In The Supreme Court of Bermuda

No. 28 of 2018

Between:

MARTSEEYAH BAHT JONES

1st Appellant

And

RITA ANGELA JONES

2nd Appellant

And

MORLAN ANTHONIO SMITH STEEDE

3rd Appellant

And

RICHARD RICARDO STEEDE

4th Appellant

And

THE QUEEN

Respondent

JUDGMENT

Date of Hearings:	05 December 2018
Closing Date for Filing of Further Evidence:	14 December 2018
Date of Judgment:	17 January 2019
1st– 2nd Appellants:	No appearances
3rd - 4th Appellants:	Mr. Tyrone Quin (DV Bermuda)
Respondent:	Mrs. Shakira Dill-Francois (Dep.S-G)

Meaning of Appeal by way of Rehearing / Meaning of "Satisfied" as standard of proof
Appeal against Order of Forfeiture under section 51 of the Proceeds of Crime Act 1997

JUDGMENT of Shade Subair Williams J

Introduction

1. This matter has come before the Court on appeal from a ruling made by the learned Magistrate, Mr. Khamisi Tokunbo, in answer to an application by the Crown for forfeiture of criminal proceeds pursuant to section 51 of the Proceeds of Crime Act 1997.

2. The appeal was heard by way of a rehearing pursuant to section 51(4). Having heard Counsel, I reserved judgment and the provision of written reasons which are outlined below.

Summary of the Facts

3. No real contention arose between the parties on the facts before this Court.

4. On Friday 22 January 2016, the late Mr. Morlon Steede (MS)[1], a Jamaican national attended the LF Wade International Airport to travel to Jamaica via Miami.

5. MS was subject to a secondary search at the US Customs and Border Protection. Upon questioning by US Customs Officers, MS presented a false document which purported to be an authentic certificate from the Jamaica Constabulary Force reporting that MS did not appear to be in the Jamaica Criminal Database. This was later proven to be untrue on MS' admission that he served a term of 6 months' imprisonment for possession of controlled substances. On this basis, MS was denied entry to the US.

6. When further questioned by a US Customs Officer as to the quantity of cash he had on his person, MS falsely stated that he had $3000 in his possession. However, it was later discovered that MS was carrying $7000 in US currency without supporting documentation to explain the purpose of the cash. This resulted in the investigative involvement of Detective Constable 2213 Anthony Topey of the Joint Intelligence Unit.

7. DC Steede interrogated MS on the source of the cash discovered on his person. In reply, MS informed police that a $5000 portion of the money seized had been given to him by his wife, Martseeyah Jones (MJ) for a down payment on a house he was to select in Jamaica for her and her sisters.

8. However, on the evidence which was before the learned Magistrate, MJ told Detective Constable 2028 Jones that both she and her sister, the 2nd Appellant, Rita Jones (RJ), gave MS a sum of $2,500 (making up the total sum of $5000) for investment purposes. Evidence

[1] MS died on 3 November 2017

before the Court also established that RJ also assisted MS prior to his airport arrival in converting the $7000 cash into US currency.

9. According to statements made by MS during the same interview he said that the remaining $2000 had been given to him by his father, the 4th Appellant, Ricardo Steede, (RS) as a form of financial assistance.

10. On 23 February 2016 RS partook in a voluntary police interview and informed police that he had given (not gifted) the $2000 to MS on the specific instruction that MS pass this money on to his (MS') mother in support of a bus transportation business owned or operated by MS' parents.

11. The $7000 sum was seized and placed into an evidence exhibit bag and later handed over to the Financial Crime Unit of the Bermuda Police Service. On the same date, MS signed a document entitled 'Notice of Disclaimer' which stated, *inter alia*, that he did not object to the forfeiture of the $7000 cash sum and that he would not contest a forfeiture application before the Court. Additionally, MJ informed DC Jones on 19 September 2017, that neither she nor her sister, RJ, had any interest in pursuing the recovery of the seized sum and that they would both sign disclaimers to that effect.

12. A forfeiture application was made before the learned Magistrate. On 31 May 2018 the learned Magistrate ordered that $2000 of monies seized was to be released and returned to RS. The remaining $5000 was ordered to be forfeited to the Crown.

13. RS prosecuted this appeal through his Counsel without the participation of the other named Appellants. He maintained his personal interest in the $2000 which was released to him and further asserted that he appeared in a representative capacity for the other Appellants including the estate of MS in respect of the forfeited $5000.

14. While RS' standing as an estate representative was not seriously argued by Ms. Dill-Francois, the Respondent did not accept that RS could properly pursue the appeal on behalf of the other named Appellants. Accordingly, Appellants MJ and RJ were directed to confirm by supplemental affidavit evidence their respective interests in prosecuting this appeal and recovering any of the forfeited sums.

15. By affidavit evidence sworn on 5 December 2018, MS stated:

1. At all material times I was or am the wife of the 3rd Appellant who is now deceased.
2. At all material times I have been a party to these proceedings.
3. At all material times I have asked and given the 4th Appellant Mr. Richard Steede the authority (to) handle all legal matters on behalf of the estate of my late husband, the 3rd Appellant.
4. More specifically, I have asked and given Mr. Richard Steede authority to represent the estate of my late husband with regard to these legal proceedings.

