was from unlawful conduct and was recoverable property under section 298 of POCA (UK). Mr Muneka was travelling from London to Albania when he was found with £22,760.00 at Heathrow Airport. He explained that £17,000.00 was from his trade, and that most of the rest, approximately £3,000.00, had been given to him by individuals to take to relatives in Albania. The cash was seized and an application was made for forfeiture. At that hearing, Mr Muneka gave different and contradictory explanations. The district judge found that Mr Muneka had lied about the source of the money and its intended use. It was argued on Mr Muneka's behalf that this was not sufficient evidence to establish that the money had been obtained as a result of unlawful conduct or was intended for use in unlawful conduct.

[113] Moses J, in that case, stated the issue as whether the Crown had proved that this cash had been obtained through unlawful conduct or was intended for use in unlawful conduct. Looking at that issue as one to be taken in the context of the circumstances of the case, Moses J said this, at para. [8] to [9]:

> "[8] The fact that this appellant lied was evidence upon which the district judge was entitled to conclude that the very suggestions put to him were in fact true on the balance of probabilities. The context in which the questions were asked is, in my judgment, important. The district judge was entitled to ask herself: why should this appellant have lied about the source and destination of that cash? He must have appreciated that such lies could have had no reasonable explanation other than that the suggestions made to him as to their source and as to destination were in fact true?
>
> [9] In my judgment, in that context the fact that there was no explanation for the source of that money, no reasonable explanation as to why he was taking that cash to Albania, the fact that there were discrepancies in his explanations as to the source of the money and as to its destination, taken

> together, did establish, both source and intention. At least the district judge was entitled to conclude on the balance of probabilities."

[114] In **Muneka v Commissioners of Customs and Excise**, the court also relied on the case of **Nevin v Customs and Excise** (unreported), Queen's Bench Division, United Kingdom, Appeal No Co/1062/95, judgment delivered 3 November 1995; [1995] Lexis Citation 4353, in holding that lies considered in the context of the issue, "may well establish that the source of the money is criminal activity" (see para. [12]). The following paragraph from **Nevin v Customs and Excise** was relied on, where Sedley J said, on page 4 of that decision, that:

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

[115] In reliance on the above paragraph, Moses J said in **Muneka v Commissioners of Customs and Excise**, at para. [12], that:

> "Those comments apply with added force in the context of a case where it is not necessary to identify any criminal activity such as drug trafficking; all that has to be identified is that the source was criminal activity or the intended destination was use for criminal activity. A lie in that context may well entitle the fact-finding body to infer what the source or intention for which the cash was to be used was in reality on the balance of probabilities."

[116] In the instant case, the learned Senior Resident Magistrate, having heard the evidence which was adduced, found that a case for forfeiture had been made out based

on the circumstances surrounding the seizure of the cash, including lies which were told. The question for this court is whether there was sufficient evidence on which she could have properly come to that conclusion.

[117] As previously stated, at the hearing of the applications, oral evidence was given by Corporal McKenzie, Corporal Gordon and Detective Sergeant Kerridge. The particulars of the opposing claims contained in the affidavits were not mentioned in the judgment of the learned Senior Resident Magistrate. She took the view that she need not determine the matter based on the affidavits, as it was her duty to hear oral evidence. Mrs Whyte-Tomlinson maintained that, based on the case of **Metalee Thomas v The Assets Recovery Agency** [2010] JMCA Civ 6, the affidavits were not tendered into evidence and were not considered by the learned Senior Magistrate at the hearing, even though they had been filed and formed part of the record of the court. She pointed out that this court, in that case, had concluded that these kinds of claims are to be heard summarily, on oral evidence given on oath in open court, and not on affidavit evidence only, in keeping with section 183 of the Judicature (Resident Magistrates) Act.

[118] In the case of **Metalee Thomas**, the learned magistrate heard the case in chambers on the affidavits of the applicant only. This court held that she was wrong to have done so. It is generally accepted that these matters are commenced by plaint under section 143 of Judicature (Resident Magistrates) Act. Under that Act, particulars of claim are permitted to be filed with the plaint and served on the defendants, along with the summons to appear. It has been the practice in these matters, however, for the process to begin by way of notice accompanied by the affidavits outlining the basis of and the particulars of the claim. The Privy Council has ruled in **Powell v Spence** that claims commenced in this way have been properly commenced. It, therefore, would appear, that the affidavits filed with the notices ought to be treated, at the very least, as the particulars of claim, in the same way the notice is treated as the plaint. This court therefore, gave due regard to them, so far as was necessary in that context.

