

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 - 1st Respondent

AND THE ATTORNEY GENERAL - 2nd 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 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."

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 14th 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 19th 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 27th June 1997 he was arrested and charged for the offences of possession of ganja, dealing in ganja and

