[2018] JMSC Crim 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

[DIVISION]

CLAIM NO.HCC 86/16

BETWEEN	**ASSET RECOVERY AGENCY**	**APPLICANT**
AND	**CHERICE BROWNE – BLAKE**	**RESPONDENT**

IN OPEN COURT

Application for Pecuniary penalty order- Proceeds of Crime Act Sections 2,5,6,7 and 8- Standard of proof – Hearsay –Fresh evidence- Burden of proof

Mrs Shanique Crooks Alcott, instructed by the Asset Recovery Agency for the Applicant

Mr. Kemar Robinson, instructed by Mr. Peter Champagnie & Co. for the Respondent

Heard on the 5th of March, 11th of June and 17th of December 2018

LORNA SHELLY WILLIAMS, J

Background

[1] Ms. Cherice Browne-Blake, the Respondent was arrested and charged for a number of offences including possession of cocaine, dealing in cocaine, taking steps to export cocaine contrary to the Dangerous Drugs Act on the 15th of May

2016. On the 20th of May 2016 the Respondent pleaded guilty to possession of cocaine, dealing in cocaine and taking steps to export cocaine. She was sentenced to a fine of $700,000.00 or six months in prison.

[2] On the 31st of May 2016 an application was made to the Parish Court Judge for a Committal Order under Section 52 of the Proceeds of Crime Act ("POCA") for the Respondent to be committed to the Home Circuit Court for consideration of a forfeiture order and pecuniary penalty order.

[3] On the 10th day of June 2016 an application was made to the Home Circuit Court for both a forfeiture order and a pecuniary penalty order. The Applicant has abandoned their application for a forfeiture order and is only now seeking a pecuniary penalty order (the order). The Applicant is seeking to have the order made in the sum of $6,741,962.50.

[4] The Applicant called one witness, Ms Rose Williams who is an assistant financial officer in the Asset Recovery Agency. She had submitted two statements in the matter. Attached to her statements were two additional statements from Detective Inspector Oral Henry who had analysed and placed a value on the cocaine seized from the Respondent, as well as a statement of Mr Steven Cummings.

[5] Mr. Kemar Robinson, Counsel for the Respondent made an application prior to the start of the hearing that the statement of Mr. Steven Cummings should not be admitted into evidence. I ruled that the statements would be admitted into evidence but indicated that Counsel would be accorded the opportunity to make submissions as to the weight to be attached to it.

[6] The hearing proceeded and at the end of the hearing dates were agreed for the submissions of the Applicant and the Respondent and the decision was reserved. Counsel for the Respondent, at the time of submissions sought to reopen the hearing to admit documents on behalf of the Respondent. The application to hear further evidence was heard the 11th of June 2018 and the application was refused.

Applicant's submissions

[7] The Application is for the order in the sum of $6,741,962.50 which is broken down into :-

a.	Value of cocaine	$612,900.00
b.	Cash deposit to NBC account	$5,149,000.00
c.	Cash deposit to First Caribbean accounts	$280,062.50
d.	Court fines paid	$700,000.00

[8] Counsel for the Applicant submitted that in their calculations they had eliminated all sums earned by the Respondent from her employment at the Fiction Night Club subsequent to her conviction. They submitted that all other sums came under the category for which the order could be made as they were benefits attained by the Respondent based on her criminal lifestyle.

Respondent's submission

[9] Counsel for the Respondent, in response urged the court not to make any orders against the Respondent. He argued that the Respondent had not benefitted from the cocaine she was charged with as it was seized. He submitted that the court fines had been paid by a third party and as such could not be the subject of the order. He further submitted that the sums paid into her bank accounts were either from legitimate sums earned or from a deposit into her account from Mr Cummings from which she did not benefit.

The law

[10] Section 5 of POCA is instructive as to how a court should proceed in these matters. Section 5(1) states that:-

> *"5(1) Subject to subsection (9), the Court shall, upon the application of the Agency or the Director of Public Prosecutions, act in accordance with subsection (2) if the Court is satisfied that a defendant is-*
>
> *a) Convicted of any offence in proceedings before the Court; or*

b) Committed to the Court pursuant to section 52 (committal from Resident Magistrate's Court with a view to making forfeiture order or pecuniary penalty order)."

