

*Judgment Book*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M23 OF 1999

**BEFORE:** THE HONOURABLE CHIEF JUSTICE  
THE HONOURABLE MR. JUSTICE GRANVILLE JAMES  
THE HONOURABLE MR. JUSTICE KARL HARRISON

**BETWEEN** GARY THOMPSON - Applicant

**AND** THE DIRECTOR OF PUBLIC PROSECUTIONS - 1<sup>st</sup> Respondent

**AND** THE ATTORNEY GENERAL - 2<sup>nd</sup> Respondent

Mrs. Jacqueline Samuels-Brown and Miss Thalia Maragh for the Applicant  
Bryan Sykes, Acting Senior Deputy Director of Public Prosecutions and  
David Fraser for the First Respondent  
Mrs. Susan Reid-Jones for the Second Respondent

**Heard:** January 15, 16 and March 23, 2001

**WOLFE, C.J.**

The applicant Gary Thompson moves the Court pursuant to Chapter III of the Jamaica (Constitution) Order in Council 1962, alleging that certain provisions of the said Chapter III have been, are being and are likely to be contravened in relation to him and prays the following reliefs:

1. A DECLARATION that section 3 of the Drug Offences (Forfeiture of Proceeds) Act 1994 is in breach of Chapter three (3) of the Constitution in that it provides for the deprivation of property contrary to section 18 of the said Chapter three (3) of the Constitution.

2. A DECLARATION that the deprivation of property after and in addition to the imposition/fixing of a sentence by the Court of trial for an offence and as a consequence of the said conviction (and sentence) amounts to and constitutes an additional penalty for the said offence.
3. A DECLARATION that the provision in the Drug Offences (Forfeiture of Proceeds) Act for the deprivation of property as a consequence of the conviction for an offence; separate and apart from the sentence fixed by the trial court results in the convicted person being twice punished for the said offence and is accordingly in breach of section 20 of the Constitution.
4. A DECLARATION that the provision in the Drug Offence (Forfeiture of Proceeds) Act for the deprivation of property by a Court other than the Court of trial is unlawful and unconstitutional being in breach of section 20 of the Constitution.
5. A DECLARATION that the interlocutory Orders obtained herein whereby the applicant has been prevented from disposing of or otherwise dealing in property over which he enjoys such rights has been and is in breach of the protection afforded/secured to him by Article 18 of the Constitution.
6. A DECLARATION that the Director of Public Prosecutions' application in the instant case for forfeiture of the applicant's property or rights therein is in breach of the protection afforded/secured to the applicant by Article 18 of the Constitution.

7. A DECLARATION that the Orders sought by the Director of Public Prosecutions in the instant case contravenes the Applicant's rights under Article 18 of the Constitution.
8. A DECLARATION that the application by the Director of Public Prosecutions herein is a proceeding relating to the determination of the existence and or the extent of the Applicant's civil rights, to wit, proprietary rights.
9. A DECLARATION that the Director of Public Prosecutions' application herein for process before a Judge in Chambers contravenes the Applicant's right to a hearing held in public as mandated by section 20 of the Constitution.
10. AN ORDER that the Director of Public Prosecutions' application herein be stayed or dismissed for unconstitutionality.
11. AN ORDER that the Applicant be awarded compensation to be assessed as the Honourable Court may direct from the State as redress for infringement of his rights under Chapter 3.
12. SUCH FURTHER or other relief as to the Honourable Court may deem just.
13. AN ORDER that the Costs of this Application be the Respondents.

The Declarations sought may be divided into three groups.

**Group 1** - The unconstitutionality of The Drug Offences (Forfeiture of Proceeds) Act.

Declarations 1, 5, 6 and 7

**Group 2** - Fair Hearing

Declarations 2, 3 and 4

**Group 3** - Right to a public hearing in matters relating to the determination of the existence or the extent of a person's civil rights or obligations.

Declarations 7, 8 and 9.

**Unconstitutionality of the Provisions of the Drug Offences (Forfeiture of Proceeds) Act**

Section 18 (1) of the Constitution states that -

"no property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that -

- (a) prescribes the principles on which and the manner in which compensation therefore is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -
  - (i) establishing such interest or right (if any)
  - (ii) determining the amount of such compensation (if any) to which he is entitled; and

- (iii) enforcing his right to any such compensation."

