

[2010] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 19 OF 2009

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

BETWEEN	METALEE THOMAS	APPELLANT
AND	THE ASSET RECOVERY AGENCY	RESPONDENT

Earl DeLisser for the Appellant.

Mrs. Susan Watson Bonner, Miss Eureka Stewart, Mrs. Nateline Robb-Cato
and Mrs. Charmaine Newsome for the Respondent.

February 2, 3 and 26, 2010

HARRISON, J.A.

[1] This is an appeal against a forfeiture order of cash made by Her Honour Miss Jennes Anderson, Resident Magistrate for the Corporate Area Court, Kingston, on June 3, 2009.

[2] The appeal raises important issues in relation to the law and procedure dealing with cash forfeitures under the Proceeds of Crime Act 2007 (the Act) in the Resident Magistrate's Court.

The Forfeiture Application

[3] On May 19, 2009 a Notice was filed by the Assets Recovery Agency (the Agency) in the Resident Magistrate's Court for the Corporate Area, in respect of the hearing of an application under section 79 of the Act for forfeiture of cash seized by the Agency. A copy of the Notice was served on Metalee Thomas (the appellant) on 20 May, 2009 as well as on her attorney, Mr. Earl DeLisser.

[4] An affidavit sworn to on May 19, 2009 by Detective Corporal Karen Harrison of the Organised Crime Investigations Division of the Jamaica Constabulary Force sets out in detail the allegations surrounding the seizure of the cash. The affidavit evidence also reveals that the appellant is the mother of Ricardo Thomas who was arrested and charged with gun offences on the day when the cash was seized at the appellant's home.

[5] Detective Harrison states inter alia in her affidavit:

"22. I believe that the cash seized was generated for the most part by, and belongs to Ricardo Thomas. This Honourable Court is being misled into believing that the cash belongs to his mother, Metalee ...

...

24. Metalee Thomas, mother of Ricardo Thomas, claimed ownership of the cash; however, our investigations have not revealed any legitimate source of income for Metalee Thomas which could account for the sums seized, coupled with the significant sums invested in the Unregulated Financial Schemes referred to."

Another affidavit also dated May 19, 2009 was filed by the Agency and was sworn to by Detective Corporal Harrison. This affidavit states inter alia:

- "1. ...
2. Cash was seized from Metalee Thomas on the 18th day of October 2008 at premises situate at 7 Charlemont (sic) Drive, Kingston 6 in the parish of St. Andrew.
3. That pursuant to Section 76(3) of the Proceeds of Crime Act ('the Act) on the 20th day of October 2008, Donald Clough, Justice of the Peace for the parish of Kingston authorised the continued detention of the seized cash for a period of three (3) months.
4. The time for the continued detention of seized cash mentioned in paragraph 3 expired on 17th day of January 2009. The period for detention passed, without a further application being made as the file was being held by the police connected with the prosecution of the criminal matter against Ricardo Thomas in the Gun Court.
5. Upon receipt of the file the initial analysis suggested that there was merit to the case which warranted further forensic investigation ending after the criminal matter concluded.
6. Based on the foregoing I crave the Court's indulgence and ask that documents served out of time, be made to stand.
7. I humbly pray that this Honourable Court accepts this affidavit as true and correct and grants the order for forfeiture of the seized cash."

[6] The application for forfeiture came on for hearing on June 3, 2009, before Her Honour Miss Anderson. Apart from the two affidavits filed on behalf of the respondent

and a Notice which stated that the application was made under section 79 of the Act, no other document was apparently filed. The issue which the Magistrate said she had to decide was whether forfeiture could be ordered after the initial order for detention had expired and no order had been sought for further detention as specified by section 76(2) of the Act.

[7] A preliminary objection was taken by Mr. DeLisser with respect to the forfeiture proceedings. The objection raised by Mr. DeLisser has been summarised by the learned Resident Magistrate as follows:

- “(a) since the cash had been seized under section 76;
and
- (b) an initial application for its detention was made on
the 20th day of October 2008; and
- (c) that initial period of three (3) months had expired on
the 17th day of January 2009 (sic) as stated in the
applicant’s affidavit; and
- (d) no further period of detention having been applied
for as provided by the POCA also under section 76;
then
- (e) the Asset Recovery Agency and the applicant were
ultra vires in applying for forfeiture under section 79
of POCA because in making such an application they
had failed to follow the mandated provisions of both
sections 76 and 79 of the POCA.”