In this case the Respondent was convicted for drug related offences which places her in the category where the court may make the order against her.

[11] The next issue is to determine if the Respondent has benefitted from a criminal lifestyle. That is dictated by Section 5(2) of POCA which states that:-

"5(2) The Court shall:

(a) *Determine whether or not the defendant has a criminal lifestyle and has benefitted from his general criminal conduct;*

(b) *The Court determines that the defendant does not have a criminal lifestyle, determine whether or not the defendant has benefitted from his particular criminal conduct; and*

(c) *Identity any property used in or in connection with the offence concerned and make an order that that property be forfeited to the Crown."*

[12] What amounts to a criminal lifestyle?

Criminal lifestyle is defined in section 6 of POCA which states that:-

"6. (1) A defendant shall be regarded as having a criminal lifestyle If the offence concerned-

(a) *is specified in the Second Schedule;*

(b) *constitutes conduct forming part of a course of criminal activity, from which the defendant obtains a benefit; or*

(c) *is committed over a period of at least one month and the defendant has benefited from the conduct which constitutes the offence. "*

In this case, the Respondent having been convicted for a drug related offence, namely, possession and dealing in cocaine, would be defined as having a criminal lifestyle as these drug offences are specified under the Second Schedule.

[13] The court would then have to ascertain, as per Section 5(2)(b) of POCA, whether or not the Respondent has benefitted from her criminal lifestyle. The Act does assist the court in this as Section 8 proffers a series of assumptions the court should make to ascertain this. Section 8 of POCA states that:-

> *"8. Subject to subsection (3), where the Court determines under section 5 that a defendant has a criminal lifestyle, the Court shall make the assumptions listed in subsection (2) for the purpose of-*
>
> (a) *determining whether the defendant has benefited from his general criminal conduct; and*
>
> (b) *identifying his benefit from that conduct*.
>
> (2) *The assumptions referred to in subsection (1) are that-*
>
> (a) *any property transferred to the defendant at any time after the relevant day was obtained by him-*
>
> (i) *as a result of his general criminal conduct; and*
>
> (ii) *at the earliest time from which the defendant appears to have held it;*
>
> (b) *any property held by the defendant at any time after the date of conviction was obtained by him-*
>
> (i) *as a result of his general criminal conduct; and*
> (ii) *at the earliest time from which the defendant appears to have held it;*
>
> (c) *any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct; and*

(d) *for the purpose of valuing any property obtained, or assumed to have been obtained, by the defendant, he obtained the property free of any other interests in it."*

[29] These assumptions are of course rebuttable. The Respondent may rebut these assumptions by producing evidence on a balance of probabilities that she did not benefit from a criminal lifestyle. The method by which these assumptions may be rebutted have been opined upon in a number of cases. These include the English Court of Appeal decision of **R v Wilkes** [2003] EWCA Crim 848 where Gross J stated at paragraph 26 that:-

> *"The purpose of the assumptions that the offender's source of income is the proceeds of crime is to shift the burden to the appellant to show (on balance) that it was not from criminal conduct. The Prosecutor does not have to point to a single criminal offence during the relevant period where the appellant has acquired or secured property; the trigger to enable the court to make the assumption is whether the offences are qualifying offences within the statutory definition . . .*
>
> *There is no requirement that any item of income should be referrable to any particular piece of criminality, to require such an exercise would defeat the purpose of the statutory assumption in section 72AA(4)(b). The safeguard for the appellant is that the assumption can be displaced by him on a balance of probabilities by showing that his expenditure was supported by income from legitimate sources."*

[14] In the case of **Mahmood v R** [2013] EWCA Crim 325 **Cranston J** at paragraph 14 stated that:-

> "*He had produced nothing in the way of hard facts or documentation to support any legitimate earnings and no witnesses."*