Section 3 (2) of the Drug Offences (Forfeiture of Proceeds) Act stipulates that -

"where a person is convicted of a prescribed offence committed after the 15<sup>th</sup> day of August 1994, the Director of Public Prosecutions may apply to a Judge of the Supreme Court (hereinafter referred to as the Judge) for one or both of the following orders -

- (a) a forfeiture order against any property that is tainted property in relation to the prescribed offence."

Having set out the provisions of the Drug Offences (Forfeiture of Proceeds) Act which empowers a Judge of the Supreme Court to make an order of forfeiture on the application of the Director of Public Prosecution, one must now look at section 18 (2) of the Constitution, which states:

"nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property -

- (b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence."

It will be useful at this point to give a summary of the factual situation leading to this motion.

On the 14<sup>th</sup> day of August 1997, the applicant, a businessman, pleaded guilty to the offences of possession of ganja and dealing in ganja in the

Clarendon Resident Magistrates Court. He was duly sentenced in respect of both offences.

The Crown alleged that the prohibited substance was found in a store room to the back of premises owned and occupied by the applicant. It is the said premises which the Director of Public Prosecutions now seeks to forfeit.

At the outset of her arguments Mrs. Samuels-Brown made the following concession, *viz*:

"That the applicant pleaded guilty to an offence which is a prescribed offence within the meaning of section 2 of the Drug Offences (Forfeiture of Proceeds) Act."

The burden of Mrs. Samuels Brown's argument is that the Constitution forbids the taking of property from an individual without offering compensation for the said property.

It was further submitted that section 18(2) of the Constitution which permits the forfeiture of property is not applicable in the instant case as the forfeiture was not by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence.

Counsel submitted that for the forfeiture to come within the provisions of section 18(2)(b) the forfeiture order would have to form a part of the sentence meted out to the accused at the time of trial.

I find the submissions of Learned Counsel untenable. Section 18(2) unequivocally permits the legislature to promulgate laws, "for the taking

The decision of their Lordships Privy Council in *Richards (Lloydell) v R* (1992) 41 W.L.R. 263 refutes any suggestion that the word conviction means verdict. Lord Bridge of Harwich delivering the opinion of the Board said at page 266.

"But in the absence of something in the context which suggests that narrower meaning, the authorities in the 19<sup>th</sup> Century and earlier all seem to point to the conclusion that the requirement to establish a conviction requires proof not only of a finding of guilt but also of the court's final adjudication by sentence or other order."

#### FAIR HEARING

Section 20(1) of the Constitution provides that:

"whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by Law."

Counsel for the applicant submitted that fair hearing as provided for under the Constitution means or includes:

- (i) a hearing which is a single integral whole presided over by a single as opposed to multiple tribunals from beginning through to verdict and sentence.
- (ii) In the event of an adverse verdict, the verdict delivered by the tribunal constitutionally brings the matter to finality save in case of an appeal.

- (iii) Trial Judge becomes functus after sentence which means that no other tribunal may deal with sentence.
- (iv) The presumption of innocence which operates in favour of the accused may only be displaced by proof of all matters beyond reasonable doubt.

She further submitted that the forfeiture order is a part of the sentence in respect of the offence for which the person is convicted. This is so, she contends because there is no distinction between the word penalty and the word sentence. The whole scheme of the act, she continues, makes it apparent that the forfeiture order is integrally and organically connected with the prior conviction for the prescribed offence.

In support of the above submissions, she relies upon the language in sections 6(1), 7(1) and 50 of the Act. Section 6(1) states:

"Where an application is made to the Judge for a forfeiture order or pecuniary penalty order in respect of a person's conviction for a prescribed offence, the Judge may, in determining the application, have regard to the transcript of any proceedings against the person for the offence."

Section 7(1) states:

"Where an application is made to the Judge for a forfeiture order against property in respect of a person's conviction for a prescribed offence and the Judge is satisfied that the property is tainted, property in respect of the offence, the Judge may order that the property or such part thereof as the Judge may specify in the order, be forfeited to the Crown."

Section 50 (1) stipulates:

"A person who has an interest in property against which a forfeiture order is made may appeal against that order:

- (a) in the case of a person convicted of the prescribed offence in respect of which the order was made in the same manner as if the order were or were part of a sentence imposed on that person in respect of that offence."

Counsel contends that the reference, in the three sections cited above to the previous trial makes it clear that the forfeiture order forms part of the sentence and seeks to punish the applicant twice for the same offence thereby breaching the single tribunal rule and the provisions of section 20(1) of the Constitution.