[8] The learned Resident Magistrate ruled that she had accepted the submissions of Mr. DeLisser as being correct but she would exercise her powers of amendment under section 190 of the Judicature (Resident Magistrates) Act by amending the application to

substitute "section 56" in place of section 79 in the Notice filed May 19, 2009. She thereafter proceeded to make the following order:

- "1. The Application for Forfeiture be amended to substitute S. 56 for S. 79 of the Proceeds of Crime Act 2007.
 2. The cash being U.S.\$5,341.00 and J.A.\$173,500.00, seized from Metalee Thomas, of 7 Charlemont Drive, Kingston 6, in the parish of St. James be forfeited to the Crown.
 3. Verbal notice of appeal given
- ..."

The Magistrate's Reasons for Judgment

[9] The learned Resident Magistrate's reasons for judgment are not lengthy so I have set them out hereunder:

"The Reasons for Judgment

Both Attorneys were invited by the Resident Magistrate, to look at section 56 of POCA which states:

- '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.

- (2) 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.
- (3) The court mentioned in subsection (1) (a) or (b) shall decide on a balance of probabilities whether it is proved that -
 - (a) any matters alleged to constitute unlawful conduct have occurred; or
 - (b) any person intended to use any cash in unlawful conduct.

'Unlawful conduct' is defined in section 55 as;

- (a) conduct that occurs in, and is unlawful under the criminal law of Jamaica;'

The Court was of the view that it must take cognizance of the facts detailed in the entire affidavit of the applicant which outlined the circumstance under which the cash was seized. Also since the POCA provisions for forfeiture was a matter for civil adjudication, the standard of proof is one based on a balance of probabilities. In considering the application for forfeiture the court also felt it had to be mindful of the mischief which the POCA sought to address viz that the suspected proceeds of crime; or cash suspected of being intended for use in unlawful conduct; should be confiscated so that it cannot be available for the use or future enrichment of the respondent; In the circumstances, the court felt that although attorney for the respondent was correct in his submission that the correct procedure for forfeiture under section 79 of the POCA had not been followed, that did not necessarily mean that the application fell foul of the POCA and thus must fail.

The Court felt that POCA was quite deliberate in making it possible for an application for forfeiture of cash to be made

in the civil jurisdiction of a Resident Magistrate's Court even when there may be other matters which are connected with the cash but must be considered either in the criminal jurisdiction of the Resident Magistrate's Court or even in The Supreme Court. The court also felt that in the quest to achieve its aim the POCA was also deliberate in providing more than one means for forfeiture. The present application had been brought under the incorrect section of POCA.

The Magistrate, under section 190 of The Judicature (Resident Magistrates) Act amended the application to read

Application for Forfeiture under section 56 of the POCA.

Section 190 of The Judicature (Resident Magistrates) Act reads:

'The Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be made.'

After the amendment was made the forfeiture order was granted."

Objectives of the Act

[10] The Act has several objectives. Most importantly, it seeks to separate criminals and their associates from the proceeds of criminal conduct. The courts are empowered to make forfeiture orders, both in the criminal and civil jurisdictions.

[11] Part IV of the Act deals with forfeiture applications both in the Supreme Court and the Resident Magistrate's Court. The Supreme Court can deal with forfeiture applications of all kinds of property including cash, but the Resident Magistrate's Court is restricted to cash forfeitures - see section 56 (1) (b).

[12] Section 56 (2) of the Act makes it plain that civil forfeiture proceedings can be brought whether or not criminal proceedings have been brought. The effect of section 56 (2) is that an acquittal in criminal proceedings or a discontinuation of criminal proceedings is not a bar to civil forfeiture proceedings. Section 56 (3) provides that the standard of proof is the civil standard in respect of civil forfeiture proceedings.