[15] The final issue to be taken into consideration by the court, based on section 5 of POCA is for the court to pinpoint any property identified with the offence and make the requisite order that the property be forfeited. In this case the order being

sought by the applicant was not for forfeiture but for a pecuniary penalty order. The order being sought is subject to Section 7, which states that:-

> (1) *"A person benefits from conduct if he obtains a benefit as a result of or in connection with the conduct.*
>
> (2) *For the purpose of making a pecuniary penalty order, a person who obtains a non-pecuniary advantage as a result of or in connection with conduct shall be deemed to have obtained as a result of or in connection with the conduct, a sum of money equal to the value of the non-pecuniary advantage.*
>
> (3) *References to property or a non-pecuniary advantage obtained in connection with conduct, include references to property or a nonpecuniary advantage obtained both in that and some other connection.*
>
> (4) *If a person benefits from conduct, his benefit is-*
>
> (a) *for the purposes of making a forfeiture order, the property obtained as a result of or in connection with the conduct;*
>
> (b) *for the purposes of making a pecuniary penalty order, the value of the benefit obtained as a result of or connection with the conduct."*

A pecuniary penalty order speaks more to benefits that the Respondent would have gained as opposed to forfeiture order which speaks to property obtained as a result of the conduct.

[16] In granting any order the court has to ascertain the time period that is, the starting point at which any such order may be made. Section 8 (5) of POCA defines what is referred to as the relevant date. Section 8 (5) of POCA states that:-

> "2. *The "relevant day" is defined in section 8(5) as follows:*
>
> *"(5) For the purposes of this section-*
>
> *(a) where no previous forfeiture order or pecuniary penalty order has been made against the defendant in relation to benefit from general criminal conduct, the relevant day" is the first day of the period often years ending with —*

(i) the day when proceedings for the offence concerned were started against the defendant; or

(ii) if there are two or more offences and proceedings for them were started on different days, the earliest of those days;"

[17] POCA places a date as to when any orders under this act can be made. Section 2 (10) of POCA states that:

> *"(10) Nothing in section 5 (malting of order), 6 (criminal lifestyle), 7 (conduct and benefit), 8 (assumptions for determining benefit from general criminal conduct), 9 (effect of forfeiture order), 10 (voidable transfers), 20 (reconsideration of case where no order was made), 21 (reconsideration of benefit where no order was made), 22 (reconsideration of benefit after order is made) or 30 (court's powers on appeal) refers to conduct occurring, offences committed or property transferred or obtained, before the 30th May, 2007."*

[18] The last issue to be decided in relation to law is what type of evidence can be considered by the court in deciding whether or not the order should be made. POCA itself does not define what type of evidence can be considered by the court however this has been considered in a number of cases.

[19] In the case of **R v Clipston** [2011] EWCA Crim 446, the court was addressing a confiscation order as opposed to a pecuniary penalty order, however, the sentiments expressed in that case would apply to pecuniary penalty orders. The court was of the view that in light of the type of proceedings under POCA then it would be the case that hearsay evidence would be admissible, it was just a matter of the weight to be attached to it.

Analysis

The application by the counsel for the Respondent for documents to be admitted having been refused, I now give my reasons in writing for doing so.

Additional evidence or Fresh evidence

[20] The Respondent in this matter sought to introduce additional evidence at the end of the hearing, at the time of written submissions. The Respondent sought, at the time of filing his closing submissions, to indicate therein, that the Respondent had certain documents in her possession that may assist her case. I thought it prudent to then have a hearing as to whether or not these documents should be admitted into evidence.

[21] Counsel for the Respondent argued, that there were some documents that were in the custody of the Respondent, that would clearly show that the moneys in her accounts could not be the subject of the application for the order. The documents that were the Respondent sought to admit were "-

a. Documents from a Bank,

b. Documents allegedly from the tax department in Canada that would have shown that she was employed for a period of time in Canada.

c. The receipt that was issued by the court after the fine had been paid for her cocaine offences.

Mr Robinson in support of his application relied on the case of **Lilieth Douglas v Errol Francis** [2017] JMCA App 8.