It is my considered view that section 4(1) of the Drug Offences (Forfeiture of Proceeds) Act makes clear the fallacy of Counsel's arguments. The section requires the Director of Public Prosecution to give notice of his application not only to the convicted person but to any other person who he has reason to believe may have an interest in the tainted property. The possible introduction of other parties into the forfeiture procedure defeats the argument that the procedure is a continuation of the previous trial.

The provision in section 6(1), which permits the Judge hearing the forfeiture application to have recourse to the transcript of trial is to provide the Court with knowledge of the allegations made with respect to the property in relation to the commission of the offence. The provision is discretionary. It says the "Judge may".

Section 6(2) is most instructive, it states:

“where an application referred to in subsection (1) is made to the Judge before whom the person was convicted and the Judge has not, when the application is made, passed sentence on the person for the offence, the Judge may, upon being satisfied that it is reasonable to do so in all the circumstances defer passing sentence until the application has been determined.”

The section makes it clear that the forfeiture order is not a part of the sentence. In the case of offences against the Dangerous Drugs Act, the sentence for any breach is set out in the Act. The forfeiture proceedings is not punishment for the offence for which the person is convicted but is designed to prevent persons from enjoying the fruits of ill gotten gains or to deprive them of property used in the acquisition of ill gotten gains.

Section 55 of the Act supports the view that the forfeiture proceedings are not criminal in nature. It provides that unless otherwise stated in the Act, any question of fact to be decided by a Judge on an application under this Act shall be decided on the balance of probabilities, which is the burden of proof in civil cases.

It is reasonable to assume that the standard of proof was specifically mentioned in the Act to make it clear that the standard of proof in forfeiture applications is different from that in the previous trial.

In a recent decision of the Privy Council in the case of *HM Advocate and Another v McIntosh* published in *THE TIMES* of Thursday February 8, 2001;

Judgment delivered on February 5, 2001, it was held that Confiscation Orders do not breach rights.

Their Lordships Board was considering the validity of section 3(2) of the Proceeds of Crime (Scotland) Act 1995. This section is *in pari materia* to section 3 of the Drug Offences (Forfeiture of Proceeds) Act 1994.

Lord Bingham delivering the opinion of the Board opined that the procedure for confiscation of property was not criminal in nature. He said the application was not against a person charged with a criminal offence. *Inter alia* he observed that the application was not by way of complaint or indictment and was not governed by the ordinary rules of criminal procedure. This decision supports the view which I hold that the forfeiture procedure is not a criminal trial and is not a continuation of the previous trial.

*En passe*, the comment of Lord Bingham as to the validity of the 1995 Act is interesting. He said:

“The statutory scheme contained in the 1995 Act was one approved by a democratically elected Parliament and should not be at all readily rejected.”

I adopt these words in relation to the Drug Offences (Forfeiture of Proceeds) Act 1994.

For the aforesaid reasons, I hold there is no breach nor is there likely to be any breach of the right to a fair hearing guaranteed to the applicant under section 20(1) of the Constitution.

PUBLIC HEARING

The submission is that section 20(3) of the Constitution governs the hearing of the forfeiture application and consequently the application must be heard in public and not before a Judge in Chambers. Section 20 (3) states as follows:

"All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority shall be held in public."

It is further contended that the exceptions created by section 20(4) of the Constitution are not applicable in the instant case.

#### Section 20(4)

"nothing in subsection (3) of this section shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings persons other than the parties thereto and their legal representatives.

- (a) in interlocutory civil proceedings; or
- (b) in appeal proceedings under any law relating to income tax; or
- (c) to such extent as the court or other authority
  - (i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or
  - (ii) may be empowered or required by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of twenty-one years or the protection of the private lives of persons concerned in the proceedings."

I find that reliance upon section 20(3) of the Constitution is misplaced. The issue in the matter is not one "relating to the determination of the existence of a person's civil rights".

The issue is whether or not the property is tainted property and as such should be forfeited.

There can be no valid objection to the matter being heard in chambers. In any event, if Counsel is of the view that the matter ought to be heard in open court the proper course is to make an application to the Judge in Chambers to order that the matter be transferred to open court.

For the reasons expressed herein, I hold that the declarations sought should be denied and the motion be dismissed.

**GRANVILLE JAMES, J**

I have had the opportunity of reading the judgments of the Learned Chief Justice and Harrison J. I agree with their reasoning and conclusion.