[119] In this case, it was Corporal Gordon who seized the cash at the TCND office where the appellant, the suitcase, and her bag with the cash were taken from the NMIA by Corporal McKenzie. It was Corporal Gordon too who first applied to detain the cash. Corporal Gordon's *viva voce* evidence was that he, along with Detective Corporal Kerridge went to see Dr Nunes at his offices. Dr Nunes gave a statement to them in which he gave conflicting accounts regarding the money. Dr Nunes' account to Corporal Gordon was that the money was from a loan from RBTT which he had used to buy foreign exchange from cambios and other money exchange places. Corporal Gordon was suspicious of Dr Nunes' demeanour during the interview, of the fact that no orders for medical equipment had been made even though he had said the money was to purchase such equipment, and the fact that Dr Nunes was an educated man but chose not to use the formal banking system. Corporal Gordon also interviewed the appellant's husband.

[120] The evidence of Constable Kerridge was that his investigation revealed no criminal activity or criminal association on the part of the appellant, Dr Nunes, or Mr Reynolds. He admitted that the Jamican equivalent to the sums seized at the time was approximately $8,000,000.00. The loan from RBTT was over $16,000,000.00. Detective Corporal Kerridge said Dr Nunes appeared nervous during the interview.

[121] The learned Senior Resident Magistrate accepted the evidence of Corporal McKenzie that the appellant had told him she only had US$8000.00, and found that the appellant was lying as she, in fact, had US$12,500.00 in her possession. The learned Senior Resident Magistrate rejected the appellant's explanation that she may have miscounted. Further evidence relied on by the learned Senior Resident Magistrate, in summary, was the fact that:

1) the suitcase was bulky and aroused suspicion;

2) the appellant admitted to packing the suitcase herself and it was reasonable to expect the appellant would have seen the bulge;

3) the credible evidence of the amount and composition of the money supported the evidence that it caused a bulge in the suitcase;

4) the money was concealed in two compartments in the suitcase. These compartments had no zipper and had to be cut open;

5) the fact of the large amounts of cash in the respondent's possession;

6) the inconsistent evidence of the appellant and Dr Nunes, and the discrepancies in their evidence which contradicted each other;

7) Dr Nunes' statement that the money was to buy medical equipment in Trinidad and that he was to meet the appellant and her husband there, as against the appellant's assertion that she was not planning to meet anyone in Trinidad and Tobago;

8) the fact that Dr Nunes stated that the money had been acquired from a loan from RBTT, where that loan was acquired three years before the cash was seized; and

9) the fact that the purpose of the loan acquired from RBTT three years prior, as stated in the letter from the bank, was for purposes, none of which included the purchase of medical equipment or the opening of a medical practice.

[122] Although, the learned Senior Resident Magistrate used the word "bulky" to describe the suitcase (which counsel on both sides agreed was an error, as the evidence was that the concealed compartment in the suitcase was bulgy), it is clear that what she was referring to was the bulge in the compartment caused by the cash. This is made clear by the reasonable assumption she made that the appellant ought to have seen the "bulge" in the suitcase, having packed it herself. No prejudice would, therefore, have

been caused to the appellant by the learned Senior Resident Magistrate's single reference to the suitcase being "bulky".

[123] The learned Senior Resident Magistrate went on to find that, on a balance of probabilities, based on the circumstances surrounding the cash and the evidence in relation to it, that the inference was irresistable that the cash had been unlawfully obtained or had been intended to be used in unlawful conduct. In coming to that conclusion, she relied on the evidence of the concealment of the cash, and the varying and untrue statements of the appellant and Dr Nunes, in attempting to explain the presence of the money, and the large quantity of cash involved.

[124] The learned Senior Resident Magistrate also drew some reasonable inferences and made some reasonable assumptions. Firstly, she concluded that the appellant ought to have seen the bulge in the suitcase (having packed it herself). Secondly, she found that it could reasonably be inferred that there was a deliberate attempt to conceal the cash, from the fact that the money was in a compartment without a zipper or any other entry points, inside of which were cloth, cushion, cash, cushion and cloth again. She also rejected the claim that the cash in the suitcase belonged to Dr Nunes and the appellant's husband and was from the proceeds of the loan, finding that that explanation lacked credibility.

