

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

RESIDENT MAGISTRATES' CIVIL APPEAL NO 23/2013

**BEFORE: THE HON MR JUSTICE PANTON P
 THE HON MR JUSTICE MORRISON JA
 THE HON MR JUSTICE BROOKS JA**

**IN THE MATTER of an application
by LEROY SMITH under section 78
of the Proceeds of Crime Act for the
release of cash seized from LEROY
SMITH**

BETWEEN	LEROY SMITH	APPELLANT
AND	COMMISSIONER OF CUSTOMS	RESPONDENT

Chumu Paris for the appellant

Miss Janet Scotland and Miss Julaine Lumsden for the respondent

12 December 2013 and 21 February 2014

BROOKS JA

[1] This is an appeal by Mr Leroy Smith against an order for the forfeiture of £14,000.00 in cash which was seized from him on his arrival into the island by way of

the Sangster International Airport on 14 January 2012. Mr Smith is of Jamaican origin but is also a citizen of the United Kingdom, having migrated there some years ago. He was entering the island, having boarded his flight in England where he is ordinarily resident. The money was seized from him by a customs officer pursuant to the Proceeds of Crime Act (referred to hereafter as "the Act"). This was after Mr Smith gave inconsistent answers as to how much cash he was bringing into the island at the time and after he was found to be in possession of more cash than he had declared in his customs/immigration form.

[2] On 26 November 2012, Her Honour Ms Sharon Barnes, Resident Magistrate for the parish of Saint James, adjudicated on competing applications. The first was by Mr Smith, asking that the cash be returned to him and the second was by the Commissioner of Customs requesting the forfeiture of the seized cash. The learned Resident Magistrate refused Mr Smith's application and ordered the forfeiture of the entire sum, as requested by the Commissioner.

[3] Mr Smith appealed against the order for forfeiture. We heard his appeal on 12 December 2013 and at that time dismissed the appeal and affirmed the decision of the learned Resident Magistrate. We promised then to put our reasons for the decision in writing. This judgment is in fulfilment of that promise.

[4] The main issue that was raised by the appeal is whether there was sufficient evidence of the money having been the result of any unlawful conduct or sufficient evidence of any intention for the money to be used for unlawful conduct, so as to

justify the learned Resident Magistrate ordering the forfeiture. We shall outline the salient facts of the case, summarise the submissions and then set out our reasoning for having arrived at our conclusion mentioned above.

The background facts

[5] The evidence on which the learned Resident Magistrate's decision was mainly based was presented by two customs officers. The first, Ms Sonya Stevens, testified that when she had initially approached Mr Smith in the baggage hall of the airport, he told her that he was not travelling with a sum in excess of US \$10,000.00. His customs/immigration form which he had handed over to her, also declared that fact.

[6] Ms Stevens said that when she asked Mr Smith to accompany her to the examination trestle for his luggage to be examined, he told her that he had £8,000.00 and also asked her not to check the luggage and that he would "give [her] a little something". She said she became suspicious of the situation, summoned her supervisor and took Mr Smith to an examination room. It was there that the supervisor, Ms Tracey-Ann Green, joined them. Mr Smith, according to both customs officers, confirmed Ms Stevens' report that he had offered her something so as not to check his bags. He was travelling with one large suitcase, a smaller carry-on bag and a laptop computer case.

[7] Ms Stevens searched Mr Smith's large suitcase and in one section found a plastic bag containing £5,000.00 cash. She found a further £3,000.00 in a camera case in that suitcase. There was no camera in the case. At that stage, Mr Smith, in response to her

question, said that he had no more cash than that which had been found. Ms Stevens, however, searched Mr Smith's laptop case and found a further £3,000.00 in it. Again she asked Mr Smith if he had any more cash and he said that he did not.

[8] Ms Green intervened at that stage of the interaction between Mr Smith and Ms Stevens. Ms Green testified that she noticed that during that interaction Mr Smith seemed to be in some discomfort, as he kept tugging at his groin area. She, therefore, directed him to a smaller room where she instructed him to lift up his shirt. He complied. She then directed him to pull his pants down. She said that, in complying, Mr Smith pulled down at least three pieces of clothing, in a single movement.