Notice and Grounds of Appeal

[13] Notice of Appeal was filed on July 3, 2009. The grounds of appeal state:

- (i) That the Learned Resident Magistrate erred in law in ordering that the Respondent/appellant's money be forfeited under Section 56 of the Proceeds of Crime Act.
- (ii) That even if Section 56 of the Proceeds of Crime Act was the relevant section under which the money could be forfeited the Respondent/Appellant ought to have been given sufficient time to respond to the new development.

Whereby the appellant humbly prays that:

- (a) The judgment of the learned Resident Magistrate be set aside;
- (b) The sum of US\$5,341.00 and Ja\$173,500 be returned to her.

The Submissions

[14] Mr. DeLisser relied both on written as well as oral submissions. In his written submissions, he states as follows:

"1 The question to be asked here is as follows:-

- (a) Can a Resident Magistrate make a ruling that the entire application brought under Section 79 be summarily set aside in the manner which she did?

In my submission, the answer is no.

- b. All documents served on the Respondents rightly sets (sic) out the procedure under the Act from Section 79 and quite rightly does not mention Section 56 as this section is irrelevant.

- 2. Section 190 of the Judicature (Resident Magistrate) Act cannot be applied in this case. The Resident Magistrate presented an entirely new application for herself (sic) to rule on.

The entire application of the Asset Recovery Agency is made under Section 79. If the application fails under Section 79, that is the end of the matter."

[15] In this court, Mr. DeLisser submitted orally that, having agreed in limine that the matter could not stand under section 79, it was not open to the learned Resident Magistrate to examine another section under which no application was made and to rule on the effect of that section. He submitted that in any event the section is irrelevant for the purpose of any application before the Magistrate. Section 72 of the Act onwards he said, deals with the procedure before a Resident Magistrate and under the Act there is no alternative.

[16] Mr. DeLisser also submitted that section 56 is not a catch all section and it defines the scope for the Resident Magistrate to act. It is not a section he said, under which any action can be brought. Furthermore, section 56 is not an alternative provision to section 72.

[17] In her response to ground 1, Mrs. Watson Bonner submitted that the applicant had overwhelmingly satisfied the court on a balance of probabilities that the monies seized were recoverable property and ought to be forfeited. The application provided evidence of unlawful conduct and the learned Resident Magistrate's decision to forfeit the cash was sound.

[18] Mrs. Watson Bonner also submitted that the learned Resident Magistrate, being a creature of statute, used her statutory powers pursuant to section 190 of The Judicature (Resident Magistrates) Act, to allow the amendment, since the Act was silent in respect to applications being filed out of time. She argued that the appellant's attorney-at-law made no application to the court for the release of the cash, pursuant to sections 78 and or 82 and as a result, and in all the circumstances, the appellant is now precluded from seeking the release of the cash.

[19] Mrs. Watson Bonner further submitted that the purpose of Civil Recovery is to recover property which represents the proceeds of crime, and not to prove particular criminal guilt in relation to particular acts against particular individuals.

[20] With respect to ground 2, Mrs. Watson Bonner submitted that there was no injustice and or prejudice to the appellant by virtue of the application being amended to allow for the forfeiture of the seized cash pursuant to Section 56 of the Act. She also submitted that the entire Part IV of the Act is concerned with Civil Recovery of the Proceeds of Unlawful Conduct and therefore the amendment and forfeiture are in keeping with the purpose and intention for which Part IV was created.

[21] Mrs. Watson Bonner also submitted that the applicant/appellant's attorney-at-law was duly served and had sufficient time prior to the hearing of the application on June 3, 2009 to respond. She argued that even if such an application was made at this time, the cause would have been defeated as the property, being recoverable property must remain forfeited.

[22] Finally, Mrs. Watson Bonner submitted that the money seized is recoverable property. Metalee Thomas, she said, failed to substantiate the legitimate acquisition of the seized cash. She argued that the cash was obtained by the unlawful conduct of Ricardo Thomas and that although it was being claimed by Metalee Thomas, its forfeiture to the Crown was justified. Counsel therefore asked that the judgment of the learned Magistrate be upheld.

THE ISSUES

The following issues arise for consideration in this appeal.