[22] Counsel for the Applicant argued that these documents should not be admitted into evidence as they do not amount to either fresh evidence or evidence in rebuttal. She argued that the documents would have been available to the Respondent at the time of hearing and as such the Respondent should not be allowed a second bite at the cherry. She urged the court to apply the cases of **Ladd v Marshall** [1954] 1 WLR 1489 and **Jamaica Public Service Company Limited v Enid Campbell and Marcia Clare** [2013] JMSC Civ. 22. She argued that the standard to admit these documents had not been met and as such the documents should not be admitted.

[23] The question is whether or not these documents were to be admitted into evidence? In the general rules of practice laid down in **Murphy on Evidence** 12th edition it was stated at paragraph 17 that:-

> *"The general rule of practice, in both criminal and civil cases, is that every party must call all the evidence on which he proposes to rely on during the presentation of his case, and before closing his case; e.g. Kane (1977) 65 Cr App R 270. This involves the proposition that the parties should foresee, during their preparation for trial, what the issues will be, and what evidence is available and necessary in order to deal with these issues. The definition of the issues in a civil case by exchange of statements of case and witness statements… is designed to enable this to be done wherever possible.5*

[24] This sentiment was echoed in the case of **Jamaica Public Service Company Limited v Enid Campbell and Marcia Clare** [2013] JMSC Civ. 22, Mangatal J (as she then was) at para. 101 stated at:-

> *"…Mrs Silvera conceded that until an order is drawn up and sealed (perfected) a trial judge has jurisdiction to permit pleadings to be amended, to hear further evidence and to reconsider or review the judgment already given. This jurisdiction must be cautiously exercised and only in exceptional cases as it is in the interest of the public and the interest of litigants that there should be a reasonable degree of finality in litigation."*

[25] In criminal law there are two exceptions to the general rule as to whether or not evidence can be admitted after the close of the case. These exceptions are where the evidence is called in rebuttal as an issue arose ex improvise, or if it is an oversight and in both events, it will be at the discretion of the Judge. Whilst in civil cases evidence can be admitted at the end of the trial usually if it amounts to fresh evidence, evidence in rebuttal or in the interest of justice.

[26] The question is since this an application for a pecuniary penalty order under POCA, what approach should the court adopt?

[27] In reviewing the authorities, it would appear the first issue is whether or not the application can be brought. It is clear from the authorities that this application could have been brought as the order has not been perfected.

[28] The second issue is whether or not this evidence would amount to fresh evidence, evidence being called in rebuttal, or just evidence that was inadvertently left out and in the interest of justice should be admitted? I had some difficulty in deciding which category the proposed documents would fall under as the Respondent never filed a formal application . As stated above, counsel for the Respondent merely added the documents as part of his closing submissions. This also meant there was no affidavit attached to assist the court in any way. There was no:-

a. evidence placed before the court whether in affidavit form or oral evidence to indicate where the documents were prior to the close of the hearing.

b. evidence as to the source of the documents. For instance, as it relates to the income tax returns where, how and by what means they were sourced.

c. explanation as to the location of the originals as most of the proposed documents appeared to be copies.

[29] Counsel for the Respondent made no effort to indicate under which rule these documents were to admitted. He merely stated that he would wish to rely on them. Counsel for the Applicant urged the court to treat the documents as if they were fresh evidence.

[30] Would this evidence amount to fresh evidence? The law in relation to fresh evidence is laid down in the case of **Ladd v Marshall** where Lord Denning MR stated at 1491 of the judgment that:-

> *"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with*

reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

There was no evidence placed before the court that the documents that were proposed to be placed before the court could not be obtained with reasonable diligence for use at the trial. Owing to this fact the Respondent was not allowed to place the documents before the court under this heading.

[31] The next issue is whether or not this would amount to evidence in rebuttal? There was no new issue placed before the court at the time of the hearing. Counsel for the Respondent had indicated that he was short served in relation to one of the statements of the witness for the Applicant and I asked if he required more time to take instructions or prepare his case. The matter that was to commence on the 4th of March 2018, was adjourned until the following day at which time Mr. Robinson indicated that he was ready to proceed. There was no attempt to place any document before the court during the hearing. With no new issue being placed before the court this could not amount to evidence in rebuttal.