[9] She was dissatisfied with that action, and directed him to pull up the clothing and then pull it back down one item at a time. It was when he was pulling the clothing back down that Ms Green saw a parcel in the crotch of his shorts and directed him to hand it over. It was found to contain a further £3,000.00 cash. Nothing else of interest was taken from Mr Smith, except some strawberries. They are of no significance to this judgment.

[10] Mr Smith gave a voluntary written statement, which was recorded by Ms Stevens, but which he signed. In his statement Mr Smith said among other things:

- a. The money was his money from his earnings and money from three family members.

- b. Some of the money was to be used to construct a house on family land located in Albion in the parish of Saint Thomas, for which he had the building plans; some was to be used to pay expenses connected with his wife's immigration application; and the rest was to meet his expenses while in Jamaica.
- c. That he had concealed the money for safety reasons. He knew that many persons who have taken money to Jamaica to build their homes have been robbed. He was not attempting to conceal the money from the authorities but was simply ensuring his safety.
- d. He did not see the question in the customs form that asked if he was travelling with US \$10,000.00 or its equivalent. He had read only the first two questions and had answered "no" for all. He also did not know the conversion rate between GBP and US\$.

[11] After the statement had been recorded the cash was seized and Mr Smith given a receipt for it. A justice of the peace later extended the period for which the money could be lawfully detained. Before the expiry of the extended period, Mr Smith made his application for the release of the funds and, in response, the Commissioner of Customs filed the application for forfeiture.

[12] Affidavits were filed in support of each application. In his affidavit, Mr Smith deposed that some of the money (£7,200.00) was from his “partner draw”, some (£4,000.00) was a loan from a cousin, and the balance was his savings from his earnings as a security guard.

[13] The commissioner was given an opportunity to investigate Mr Smith’s information. Ms Stevens said that she attempted to get confirmation from the person in charge of the “partner” that Mr Smith said that he was a member of, and from the cousin, but did not reap much success. It also was revealed that the building plans, to which Mr Smith had referred at the airport, were not drawn in England at his instance, as he had intimated, but had been drawn in Jamaica. It proved that they were for a property in the parish of Clarendon and not for his property in Albion. When tackled in cross-examination about the inconsistencies in this regard, he said that it was his friend’s design, that he liked the design and that he had borrowed the plans from his friend in order to use it on his own property.

The Resident Magistrate’s reasons for judgment

[14] The learned Resident Magistrate gave written reasons for her decision. She relied on the fact that Mr Smith was transporting the cash in a manner which gave rise to suspicion, that he gave conflicting explanations as to the source of the cash and that the documentation that he later provided as to the source of the cash did not establish that the source was legal. As a consequence, she found, on a balance of probabilities that the cash was recoverable property and granted the application for forfeiture.

The submissions

[15] Mr Paris, on behalf of Mr Smith, argued that Mr Smith's inconsistent answers, even if found to be untruths, were insufficient to establish that the source of the funds was unlawful. Learned counsel argued that sometimes people tell untruths in those circumstances, not to hide the source of the funds but to conceal the amount of money that they are carrying. He said that in the framework of the Act, it was necessary to first determine that there was unlawful conduct before assessing the inconsistent answers given by the traveller. He cited **The Director of the Assets Recovery Agency v Szepietowski and Others** [2007] EWCA Civ 766 in support of his submissions.