**HARRISON J**

The applicant has moved this Court to make a number of declarations and orders with respect to the proposed application for forfeiture of his property registered at Volume 1283 Folio 87 of the Register Book of Titles, pursuant to the provisions of The Drug Offences (Forfeiture of Proceeds) Act (hereinafter referred to as "The Act"). The Motion is the first of its kind since the Act came into operation in 1994. He seeks the under-mentioned reliefs:

"1 A DECLARATION that section 3 of the Drug Offences (Forfeiture of Proceeds) Act 1994 is in breach of Chapter 3 of the Constitution in that it provides for the deprivation of property contrary to section 18 of the said Chapter 3 of the Constitution.

2 A DECLARATION that the deprivation of property after and in addition to the imposition/fixing of a sentence by the Court of trial for an offence and as a consequence of the said conviction (and sentence) amounts to and constitutes an additional penalty for the said offence.

3 A DECLARATION that the provision in the Drug Offences (Forfeiture of Proceeds) Act for the deprivation of property as a consequence of the conviction for an offence, separate and apart from the sentence fixed by the trial Court results in the convicted person being twice punished for the said offence and is accordingly in breach of section 20 of the Constitution.

4 A DECLARATION that the provision in the Drug Offence (Forfeiture of Proceeds) Act for the deprivation of property by a Court other than the court of trial is unlawful and unconstitutional being in breach of section 20 of the Constitution.

5 A DECLARATION that the interlocutory orders obtained herein whereby the applicant has been prevented from disposing of or otherwise dealing in property over which he

possession of or the acquisition of property by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence."

Section 3(2) of the Drug Offences (Forfeiture of Proceeds) Act is in harmony with section 18 (2)(b) of the Constitution. Section 3(2)(a) permits the Court to make a forfeiture order against any property that is tainted property in relation to the prescribed offence. Tainted property is defined in section 2(1) as -

- (a) property used in, or in connection with the Commission of the prescribed offence, or
- (b) property derived, obtained or realized directly by the person convicted from the commission of the offence.

There is no contest that the applicant pleaded guilty to two offences, one of which is a prescribed offence under the schedule to section 2 of the Act. Equally, there is no contest that he was duly sentenced to pay a fine of \$32,000.00 and in default of payment he was to be imprisoned for fifteen (15) months at hard labour.

In the face of the irrefutable evidence, how can it be successfully argued that section 18 of the Constitution has been infringed and more particularly that the instant case is outside the scope of section 18(2)(b) of the said Constitution.

Counsel endeavoured to argue that the word conviction in section 18(2)(b) meant verdict and therefore the application to forfeit tainted property must be made as a part of the sentencing process.

enjoys such rights has been and is in breach of the protection afforded/secured to him by section 18 of the Constitution.

6 A DECLARATION that the Director of Public Prosecutions, application in the instant case for forfeiture of the Applicant's property or rights therein is in breach of the protection afforded/secured to the Applicant by section 18 of the Constitution.

7 A DECLARATION that the Orders sought by the Director of Public Prosecutions in the instant case contravenes the Applicant's rights under section 18 of the Constitution.

8. A DECLARATION that the application by the Director of Public Prosecutions herein is a proceeding relating to the determination of the existence and or the extent of the Applicant's civil rights, to wit, proprietary rights.

9. A DECLARATION that the Director of Public Prosecutions, application herein for process before a Judge in Chambers contravenes the Applicant's rights to a hearing in public as mandated by section 20 of the Constitution.

10. AN ORDER that the Director of Public Prosecutions, application herein be stayed or dismissed for unconstitutionality.

11 AN ORDER that the Applicant be awarded compensation to be assessed as the Honourable Court may direct from the State as redress for the infringement of his rights under Chapter 3 of the Constitution...."

### **BACKGROUND TO THE APPLICATION**

The applicant has stated in his affidavit in support of the Motion that he is a taxi operator and is currently residing at 37 Erin Avenue, Kingston 20. On the 27<sup>th</sup> June 1997 he was arrested and charged for the offences of possession of ganja, dealing in ganja and

taking steps preparatory to export ganja. He pleaded guilty to the charges on the 25<sup>th</sup> August 1997, before the Resident Magistrate for the Parish of Clarendon and was fined. He also states that the property, the subject matter for forfeiture, belonged to his grand father and that by the grandfather's will it was devised to him, with a life interest to his grandfather's wife and thereafter to be retained as a family holding. He further states that since the grandfather's death he has done general renovations and expansion to the property at his own expense. Finally, he states that if the premises were forfeited "by the government" he and his family would suffer great hardships and irreparable harm. Accordingly, he moves the court to grant him the declarations and orders sought in his Motion.