[125] In coming to her final conclusion, she relied on the cases of **R (on the application of the Director of Assets Recovery Agency and other) v Green and others, Leroy Smith v Commissioner of Customs, Sandra Marie Cavallier v Commissioner of Customs, Muneka v Commissioners of Customs and Excise** and **Winston Pusey v Assets Recovery Agency.**

[126] In the instant case, the appellant and Dr Nunes elected not to give any evidence. However, the three police officers who did, were cross-examined. Queen's Counsel argued that this case was distinguishable from the others in which the evidence of the circumstances surrounding the cash was held to be enough for inferences to be made to

cause an adverse finding. For instance, Queen's Counsel maintained that in **Sandra Marie Cavallier v Commissioner of Customs**, Ms Cavallier had responded falsely to a direct question as to how much cash she was carrying, but in this case, the appellant was not asked that question but was only asked if she had anything to declare.

[127] We could locate no significant distinguishing features between answering falsely to a direct question and volunteering information which was false. It was entirely proper for the learned Senior Resident Magistrate to rely on the approach taken in this case, and we did not agree with the appellant that there was any distinguishing feature to cause the principles applied in **Sandra Marie Cavallier v Commissioner of Customs** to be inapplicable to the instant case.

[128] Queen's Counsel also attempted to distinguish the case of **Leroy Smith v Commissioner of Customs**, however, apart from the finding by the learned magistrate on Mr Smith's frequent travels to Jamaica, which his income did not suggest he could afford, and his attempt to bribe the customs officer, there is not much more by way of distinguishing features between that case and this one. In this case, although not mentioned by the learned Senior Resident Magistrate, the appellant had travelled three times before to Trinidad, on her account, but could not recall one place in which she had stayed. On this occasion, she also could not provide an account of any particular place she intended to stay in Trinidad.

[129] Queen's Counsel submitted that lies alone were not sufficient to establish the case for forfeiture of the cash. It is clear, however, based on what has been outlined, that the learned Senior Resident Magistrate had not relied on lies alone. Nonetheless, if they form part of the evidence, lies can be relied on as a basis from which the inference may be drawn that the cash was from an unlawful source or was intended for unlawful use. In **Muneka v Commissioners of Customs and Excise**, the circumstances of the seizure were such that they called for an explanation which had not been truthfully given. In this case, the learned Senior Resident Magistrate found that the appellant lied as to the sum she was carrying in her handbag and as to her knowledge of the cash in the suitcase,

and rejected her explanations. She found that the lies formed part of the circumstances from which adverse inferences could properly be drawn. We saw no reason to disagree with this stance. We, therefore, agreed with the respondent that there was sufficient evidence from the circumstances surrounding the cash from which the learned Senior Resident Magistrate could draw the adverse inferences that she did and come to the conclusions that she came to.

(iii) whether the learned Senior Resident Magistrate erred in finding that the appellant had lied, and as a result, erroneously found that the seized cash was recoverable property

[130] Counsel for the appellant posited that the appellant did not lie because she had not been asked how much money she had, but rather, whether she had anything to declare. He also contended that the fact that the suitcase compartments were seen to be bulgy when the suitcase was opened was not enough for the learned Senior Resident Magistrate to find that the appellant had lied about not knowing that the money was in the suitcase.

[131] Counsel for the respondent maintained that the learned Senior Resident Magistrate was correct to find that the appellant had lied both about the money in her handbag and the money in the suitcase.

[132] How did the learned Senior Resident Magistrate deal with what she considered to be lies told by the appellant? Having accepted Corporal McKenzie's evidence that the appellant said the only sum of concern was US$8000.00, when in fact a total of US$12,500.00 was in her handbag, the learned Senior Resident Magistrate determined that the appellant had lied. She rejected the appellant's explanation as to how more money was found than she had declared, that explanation being that she may have miscounted. She also did not accept the appellant's evidence that she did not know about the money in the suitcase.

[133] We agree with counsel for the respondent that the learned Senior Resident Magistrate was entitled to find that, on the unchallenged evidence of Corporal McKenzie

regarding the cash, the appellant had lied about the amount of money in her handbag. It would have been surprising if the learned Senior Resident Magistrate had come to any other conclusion. The appellant had in her handbag US$8,000.00 in one parcel, and in the same bag, in a purse, she had US$4,500.00. These monies were clearly separated. The appellant's explanation was not that she forgot about the US$4,500.00 in the purse, but that she must have miscounted. This would have been to the tune of US$4,500.00. The learned Senior Resident Magistrate was entitled to reject that as a blatant lie.

