

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 25/2009

BETWEEN WILTON WILSON APPELLANT

AND COMMISSIONER OF CUSTOMS RESPONDENT

Ms Janet Scotland, Mrs Suzette Harriott-Rogers and Ms Luciana Ramsay for the respondent

BROOKS, J.A. (Ag.):

[1] This is an appeal from an order of the Resident Magistrate's Court for the parish of Saint James for the forfeiture of US\$95,310.00 and Canadian \$23,400.00 in cash which were seized from Mr Wilton Wilson on 7 January 2009. The seizure was carried out by officials of the Jamaica Customs Department pursuant to section 75 of the Proceeds of Crime Act, 2007 (POCA). This occurred shortly after Mr Wilson arrived at the Donald Sangster International Airport, having just disembarked from a flight

originating in Toronto, Canada. Mr. Wilson carried the money in his jacket pockets.

[2] The Customs Department, later in the day on 7 January 2009, applied for and secured from a Justice of the Peace, an extension, by three months, of the period for the detention of the funds. This was by virtue of section 76 (3) of the POCA. The Customs Department did not, however, make an application for the forfeiture of the monies before the expiry of that three month period. Its application was filed on 14 April 2009. This is despite the fact that Mr Wilson, on 19 January 2009, had served on the Customs Department, notice of an application which he had filed in the Resident Magistrate's Court, for the release of the cash. His application was filed on 16 January 2009.

[3] The application for forfeiture came before the learned Resident Magistrate on 20 April 2009. She gave an outline of the chronology of the matter. She said, at paragraphs 5 and 6 of her reasons for judgment:

"5. The records of the court were checked and they revealed the following: On January 15, 2009 Mr. Johnson made an application for the release of the cash which was ordered to be further detained for three months on January 07, 2009. The order for further detention of seized cash would expire on April 06, 2009. The application for release of the detained cash was set for hearing on January 22, 2009. This application was adjourned until March 23, 2009 because neither the

applicant nor the respondent was fully instructed. On March 23, 2009, none of the parties were (sic) present.

From the record it was clear that the learned Resident Magistrate, Her Honour Miss Winsome Henry, did not hear any arguments on this application because the parties were not present on the appointed day for the hearing of the application (March 23). On April 14, 2009, this application for forfeiture was filed. **As a result, no order was made on the application for the release of the seized cash,** nor was there an order by the learned Resident Magistrate that the seized cash was to be further detained. It is this seeming procedural irregularity that Mr. Johnson has taken issue with.

6. When the parties did not attend on March 23, 2009 for submissions to be heard on the release of the seized cash, it is my view, that an order should have been made to strike out the application for the release as none of the parties were (sic) present (as would be the case in any civil case before the court where the parties are absent) and the parties should have been informed of the court's decision. **However, since the application was not struck out and no order was made for the release of the seized cash to the defendant, practically it remained detained."**
(Emphasis supplied)

[4] The learned Resident Magistrate, thereafter, stated that because both parties had failed to attend on the dates which had been earlier fixed for the hearing of Mr Wilson's application, she would treat that application as having been abandoned. She then heard and granted

the application for the forfeiture of the monies. Mr Wilson's Counsel was present and unsuccessfully opposed the application for the forfeiture.

[5] Before us, Ms Scotland, appearing for the Commissioner of Customs, has conceded that, based on the authority of **Metalee Thomas v Asset Recovery Agency** RMCA 19/2009 (delivered 26 February 2010), the order for forfeiture was not properly made; the application for same having been made out of time. The issue left for our consideration, is whether this court is empowered to order the release of the detained cash.

[6] Mr Johnson, on behalf of Mr Wilson, submitted that ownership of the monies is vested in Mr Wilson and remains so. The fact that the detention, authorised by the POCA, has now expired, Mr Johnson submitted, means that Mr Wilson is entitled to the return of the monies without further court process. He submitted that the prayer appended to Mr Wilson's notice of appeal for "Such further and other relief as the Honourable Court may deem just" would be sufficient basis for this court to make an order for the immediate release of the monies. Mr Johnson submitted that it would be onerous for Mr Wilson to be obliged to return to the Resident Magistrate's Court to pursue his application.

[7] In response to questions from the court, Mr Johnson submitted that the provisions of section 78 of the POCA did not prevent this court making the order sought. Section 78 provides:

- “(1) This section applies while any cash is detained under section 76.
- (2) **A Resident Magistrate’s Court** may direct the release of the whole or any part of the cash if the court is satisfied, on the application by the person from whom the cash is seized, that the conditions in section 76 for the detention of the cash are no longer met in relation to the cash to be released.
- (3) An authorised officer may, with the approval of **the Resident Magistrate’s Court or Justice** (as the case may be) under whose order cash is being detained, release the whole or any part of it if satisfied that the detention of the cash to be released is no longer justified.”
(Emphasis supplied)

Learned counsel submitted that the word “may”, as used in subsection (2), allowed for other factors to be taken into account by the Resident Magistrate. These factors, he said, would be separate and apart from the situation where the conditions set out in section 76, have been made otiose. Mr Johnson also submitted that subsection (3) appears to apply to situations occurring before a forfeiture hearing is held.

[8] The framework of section 78 requires that the release of cash, once detained, must be authorized by the Resident Magistrate’s Court or a Justice of the Peace. An application has to be made for the release, either by the person from whom the cash is seized, or by an authorized officer. There is no basis for release of the funds without an order of the

Court or without the Court's (or Justice's) approval. In **Metalee Thomas**, this court ruled that a forfeiture order had not been properly made. It then went on to say, at paragraph 40 of the judgment:

"The grounds of appeal had also sought an order that the [cash detained] 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." (Emphasis supplied)

[9] In **Metalee Thomas**, it does not seem that any application had been made to the Resident Magistrate, for the release of the cash, before the appeal was heard. In the instant case, the learned Resident Magistrate ruled that:

"From the records, it would seem that the application for [the release of the cash] had been abandoned by [Mr Wilson]. It is therefore my belief that the court could hear and determine the application for forfeiture, brought by [the Customs Department] although it was filed out of time..."

[10] We are of the view that the learned Resident Magistrate erred in finding that the application for the release had been abandoned. In our view, it clearly had not been abandoned; it was just over three months old, no document to that effect had been filed and counsel was present to oppose the application for the forfeiture. The learned Resident Magistrate also erred on the question of the forfeiture, but in her defence, her ruling was made before **Metalee Thomas** was decided.

[11] In our view, the fact that the learned Resident Magistrate erred on the question of the abandonment of the application for the release of the detained cash, means that the application is still "live" before that court. No ruling has been made in respect of it. The application is to be dealt with by the Resident Magistrate's Court pursuant to section 78(2) of the POCA. Although the authority to forfeit the cash has expired, it is the Resident Magistrate's Court which is given the jurisdiction to consider applications for its release from detention. That court must be given the opportunity to do so in the instant case.

Conclusion

[12] We find that the learned Resident Magistrate erred in finding that the application for the release of the cash was abandoned. There was no basis for that finding. It therefore means that no ruling has been made in respect of that application. The application not having been adjudicated upon below, we cannot make a ruling in respect of it. It must be dealt with by the Resident Magistrate's Court.

[13] The appeal is therefore allowed, the judgment of the learned Resident Magistrate is set aside and it is ordered that the application, for the release of the funds detained, must be dealt with by the Resident Magistrate's Court, pursuant to section 78(2) of the POCA. This must be prosecuted before another Resident Magistrate.