No application for forfeiture of the property was made upon his conviction in the Resident Magistrate's Court but the Director of Public Prosecutions has filed an Originating Summons in the Registry of the Supreme Court seeking forfeiture of the abovementioned property under the Drug Offences (Forfeiture of Proceeds) Act. An Ex-parte Summons pursuant to section 27(2) of the Act that was filed in the matter came up for hearing before Reid J on the 27<sup>th</sup> March 1998 and he made the following order:

" It is hereby ordered that:

" Gary Thompson or any other person be prohibited from disposing of or otherwise dealing with any part thereof or interest therein of all that parcel of land registered at Volume 1283 Folio 87 of the Register Book of Titles."

On the 21<sup>st</sup> September 1998 a further order was made and it states as follows:

"The Restraint Order granted by Reid J on the 27<sup>th</sup> March 1998 in the following terms namely that Gary Thompson or any other person be prohibited from disposing of or otherwise dealing with any part thereof or interest therein of all

Provision is also made in the Act for the procedure to be followed on application, protection of third parties, application for restraint orders, the standard of proof and compensation. Section 55 of the Act provides also that the standard of proof shall be decided on a balance of probabilities.

### THE GROUNDS

The applicant has relied on a number of grounds. He has stated as follows:

"(a) Section 18 of the Constitution protects the citizen's fundamental right in and over his property and provides, subject to certain specified exceptions, that such rights may not be compulsorily acquired unless there is inter alia, provision for compensation.

(b) The Drug Offences (Forfeiture of Proceeds) Act (hereinafter "the Act") purports to entitle the Director of Public Prosecutions to obtain an order from a Judge of the Supreme Court for forfeiture of privately owned property, thereby depriving the owner thereof of his constitutionally enshrined rights therein, and without any provision for compensation.

.© The said act purports to allow such deprivation of property to take place in relation to what is referred therein as "tainted property". Tainted property is defined to include "property " used in or in connection with commission of (scheduled) offences.

(d) The Act further provides that a judge of the Supreme Court may make an order for the deprivation of tainted property where a different court, in this case the Clarendon Resident Magistrate's Court, has previously convicted and sentenced an accused in relation to such property.

(e) The question therefore arises whether the provisions of the Act fall within the exceptions provided for in the Constitution. Among the exceptions is "...acquisition of property...by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence" . Section 18(2) (b).

(f) The wording of the Act itself excludes the application of section 18(2)(b) of the Constitution. The Act specifically provides that property may only be forfeited under it after prior conviction and sentence. Thus it is submitted the forfeiture cannot be regarded as a penalty for the commission of the offence.

(g) Alternately, if it were to be a penalty it would be a second penalty is not constitutionally permissible as it offends against the principle that no man shall be twice punished for the same offence. This principle has been embodied in section 20(8) of the Constitution.

(h) Once a person has been tried, convicted and punished the matter is now res judicata as between himself and the Crown and there is no further power to retry or further convict or impose additional sentence save as is provided for by section 20(8) of the Constitution.

(i) In the instant case the Applicant pleaded guilty before the Resident Magistrate for the Parish of Clarendon. His plea was accepted and a conviction recorded against him, whereupon the Director of Public Prosecutions made his application for forfeiture herein.

(j) The Director of Public Prosecutions, pursuant to this Application obtained interlocutory orders preventing the applicant from exercising proprietary rights over the property in the interim.

## THE LEGAL ISSUES

I now turn to consider the matters of law in relation to the various challenges made by the Applicant

### The unconstitutionality argument

The general position is that there is a presumption in favour of the validity of all Acts of Parliament. In **Donald Panton and Anor v The Attorney General** Constitutional Court Motion M. 64 of 1995 delivered on the 20<sup>th</sup> November 1996, Panton J., (as he was then) said:

“...In considering whether an Act of Parliament is unconstitutional, there is one fundamental point which should be borne in mind at the outset. It is this: There is a presumption in favour of the validity of all acts of Parliament. This is the general position in most, if not all, Commonwealth countries where there are written constitutions”.

The matter went on appeal and Rattray P said at page 8 of the judgment:

“...The Full Court embarked upon a correct and well established approach to be taken when the constitutionality of legislation is challenged. Their Lordships’ judgments emphasized the presumption in favour of the validity of legislative enactments which can only be rebutted by an identifiable transgression which is clear and beyond reasonable doubt...”