Issue No. 1 – The Recovery Process

[23] Part IV of the Act is concerned with Civil Recovery of property and cash. Section 56 provides that the general purpose of Part IV falls under two subheads. Section 56(1) (a) enables the enforcing authority to recover property which is, or represents property obtained through unlawful conduct in any civil proceedings before the court. The word "Court" is defined in section 2 of the Act to mean Supreme Court. The heading immediately above section 57 reads "*Civil recovery in the Supreme Court*". Sections 57 – 71 inclusive fall under this heading so, in my view section 56(1) (a) refers to matters that are to be dealt with in the Supreme Court.

[24] Section 56(1) (b) deals specifically with matters brought in the Resident Magistrate's Court. The section reads as follows:

"56 (1) This Part has effect for the purposes of –
(a)
(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."

[25] Immediately above section 72 there is the heading: "*Recovery of cash in summary proceedings*". One gets the distinct impression that from section 72 onwards the procedure is laid down for cash forfeitures as well as the powers of the Magistrate when he or she deals with matters concerning cash forfeiture applications.

[26] Section 72 of the Act provides that an authorised officer may search for cash on any premises once he or she has reasonable grounds for suspecting that the cash is recoverable property. Cash can be detained, initially, for only 72 hours provided that the authorised officer continues to have reasonable grounds for his suspicion under section 75 (section 76 (1)). However, the period may be extended by a Resident Magistrate (section 76 (2)). A Justice of the Peace also has the power to extend the time (section 76 (3)).

[27] On the very first application for extension of time, any extension granted cannot go beyond 3 months from the date of the order granting the extension and, on the second application, the extension cannot go beyond 2 years beginning with the date of the first order (section 76 (2)). Thus, the first extension is for 3 months and the second extension is a further 21 months, to come up to two years from the date of the first extension which means that the maximum period for detention is two years. Section 76 (5) sets out the conditions for extension of the detention of cash seized. Where detention of the cash is no longer justified, the Resident Magistrate may order its release on the application of the person from whom the cash was seized or approve its release by the authorised officer (section 78 (2) and (3)).

[28] When cash is detained under section 76, an application may be made to a Resident Magistrate for forfeiture of the cash seized (section 79(1)). The Resident Magistrate may order the forfeiture of the cash seized if it is, (a) recoverable property or (b) intended for use in unlawful conduct.

[29] The question which arises for the court at this stage is: what is the nature of the evidence upon which the court can act in determining unlawful conduct? So far as we are aware, there are no decided cases in this court on the point. However, in **Director of Assets Recovery Agency v Green** [2005] EWHC 3168, in relation to Part 5 of the English Act which is similar to Part IV of the Act Sullivan, J. stated as follows:

- "1 In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.
2. A claim for civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle."

[30] It is therefore our judgment that the marginal note to section 56 sets out the general purpose of Part IV. It was the intention of Parliament to make it possible under section 56(1) (b) for cash forfeitures to be dealt with in the Magistrate's Court. In the circumstances, it is our view that section 56 is clearly not an alternative provision to section 72, so the learned Resident Magistrate had fallen into error when she concluded that the application had been brought under the incorrect section of the Act.

Issue No. 2 – Commencement of Forfeiture Actions in the Magistrate's Court

[31] Section 5 of Regulation No. 30C passed on March 29, 2007 prescribes how forfeiture proceedings are instituted in the Supreme Court and reads as follows:

"5 - (1) In proceeding under section 57 of the Act (proceedings for recovery orders), the enforcing authority shall serve the claim form -

- (a) on the respondent; and
- (b) unless the Court dispenses with such service, on any other person who the enforcing authority believes holds any associated property that the enforcing authority wishes to be subject to a recovery order, wherever domiciled, resident or present.

(2) Where the enforcing authority wishes any property to be subject to a recovery order, the enforcing authority shall, in the claim form -

- (a) specify the property or describe it in general terms; and
- (b) state whether the property is alleged to be recoverable property or associated property.

(3) The references in this section to the claim form include the particulars of claim, where the particulars of claim are served subsequently."