[16] Learned counsel highlighted paragraph 28 of **Szepietowski**, in which Waller LJ stipulated the need to identify the unlawful conduct before considering the aspect of untruthful explanations. Waller LJ said:

"In this case, in considering whether a good arguable case has been established, it will be necessary to examine first whether it is arguable on the evidence that unlawful conduct of the kind asserted by the ARA has taken place i.e. mortgage fraud. Next needs to be considered whether it is arguable that the property sought to be frozen represents property originally obtained through such unlawful conduct, but not necessarily through specific examples of that conduct; and finally, if there is some evidence that property was obtained though [sic] unlawful conduct, consideration needs to be given to any untruthful explanation or a lack of explanation where opportunity has been given to provide it. **An untruthful explanation or a failure to offer an explanation may add strength to the arguability of the case.**" (Emphasis supplied)

[17] Ms Scotland, for the Commissioner of Customs, argued that there was sufficient evidence to allow the learned Resident Magistrate to make the findings that she did. Learned counsel pointed to the record of appeal which, on learned counsel's submissions, revealed that Mr Smith gave three different explanations as to the source of the money. His refusal to provide details, when these were requested of him in cross-examination, was also highlighted by Ms Scotland.

[18] There was also the evidence, Ms Scotland submitted, that Mr Smith had travelled from England to Jamaica and back six times in the period between December 2010 and January 2012. She submitted that his level of earnings as a security guard could not have allowed him to travel that frequently. Learned counsel submitted that when the subject matter of the investigation is cash, the court at first instance is entitled to place significant emphasis on untruthful statements. She cited, in support of her submissions, **Sandra Marie Cavalier v Commissioner of Customs** [2010] JMCA Civ 26, in which the following quotation from **Nevin v Customs and Excise** (unreported, delivered 3 November 1995) was cited:

"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.”
(Emphasis supplied)

Analysis

[19] Part IV of the Act deals with the civil recovery of property which are the proceeds of unlawful conduct. It includes sections 55 through 90 of the Act. Section 55 defines recoverable property and property obtained through unlawful conduct. Section 75 of the Act allows for a customs officer to seize and detain cash if that officer has reasonable grounds to suspect that the cash is recoverable property, or reasonably suspects it to be intended to be used for unlawful conduct.

[20] The property having been seized, section 76 allows for its continued detention for a period of up to three months. The person from whom it has been seized may apply, pursuant to the provisions of section 78, for the release of the cash on the ground that either the basis for the detention or the provisions of section 76 are no longer applicable. On the other hand, section 79 allows the detaining officer to apply within the three month period for the cash, or any part, of it to be forfeited. Section 79 authorises a Resident Magistrate, after a summary hearing, to order the forfeiture of the cash.

[21] 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**).

[22] There is ample evidence in this case for the customs officer, Ms Stevens, to have suspected that Mr Smith was involved in some unlawful activity. His attempt to bribe her, his denial, after the first £8,000.00 was found, that he had any more cash, and his attempt to conceal the cash secreted in his clothing, were, together, sufficient to justify the detention of the cash.

[23] Before the learned Resident Magistrate, the evidence which first fired Ms Stevens' suspicion, together with:

- a. Mr Smith's inconsistent explanations as to the source of the money;
- b. the manner in which the money was concealed;
- c. his unsatisfactory explanation about the building plans and how they came to be in his possession;
- d. his frequent travels to Jamaica in the absence of proof of earnings to support that level of travel; and
- e. his refusal to answer questions in cross-examination which were aimed at securing particulars of his explanation of the source of the funds;

were enough to support the learned Resident Magistrate in arriving at the conclusions that the property was recoverable property.

Conclusion

[24] It is our view that the learned Resident Magistrate was entitled to arrive at the conclusion that the money which Mr Smith had in his possession should be forfeited as being recoverable property. His attempt to enter the country with the cash, concealed in the way that it was, was not motivated by reasons of personal safety of his property as Mr Paris submitted. Mr Smith's attempt to bribe the customs officer not to search his luggage, his false declaration as to the amount of money that he was carrying, his attempt to conceal the money in his clothing from the customs officer and his inconsistent explanations as to the source of the fund amply demonstrate that he was attempting to conceal the money from the authorities.

[25] In the circumstances, the learned Resident Magistrate was entitled to find that the cash was recoverable property and to order that it be forfeited. It is for those reasons that we made the orders that have been set out at paragraph [3] above.