In **King v Attorney General** (1992) 44 WIR 52 at page 67, Chief Justice, Sir Denys Williams, of the Barbados High Court said :

“ There is thus a presumption in favour of the constitutional validity of an Act which is challenged as unconstitutional and the burden is on him or her who complains to show that there has been a clear transgression of the constitutional provisions. The Court is not concerned with questions of the propriety or expediency of the legislation but only whether Parliament has gone beyond its constitutional powers.”

The Privy Council decision of HM Advocate and Another v McIntosh reported in the Times Newspaper of the 8<sup>th</sup> February 2001, is also instructive. The case was concerned with confiscation orders in relation to a person convicted of a drug trafficking offence under the Proceeds of Crime (Scotland) Act 1995. Lord Bingham in the course of his judgment stated inter alia:

“...The statutory scheme contained in the 1995 Act was one approved by a democratically elected Parliament and should not be at all readily rejected...”

It is against this background therefore, that I will have to consider the grounds and submissions made on behalf of the applicant as well as the responses by the Respondents.

Submissions in respect of declarations 2, 3 and 4 (grounds g – i inclusive)

The Act itself does not expressly state how the proceedings are classified but Counsel for the Applicant contends that they are criminal in nature. She further contends that since the proceedings are criminal they offend against the provisions of the Constitution in a number of ways. Section 20 of the Constitution provides inter alia:

“20.(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.

(2) Any Court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a Court or other authority, the case shall be given a fair hearing within a reasonable time.

The Applicant submits therefore that section 20 of the Constitution means or includes:

1. A hearing which is presided over by a single as opposed to multiple tribunals from beginning through to verdict and where appropriate to sentence.
2. In the event of an adverse verdict the verdict delivered by this tribunal constitutionally brings the matter to finality save in case of an appeal and re-trial.
- 3 Finality of sentence means that the trial judge becomes functus and thereafter neither that nor any other tribunal may go into the matter of sentence again whether to add to it or otherwise change it.
4. An accused person's presumption of innocence may only be displaced by proof of all relevant matters beyond reasonable doubt.

Accordingly, the Applicant submitted that there should be finality of sentence and neither the trial judge nor any other tribunal "may go into the matter of sentence again whether to add to it or otherwise change it". She referred to and relied upon the cases of **Sip Heng Wong Ng. and Anor. v R** [1988] LRC 1 and **Beswick v R** [1988] LRC 6 for support.

It was also contended by the Applicant that when one looks at the whole scheme of the Act it is apparent that penalty under the Act is integrally and organically connected with the prior conviction for the prescribed offence. Counsel argued that if it were not a continuing matter, the Act would have sanctioned two separate hearings of a criminal or penal nature relative to a singular act. Accordingly, the Act would have sanctioned two separate punishments by two tribunals for the one criminal matter against one and the same person. Furthermore, Counsel submitted that it was for the Judge originally seised

of the matter and only him who could dispose of all questions relative to penalty and/or sentence.

The Applicant also submitted that the Act purports or attempts to tag on to an earlier conviction and sentence a further penalty. Counsel said that the Judge in considering this penalty would have embarked upon a hearing and there would thus be a continuation of the trial or alternatively a second hearing in relation to one aspect of the same subject matter whereby the applicant was placed at risk of a second or additional penalty for the same offence. This she said results in the applicant being punished twice. Counsel referred to the cases of *Wigglesworth v R* [1989] LRC 591, *Wemyss v Hopkins* (1875) L. R. QB 378, *Richards v R* 41 WIR 263, *DPP v Nasralla* [1967] 2 All E.R 161 and *Maharagh* No. 2 (1978) 30 WIR 310 for support.

Counsel also prayed in aid section 20(8) of the Constitution which states as follows:

"20 (8) No person who shows that he has been tried by any competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior Court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence".

The Respondent argued on the other hand, that the application for forfeiture under the Act was not a part of the sentencing process and that the proceedings prescribed under the Act are civil in nature. Mr. Sykes placed strong reliance upon the cases of **John Gilligan v The Criminal Assets Bureau et al** High Court of Ireland No. 1997 1667P delivered 26<sup>th</sup> June 1997 and **Michael Murphy v GM PB PC Limited and GH** High Court of Ireland 1997 No. 9022P delivered 4<sup>th</sup> June 1999.