[134] With respect to the cash in the suitcase, we agreed with counsel for the respondent that the learned Senior Resident Magistrate could have done nothing else other than to reject the appellant's claim that she knew nothing about the money in the suitcase. Counsel pointed to the fact that the appellant admitted that she had packed the suitcase herself. Corporal McKenzie's evidence was that the bulges he saw, on opening the suitcase, were visible to the naked eye, even without touching them. Counsel for the respondent asked this court to consider whether it was reasonable to assume that the appellant, who had packed the suitcase herself, did not notice the unusual bulges in it, and if she did, was it reasonable to assume she would still have carried that suitcase with the bulge in it. We agreed that the answer to both questions would have been in the negative.

[135] The learned Senior Resident Magistrate approached the issue in the same manner. She accepted that the amount and composition of the money would have created a bulge in the compartments of the suitcase in which they were found. She accepted that it was the bulge which aroused the suspicion of Corporal McKenzie. She found that it was reasonable to find that the appellant would have seen the bulges since she packed the suitcase herself.

[136] The learned Senior Resident Magistrate also took account of the fact that even though the appellant denied knowing that the money was in the suitcase, she thereafter attempted to give an account of the cash in her statement. Queen's Counsel submitted that the learned Senior Resident Magistrate was wrong to do so. He claimed that the

money having been found, the appellant would have been able to say where all that money would likely have come from. Counsel for the respondent, however, countered this claim, on the basis that the cash had no distinguishing features, therefore, the appellant had no way of knowing that this was cash from a loan acquired three years previously. Counsel maintained that the only way the appellant would have known the source was because she knew the cash was in the suitcase and was complicit in it being placed there. Counsel argued that if it was necessary to determine who had placed the cash in the suitcase, as counsel for the appellant insinuated, then it was only necessary to point to the statement of Dr Nunes, that he had kept the money in a vault, but on 7 May 2011, he gave it to the appellant's husband. This she pointed out was the day before the appellant went to the NMIA. The inference, she said could be drawn that it was the appellant's husband who then placed the cash in the suitcase and created the two "elaborate" secret compartments. That would leave, she said, the question as to why this was done and why, "coincidentally", this was the suitcase that the appellant chose to take. This, counsel said, called for a truthful explanation and none was given.

[137] We took the argument one step further, for in his statement, Dr Nunes indicated that US$8,000.00 of the money he gave to the appellant's husband was separately packaged with rubber bands. So, was it also a coincidence that the appellant was found with US$8,000.00 separately packaged from the remaining sum found in her purse? Was it likely this was given to her by her husband without any mention of the cash given to him by Dr Nunes the day before her departure?

[138] The learned Senior Resident Magistrate rejected the appellant's claim that she did not know money was in the suitcase. We could not fault her for doing so. No error was made. The circumstances of this case were such that the lies told by the appellant in the context of what the learned Senior Resident Magistrate had to decide, were crucial, and had to be resolved by credible explanations. None was forthcoming. The evidence before the learned Senior Resident Magistrate was more than sufficient for her to make the order she did.

(iv) Whether the learned Senior Resident Magistrate erred in allowing Corporal McKenzie to give opinion evidence on whether the suitcase was tampered with and, as a result, relied on irrelevant and inadmissible evidence

[139] Queen's Counsel, on behalf of the appellant, maintained that there was no evidence that Corporal McKenzie had any expertise in suitcases which would enable him to give relevant and credible evidence as to whether the suitcase had been tampered with. Furthermore, Queen's Counsel argued, the evidence Corporal McKenzie gave was based on his belief and was, therefore, irrelevant and inadmissible.

[140] Counsel for the respondent disagreed and pointed to the fact that proper foundation had been led regarding Corporal McKenzie's training in detecting inconsistencies in suitcases, and his years of experience working at the airport and doing searches. Furthermore, she said, the learned Senior Resident Magistrate was entitled to rely on Corporal McKenzie's evidence of what he observed.