[32] The last category under which the documents could be admitted, was in the interest of justice. Again I had no evidence to base this under, however, I sought to briefly examine the documents to see if I could still exercise my discretion. I found in my examination that:-

a. The documents from the Bank in Canada did not appear to be credible. One letter from the proposed Bank did not contain a letter head, nor did it have contact information for the bank. The top of the letter did not contain the address of the bank. It did not contain the e-mail address of the bank nor did it indicate whether or not the bank had other branches. The proposed letter referred the reader to a number to call in the event he/she required any information.

b. There was another letter supposedly from the same Bank that now contains an address for the bank, along with contact information for the bank. That letter suggested that the Respondent has accounts with the bank. That letter is a photocopy with no information submitted as to the location of the original. The letter also had no seal or any form of verification.

c. There were documents which purported to be from the income tax department in Canada. There was no evidence from the Respondent as to how and by what means she attained these documents. Documents to be admitted into court from another country are usually verified, if it is even with a seal from the Government Department. There was no form of verification of any kind on the documents.

d. The other document is a copy of the receipt for the sums paid as fines after the Respondent was sentenced at the Resident Magistrate's Court (as it then was referred to). The Respondent would have been custody at the time of the payment and as such this receipt would have been in the name of the person who paid it.

I did not exercise my discretion to admit these documents.

Due to the fact that this is a POCA matter, in making this application the Respondent would only have to satisfy the court that in the interest of justice, on a balance of probability the documents should be admitted. In this case the Respondent has failed to do so.

Whether the value of the cocaine could be the subject of a pecuniary penalty order

[33] Whether or not the value of the cocaine can be considered by the court to be the subject of this order has been argued in a number of cases. The case of **R v Islam**

[2009] UKHL 30 was an appeal from the judgment at first instance where the judge included in his order the value of the cocaine that had been seized from the Defendant. The decision was appealed to the House of Lords where the majority in their decision stated that:-

> *"For the purpose of calculating a defendant's benefit, as distinct from the available amount, in confiscation proceedings under the 2002 Act, goods of an illegal nature obtained by him did not have to be treated as having no value. The statutory scheme distinguished between valuations in different contexts and for different purposes. The market that had to be contemplated for the assessment of the available amount had to be taken to be one to which the defendant could resort to realise his assets without acting illegally; but no such restriction applied at the stage of calculating the amount of his benefit. At that stage the nature of the goods and the market in which they were ordinarily bought and sold would determine the market to which it was proper to go to discover the amount that a willing buyer would pay to a willing seller or them."*

[34] This position was followed in the case of **The Assets Recovery Agency v Ralph Gregg** [2018] JMSC Crim. 1, para 70 where Harris J made reference to the House of Lords decision of **R v May** [2008]1 AC 1028 which was delivered by Lord Bingham considering the meaning of benefit. At paragraphs 9 and 48 he stated that:

> *"Where, however, a criminal has benefitted financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained.*
>
> *The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators."*

[35] In this case Detective Inspector Oral Henry gave a statement in which he indicated his qualification and expertise which included 25 years of experience as a police officer with experience in the Narcotics Division. He was able to calculate the value of the cocaine that was being exported by the Respondent in the sum of $612,900.00 There was no challenge to the qualification of Detective Inspector Henry nor to the value placed the cocaine. The thrust of the defence of the

Respondent was that she did not benefit from the cocaine she was attempting to export and as such no order should be made in relation to this sum.

[36] The fact that the Respondent was detained by the police and was unable to export and sell the cocaine that was in her possession does not preclude the court from making the requested order. I deem this payment to be a benefit from the criminal lifestyle of the Respondent and the sum of $612,900.00 which is the value of the cocaine will be made the subject of the order.