My first task at this stage is to decide whether the proceedings contemplated under the Act are criminal or civil in nature. Now, what are the indicia of criminal proceedings? In Goodman v Hamilton (No. 1) [1972] 2 IR 542 decided by the Supreme Court of Ireland, Findlay C.J stated at page 588:

"..The essential ingredient of a trial of a criminal offence in our law, which is indivisible from any other ingredient, is that it is had before a Court or Judge which has got the power to punish in the event of a verdict of guilty. It is of the essence of a trial on a criminal charge or a trial on a criminal offence that the proceedings are accusatorial, involving a prosecutor and an accused, and that the sole purpose and object of the verdict, be it one of acquittal or of conviction, is to form the basis for either a discharge of the accused from the jeopardy in which he stood, in the case of an acquittal, or for his punishment for the crime which he has committed in the case of a conviction."

When one looks closely at the scheme of the Act it is quite obvious that Parliament did not have in mind the criteria for criminal proceedings as set out by Findlay C.J. To my mind the Act is directed towards preventing the retention of ill-gotten gains, rather than the imposition of a punishment. Furthermore, section 55 of the Act makes it clear that the standard of proof in the proceedings is on a balance of probabilities. The section states:

"55. Except as otherwise provided in this Act any question of fact to be decided by a Judge on an application under this Act shall be decided on the balance of probabilities."

I therefore agree with the submissions made on behalf of the Respondent that the forfeiture proceedings under the Act are civil and not criminal in nature. No other conclusion could be arrived at when one examines the scheme of the Act.

I further hold that the protections relied upon by the Applicant under section 20 of the Constitution were not breached. With the greatest of respect to Counsel, it is my considered view that the cases of Sip Heng Wong Ng. And Anor. v R [1988] LRC 1, Beswick v R [1988] LRC 6, Wigglesworth v R [1989] LRC 591, Wemyss v Hopkins (1875) 10 L.R QB 378, Lloydell Richards v R 41 WIR 263, DPP v Nasralla (1967) 2 All E.R 161 and Maragh No. 2 (1978) 30 WIR 310 referred to in support by the Applicant are not relevant and of no effect whatsoever.

Declarations 8 and 9 (grounds 1 – 0 inclusive)

Counsel for the applicant submitted that the nature of the proceedings mandated by the Act puts it squarely under section 20(3) of the Constitution. This section provides:

20(3) All proceedings of every Court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any Court or other authority, including the announcement of the decision of the Court or other authority, shall be held in public."

She submitted further that section 20(4) of the Constitution allows the Court to exercise its discretion in excluding persons from the proceedings before it whereas the Act did not give the Court that discretion. Section 20(4) of the Constitution provides as follows:

"20 (4) Nothing in subsection (3) of this section shall prevent any Court or any authority such as is mentioned in that subsection from excluding from the proceedings persons other than the parties thereto and their legal representatives-

- (a) in interlocutory civil proceedings; or
- (b) in appeal proceedings under any law relating to income tax; or
- (c) to such extent as the Court or other authority-

- (i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or
- (ii) may be empowered or required by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of twenty-one years or the protection of the private lives of persons concerned in the proceedings".

For my part, I would say that the Court can exercise its discretion where matters are heard in Chambers and move them into open Court where it is more expedient to deal with such matters. Over the years, Judges of the Supreme Court have always done this so, I can see no reason why this practice would be discontinued in forfeiture proceedings.

Declarations 1, 5, 6 and 7 (grounds a, b, c, d, e, f inclusive)

The Applicant submitted, that the provisions under the Act for the forfeiture of property and other interference with proprietary rights are unconstitutional since they purport to permit the taking of property by the State without compensation. The relevant provisions under the Constitution with respect to the compulsory acquisition of property are set out as follows:

- "18. (1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that-
- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
  - (b) secures to any person claiming an interest in or right over such property a right of access to a Court for the purpose of-
    - (i) establishing such interest or right (if any);
    - (ii) determining the amount of such compensation (if any) to which he is entitled; and
    - (iii) enforcing his right to any such compensation.
- (2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property-
- (a) in satisfaction of any tax, rate or due;

(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;

.....

(5) In this section "compensation" means the consideration to be given to a person for any interest or right which he may have in or over property which has been compulsorily taken possession of or compulsorily acquired as prescribed and determined in accordance with the provisions of the law by or under which the property has been compulsorily taken possession of or compulsorily acquired."

Counsel for the Applicant contended that the forfeiture permitted by the Act did not fall under subsection 2 (supra). She further submitted that section 18(2)(b) was not applicable as this could not be regarded as forfeiture after a constitutionally proper conviction.