[32] The use of the claim form along with particulars of claim is the mode for commencing claims in the Supreme Court and this seems to be in conformity with the Civil Procedure Rules 2002. As a matter of interest, section 15(1) of the Civil Forfeiture Act of British Columbia, Canada, provides that the director of the Asset Recovery Agency may commence proceedings under the Act by originating application or action. Section 16 goes on to state that findings of fact in proceedings and the discharge of

any presumption are to be made on the balance of probabilities. A similar standard of proof is also found in the Jamaican statute.

[33] We are without the benefit of Regulations or Court Rules for matters that are brought in the Resident Magistrate's Court, so in the absence of rules and regulations, it is our view that provisions relating to commencement of actions in that court must be governed by the Judicature (Resident Magistrates) Act (R.M. Act) and Resident Magistrate's Court Rules (R.M. Court Rules).

[34] Resident Magistrate's Courts, it should be remembered, are essentially creatures of statute. "They are inferior courts without any inherent jurisdiction and with only such jurisdiction as is conferred upon them by Statute": **Lindo v Hay** Clarke's Reports 118. It is therefore reasonable to think that Resident Magistrate's Courts may exercise only such powers as are given to them by statute, and that in doing this they must act in accordance with the procedures laid down in the statute and not otherwise.

[35] The practice which prevails in the Resident Magistrate's Court is that witnesses must be examined upon oath or affirmation when they give evidence in court. This is envisaged by section 183 of the R.M. Act and Order XVI rule 3 of the R. M. Court Rules. Rule 3 states as follows:

"3. Except where otherwise provided by these rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally on oath; and where by these rules evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally on oath if the Court, on

any application before or at the trial or hearing, so directs.”

[36] The Resident Magistrate will then proceed in a summary way to try the cause and shall give judgment thereafter - see section 184 of the R.M. Act. This course was not followed by the learned Resident Magistrate. Instead she heard the application in Chambers based solely on the affidavit evidence filed on behalf of the respondent.

[37] In our judgment, the learned Resident Magistrate had fallen into further error in the way in which she had exercised her powers of amendment under section 190 of the R.M. Act. So far as the application for an amendment is concerned, the power of a Magistrate is statutory. In this particular case there was no application by counsel to amend but the learned Magistrate did exercise the powers herself which is in conformity with section 190 which reads:

“190. The Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made.”

[38] It is therefore clear from the above provision, that the Magistrate may at all times amend all defects and errors in any proceeding before him or her. However, it is plain from the authority of **Rowe v Levy** RMCA 31/00 delivered May 16, 2002 that section 190 (supra) is of relevance when there are defects or errors in form rather than

substance. In the instant situation, the learned Resident Magistrate was of the view that the application before her ought to have been brought under section 56 of the Act and she made the amendment accordingly. We are of the view that this amendment was not a mere matter of form; it was a matter of substance which amounted to an entirely new claim. The respondent had brought the proceedings for forfeiture under section 79 of the Act which undoubtedly could not be ordered since the initial order for detention of the cash had expired and no order had been sought for further detention as specified by section 76(2) of the Act.

[39] It is further our view that even if the learned Resident Magistrate was empowered to make an amendment pursuant to section 190 she was obliged to continue dealing with the matter in a summary way. By entering judgment for the respondent on the basis of the affidavit evidence before her, and by not hearing from the appellant, the learned Magistrate in our view had ignored the provisions of sections 183 and 184 of the R.M. Act and had deprived the appellant of her right to have the "real question in controversy" determined at a trial. With respect, the circumstances of this case do not demonstrate that the effect of the judgment of the learned Resident Magistrate is the doing of substantial justice between the parties.

Conclusion

[40] In our judgment, the submissions of counsel for the appellant are not lacking in merit. For the reasons outlined above, we would allow the appeal and have the judgment entered in favour of the respondent set aside. The grounds of appeal had

also sought an order that the sum of US\$5,341 and J\$173,500 be returned to the appellant, but we are of the view that any release of cash must be dealt with before the Resident Magistrate pursuant to section 78 (2) of the Act.

ORDER

Appeal allowed. Judgment entered in favour of the respondent set aside.