[141] Corporal McKenzie was asked, at trial, if, from his observation, he believed the suitcase had been tampered with. He was allowed to respond over the objections of counsel for the appellant, after the necessary foundation had been laid regarding Corporal McKenzie's training and experience. He testified that he had attended training workshops involving sessions on searches, where he was trained to detect inconsistencies in suitcases, it being the main way in which drugs are concealed for travel across borders. He would look for irregularities and check to see if stiches are inconsistent at the base, sides and top of suitcases.

[142] In the instant case, Corporal McKenzie said that based on his experience and training, he believed that the two concealed compartments in which the cash was found in the appellant's suitcase, had been tampered with. He came to this conclusion because when he used his utility knife, the stitches he saw were not factory made. They were not consistent, and there were no other entry points.

[143] The learned Senior Resident Magistrate accepted this evidence from which she drew the inference that the cash was being concealed.

[144] We did not agree with the contentions of counsel for the appellant. Firstly, the question as to whether an object, such as a suitcase, had been tampered with, is a question of fact which, in the ordinary case, requires no specialized skill, save and except for more complicated machinery. To the extent that it requires any skill at all, Corporal McKenzie, having been trained to detect inconsistencies, must be taken to have possessed some reasonable amount of knowledge of the normal and ordinary state of a suitcase, as against one which had been altered.

[145] Furthermore, no one challenged the fact that the money had been hidden in the suitcase. The appellant did not claim that it was easily accessed by opening a zipper or by any other means. No one put forward any evidence to dispute that of Corporal McKenzie, that to get to the bulge he had to cut open the stiches to the concealed compartment. Therefore, if cash is in a suitcase with no visible means of access, the relevant question must be, how did it get there? Clearly, short of saying the money was made in the suitcase by the manufacturer, even without the evidence of Corporal McKenzie, there could have been only one conclusion, and that is, that the suitcase was tampered with in order to place the cash in there and seal it in.

[146] The only addition to that common sense approach to the evidence given by Corporal McKenzie is the fact that the seal was by way of stitches which were clearly, to his naked eye, not made by the manufacturer, as they were inconsistent. An expert would not have been required to give such evidence. The learned Senior Resident Magistrate's conclusion, from the evidence, that there was an attempt to conceal the money is, therefore, unassailable. The only question left for her was why was the money so concealed. There was no merit in this contention, and to his credit, counsel did indicate it was not a ground he was pursuing with any vigour.

[147] Grounds a to d were, therefore, found to be devoid of merit and as a result, all failed.

**Issue 2 - Whether it was necessary for the learned senior resident magistrate to differentiate between the cash seized from the suitcase and the monies**

**seized from the handbag in determining what was recoverable property (ground e)**

[148] This ground was argued by Mr Stewart for the appellant. He maintained that, in coming to her decision on what was recoverable property, the learned Senior Resident Magistrate ought to have differentiated the cash seized from the handbag from that seized from the suitcase. Counsel's argument was that it is quite possible to have recoverable property along with legal property and, according to him, there was no evidence that the money in the handbag was derived from or intended for use in unlawful conduct.

[149] Counsel for the respondent maintained that there was no basis upon which the learned Senior Resident Magistrate could properly differentiate the cash, as there was sufficient nexus between the cash in the suitcase and the cash in the handbag for her to conclude that they had come from a common source or had a common destination or purpose. For that, she relied on two cases: **Customs and Excise Commissioners v Duffy and others** [2002] EWHC 425 (Admin) and **Scottish Ministers v Devaney, Anderson and Stark** 2012 Scot (D) 28/5.

[150] The former case involved an appeal by way of case stated from a decision refusing an application by HM Customs and Excise under the UK Drug Trafficking Act 1994, for the continued detention of seized cash. The appellate court had to decide whether cash found on three individuals travelling together, which individually was below the threshold, could be aggregated in order to meet the threshold for seizure. The portion of the judgment relevant to these circumstances is to be found in paras. 16 and 17, wherein the court dealt with the circumstance where cash is stored in more than one place, using the example of cash stored in two suitcases belonging to one individual. The approach suggested is that the court must look at the reality of the situation, the question being whether the cash being carried can be regarded as a single "exportation", in order to examine its "totality" and its "origin and purpose". There must be some connection between the monies found, demonstrating that they are either coming from a common source or have a common destination.