— Counsel for the Respondent submitted however, that there was nothing unconstitutional with respect to the forfeiture proceedings and section 18 of the Constitution. Furthermore, Counsel argued that where property is used or is connected with criminal activities, steps should be taken by the State to prevent the continuation of its use as well as preventing the wrongdoer in deriving any benefit from it.

It is my considered view that section 18(2)(b) of the Constitution presents no difficulty whatsoever. It is abundantly clear from the wording of the section that the question of compensation has no relevance where the acquisition of property is by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence. It follows that a law which effects or authorizes forfeiture of property in consequence of property derived, obtained or realized directly by a person convicted from the commission of a prescribed offence under the Drug Offences (Forfeiture of Proceeds) Act stands outside of section 18 of the Constitution. It follows also that a convicted person who uses property in or in connection with the commission of a prescribed offence under the Act is likewise outside of section 18 of the Constitution. I do believe that the notion of paying compensation to the owner of property if validly forfeited to the Crown for a breach of the law would be simply absurd. Of course, if

innocent third party rights are affected due to the forfeiture proceedings there is provision for redress under the Act.

### Conclusion

I am quite satisfied that the applicant has failed to establish that the provisions of the Drug Offences (Forfeiture of Proceeds) Act are unconstitutional having regard to the provisions of the Constitution. I would therefore refuse the declarations and orders sought. I respectfully adopt the words of Justice McGuinness in Gilligan case (supra) where she stated inter alia, at page 71 of the judgment:

“...“It appears to me that the State has a legitimate interest in the forfeiture of the proceeds of crime. The structure of the Act, in a similar way to ordinary civil injunction proceedings, allows for the temporary freezing of assets and for various actions to be taken on an interlocutory basis. The Respondent at any time may intervene to show good title to the assets. If he does so not only must they be returned, but the Court may order the State to pay compensation to him. It is also provided in section 3 that the Court shall not make an interlocutory order “if it is satisfied that there would be a serious risk of injustice.”

....

This court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place high in the hierarchy of rights that it protects the position of assets illegally acquired and held.”

I would therefore dismiss the Motion with Costs to the Respondent and Intervener to be taxed if not agreed.

WOLFE, CJ

The motion is accordingly dismissed.

that parcel of land be extended until the application for a forfeiture order of the land registered at Volume 1283 Folio 87 of the Register Book of Titles is finally determined.”

### THE SCHEME OF THE ACT

Section 3 of the Act provides inter alia:

“3. ....

(2) Where a person is convicted of a prescribed offence committed after the 15th day of August, 1994, the Director of Public Prosecutions may apply to a Judge of the Supreme Court (hereinafter referred to as the Judge) for one or both of the following orders -

(a) a forfeiture order against any property that is tainted property in relation to the prescribed offence....”

The schedule to the Act lists the prescribed offences and it includes :

“1. Producing, manufacturing, supplying or **otherwise dealing in any dangerous drug** in contravention of the Dangerous Drugs Act.”(emphasis supplied)

“Tainted property” in relation to a prescribed offence, means -

(a) property used in, or in connection with, the commission of the offence;  
or

(b) property derived, obtained or realized directly by the person convicted from the commission of the offence.

(k) Accordingly, the Applicant's interest in and over the property as secured by section 18 of the Constitution has been and is being infringed. Further he has been deprived of the protection of law guaranteed him under section 20 of the Constitution.

(l) Further section 20 of the Constitution does not allow for a trial to take place in parts before different tribunals. It contemplates a singular hearing at the conclusion of which if there is a conviction the court decides on and imposes the sentence of the court.

(m) In the instant case if the forfeiture being sought is to be regarded as a penalty then it is not a penalty which may be lawfully or constitutionally imposed by a tribunal which did not hear or try the case. Thus for this reason also the Orders obtained and sought are in breach of the Applicant's Constitutional rights.

(n) Section 20 of the Constitution is clear. Hearings for the final determination of the existence or extent of civil rights must be held in public.

(o) Proprietary rights are civil rights and the Act and the Orders rest on a determination that the Applicant's rights over property no longer exist. Such a hearing must be held in public. To proceed in Chambers is to breach the Applicant's entitlement to a public hearing.

(p) In summary, it is submitted that the Applicant's constitutional rights have been infringed both procedurally as well as substantively. The Act and/or the relevant parts thereof are in breach of the Constitution; the Applicant's constitutional rights have been, are being breached as a consequence by the Director of Public Prosecutions' application pursuant to the said Act whereby the Applicant is entitled to the reliefs sought."