The Bank Accounts

[37] The Respondent had a number of bank accounts at the National Commercial Bank ("NCB") and at First Caribbean International Bank ("FCIB"). There were various deposits made to these accounts for which the Applicant was urging the court to grant the order. The Application was for the sum $5,429,000.00 which is broken down into:-

a. JA$5,149,000.00 in her account at National Commercial Bank number 304935928.

b. JA$275,062.50.00 in her First Caribbean International Bank Current a/c bearing Account Number 1002151387

c. JA$5,000.00 in her First Caribbean International Bank JMD Savings a/c bearing Account Number 1002151414.

d. CAD$IOO.OO in her First Caribbean International Bank CAD Savings a/c bearing Account Number 1002160233.

e. US$134.12 in her First Caribbean International Bank USD Savings a/c bearing Account Number.

[38] The deposits to the FCIB accounts which were made between October 12th, 2012 and August 5th 2013 amounted to $280,062.50. These deposits would have been after the relevant day and as such could be the subject of the requested order. I

note that although the Respondent gave evidence that these were legitimate deposits there is no evidence neither documentary nor third party evidence placed before the court by the Respondent as to the source of these funds. The Respondent in her evidence merely denies that it is a benefit from a criminal lifestyle. An assumption is to be made under POCA that :-

> *"any property transferred to the defendant at any time after the relevant day was obtained by him as a result of his general criminal conduct."*

The Respondent has failed to rebut this assumption and as such this sum will be included in the order.

[39] The deposits to the Respondent's NCB account were made between December 2014 and April 2016 and based on POCA would be deemed to be after the relevant day. These deposits included one in the sum of $5,000,000.00 lodged in the account on the 24th of December 2014 by Mr. Steven Cummings. There was a statement that was placed in evidence by the Applicant from Mr. Cummings indicating this. Counsel for the Respondent originally made a submission that the statement of Mr Cummings amounted to hearsay and should not be admitted into evidence. However, after it was admitted Mr. Robinson sought to rely on it in his closing submissions.

[40] The statement of Mr. Steven Cummings indicated that he had purchased a BMW from Mr. Barker for the sum of $6,000,000.00 and on the instructions of Mr Barker he lodged the sum of $5,000,000.00 into the Respondent's account. Subsequent to the moneys being paid Mr Cummings indicated that he never received the papers for the BMW and the vehicle was later repossessed by the bank due to non- payment.

[41] The Respondent did not deny that this was the source of the $5,000,000.00 that was deposited to her account, but indicated that she was unaware of the activities of Mr Barker. The Respondent's evidence was that after receiving this sum, she then paid out the sums on the instructions of Mr Barker. There was no evidence

placed before the court as to whom the payments were made and for what reason. There was no evidence from any of the persons to whom the Respondent alleged she made payments to verify this.

[42] There were a number of other deposits to the said account of the Respondent amounting to $149,000.00. There was no evidence in relation these deposits apart from a bare denial that they were in pursuit of criminal lifestyle and that they were from legitimate sources.

[43] Based on the assumptions that I am allowed to draw in relation to these deposits, as detailed in paragraph 38, I deem that all the deposits made to the Respondent's NCB account after the relevant date, less the sums paid into the account from her employment at Fiction Night Club were a benefit due to her criminal lifestyle. These sums $5,149,000.00, will be included in the order as the Respondent has failed to rebut the assumption.

The payment of the Court Fine

[44] After conviction the Respondent was ordered to pay a fine of $700,000.00. or six months in prison. The fine was paid and the Respondent released from custody. There were strong submissions made by counsel for the Respondent that the fine was not paid by the Respondent and as such this sum ought not to be included as part of the order. Counsel for the Applicant urged the court to consider this to be part of the benefit received by the Respondent which would be the subject of the order.

[45] It is clear that the Respondent would have been in custody at the time of payment of the fine so would not have been in a position to pay the fine herself. The payment of the court fine, although not made directly by her, falls into the category of one of the assumptions that the law allows me to make, that:-

> *"any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct. "*

This would be considered to be a benefit received by the Respondent and will be part of the order. There was no evidence submitted by the Respondent to rebut that assumption and as such this sum will be subject to the order.

Orders

1. The Respondent shall pay to the crown the sum of $6,741,962.50 as a pecuniary penalty order on or before the 30th of June 2019.

2. Cost to the Applicant to be agreed or taxed to be taken from the sums received.