[151] The latter case was an application for forfeiture of cash under section 298 of POCA (UK). The court, in that case, was looking at a similar situation to the latter case of **Duffy**, in that, cash was found on three separate individuals, two of whom had below the minimum threshold for seizure, but if aggregated with the third, would have had above the threshold for seizure under POCA (UK). That court also decided, (to the extent relevant to the circumstances of the instant case) approving **Duffy,** that a court must look at the reality of the situation, and that sums could be aggregated if there was a nexus between the individual sums recovered, or if they had a common purpose or destination.

[152] In both cases, the court was equally concerned that any other interpretation would defeat the purpose of the legislation, so as to allow easy circumvention by those the legislation was intended to catch.

[153] Applying that approach to this case, it is clear that there was sufficient evidence to suggest that the sums either had a common origin or were destined for a common unlawful purpose.

[154] The appellant only declared US$8000.00 in her possession, which was found in in her handbag. She was asked what it was for, and she said it was to buy a deep freeze in Trinidad, and to shop. Asked about the source of the funds she said it came from a mortgage on her house and a loan. She made no mention of any other monies. Her suitcase was searched before her handbag, and the monies concealed therein were found. She denied knowledge of it, but even then, she did not admit to having any further sums. Even when Corporal Gordon and Detective Sergeant Kerridge first arrived, she was still admitting to only US$8,000.00. It was after this that her bag was searched and the additional cash found. It turned out she had US$12,500.00 in her handbag, not US$8,000.00 as she first declared, leaving aside the TT$11.00. She gave no reason then for the difference, despite being asked by Corporal McKenzie, except to say all the money in the bag belonged to her and she may have miscounted. However, this was unlikely to have been true since the cash was separately packaged in the bag. She later gave an

account for the cash in the suitcase which she had initially denied knowing about. Those monies she also said came from the mortgage on the house. The same source as the money in the handbag. She also said she bought US dollars from Cambios and other persons as well as having been given some by her husband. It was the husband who placed the cash in the suitcase. Furthermore, although the appellant said she was not planning to meet anyone in Trinidad, Dr Nunes, said in his statement that he gave the money to the appellant's husband on the day before the appellant went to the airport and that he was planning to meet them in Trinidad. The monies were in the appellant's possession bound for Trinidad. There was, therefore, a common destination.

[155] The learned Senior Resident Magistrate was, therefore, entitled to find that the cash came from the same source or was intended for the same unlawful purpose.

[156] A similar complaint had been raised in **Sandra Marie Cavallier v Commissioner of Customs**. In that case, the then resident magistrate had not drawn any distinction between the monies found in Ms Cavallier's suitcase and that found in her handbag. She found, in fact, that there was "no evidence to rebut the strong probability which attached to either a part or the whole of the seized cash" (see para. [20]). This court found that her approach was not surprising. This court pointed, at para. [19], to the fact that:

> "...there was no clear demarcation between the money in the suitcase and the money in Ms Cavallier's handbag as she claimed some of her money was in the suitcase while Mr David said the entire US$21,046.00 (which sum included the money in her handbag) was given to Ms Cavallier to be used for paying the import duty for the vehicles."

[157] In the instant case, Dr Nunes maintained that he gave the money to the appellant's husband, and the husband is said to have given the appellant some cash as well. Dr Nunes said that part of the money he had been saving in the suitcase was US$8,000.00 separately parcelled. That separate parcel of US$8000.00 was not found in the suitcase but US$8,000.00 was found in the appellant's handbag. Furthermore, no account has yet to be given for the US$4,500.00 found in the purse, nor the TT$11.00, for that matter.

[158] We concluded that the circumstances surrounding the different sets of cash were inextricably linked, and there was no basis upon which we could say that the learned Senior Resident Magistrate ought to have considered the circumstances surrounding the finding of the cash separately, in order to release the cash that had been found in the handbag. This ground had no merit.

## Conclusion

[159] In the circumstances, there was more than sufficient evidence before the learned Senior Resident Magistrate for her to conclude that the cash was recoverable property or that it was intended for an unlawful purpose. POCA (Jamaica) does not require the respondents to identify any particular unlawful conduct for cash to be subject to forfeiture, once there is sufficient evidence from which the inference may be drawn, on a balance of probabilities, that the cash was either unlawfully obtained or destined for an unlawful purpose. In this case, the learned Senior Resident Magistrate made no errors and the grounds of appeal were all without merit.

[160] It was for those reasons that we made the orders set out in para. [5] above.

## DUNBAR-GREEN JA

[161] I have read, in draft, the reasons given by Edwards JA and I agree.