The Relevant Law:

Section 51 of the Proceeds of Crime Act 1997 ("the Act"):

16. Section 51 governs the Court's powers to make an order for forfeiture and is premised on any seizure or detention of property by a police officer made under section 50. This applies to property imported into Bermuda, exported from Bermuda or found in the execution of the duties of the officer. The police officer must have reasonable grounds for suspecting that the property in question directly or indirectly represents any person's proceeds of criminal conduct or that such property is intended by any person for use in any criminal conduct.

17. Where such property is to be detained for more than forty-eight hours, it must be done under an order of a magistrate pursuant to subsection (2). The magistrate under such circumstances must be satisfied on the establishment of the reasonable grounds for suspicion and must also find that the continued detention of the property is justified while its origin or derivation is being further investigated or while criminal proceedings are being considered. Where the property detained for more than 48 hours is cash consisting of coins and bank-notes, it should, where practicable, be held in an interest-bearing account in order for that interest to be added to the cash on its forfeiture or release, pursuant to section 52.

18. Section 51 is triggered where the Crown makes an application for seized and detained property to be forfeited and paid into the Confiscated Assets Fund, as established under section 55A of the Act. Section 51 provides:

Forfeiture orders and appeals

51 (1) A court of summary jurisdiction may make an order (a "forfeiture order") ordering the forfeiture of any property which has been seized under section 50 if satisfied, on an application made by a police officer while the property is detained under that section, that the property directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in, criminal conduct.

(2) An order may be made under subsection (1) whether or not proceedings are brought against any person for an offence with which the property in question is connected.

(3) Any party to the proceedings in which a forfeiture order is made (other than the applicant) may, before the end of the period of thirty days beginning with the date on which it is made, appeal to the Supreme Court.

(4) On an application made by an appellant to a court of summary jurisdiction at any time, that court may order the release of so much of any cash to which the forfeiture order relates as it considers appropriate to enable him to meet his legal expenses in connection with the appeal.

(5) An appeal under this section shall be by way of rehearing, and the Supreme Court may make such order as it considers appropriate and, in particular, may order the release of the property (or, in the case of cash, any remaining cash) together with any accrued interest in the case of cash.

19. The evidential threshold stated at subsection (1) requires a magistrate to be *satisfied* that the elements of the section have been proved.

20. In my previous judgment *A.R.M.F. v A.J.F. [2018] SC (Bda) 61 Div (23 July 2018)* I cited the helpful remarks of Omrod LJ in *K v K (Avoidance of Reviewable Disposition) (1983) 4 FLR 31, 36G, CA* in outlining what it means for the Court to be satisfied on an application. While the examination of the term 'satisfied' was done in the context of matrimonial matters, I see no reason why its meaning would not parallel with test applicable for civil matters.

21. At page 36 of the English Court of Appeal judgment, Omrod LJ said:

> "*…I venture to think that all of us know when we are 'satisfied' of something by evidence in court, or not. Our difficulties begin when we try to say what we mean by being 'satisfied'. It forces people to turn to synonyms, which altar the sense, or to the addition of various adverbial phrases such as 'beyond reasonable doubt' or 'on the balance of probability', which can lead to rather unreal distinctions being drawn. But the question remains, in simple language, 'Am I satisfied?' I think that, if the judge had asked himself that question, he would have arrived at the same answer as that which he actually did.*
> *The question of what is the meaning of the phrase 'is satisfied' has been litigated over and over again in relation to other sections of various Matrimonial Causes Acts and it has been pronounced upon on a number of occasions by the House of Lords, not in this context but in the context of other sections.*
> *I would briefly refer, because I think it is a helpful case, to Blyth v Blyth [1966] Ac 643, a decision which split the House of Lords three to two, but in the three majority speeches the position is made quite clear. The first is Lord Denning's and he took the view that 'satisfied' was primarily directed to the question of which side the onus of proof lay, but as to what the word 'satisfied' meant, he said at p. 668:*
> *'I hold, therefore, that in this statute' [that is the predecessor to the Matrimonial Causes Act 1973] 'the word "satisfied" does not mean "satisfied beyond reasonable doubt". The legislature is quite capable of putting in the words "beyond reasonable doubt" if it meant it. It did not do so. It simply said on whom the burden of proof rested, leaving it to the court itself to decide what standard of proof was required in order to be "satisfied".'*
> *…*
> *I do not think one can take it much further than that, save to refer to a dictum which Lord Denning cited in Bater v Bater [1951] P 35, when he referred to a dictum of Lord Stowell which, although the language is not very familiar, I find helpful. It was in a case called Loveden v Loveden (1810) 2 Hagg Con 1:*

'The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.'
I do not think I can do better than that."

22. The term "criminal conduct" in subsection (1) is defined at section 3 of the Act and means drug trafficking or any relevant offence. A drug trafficking offence is given a specific meaning under the same section and is defined by reference to various sections of the Misuse of Drugs Act 1972. Any "relevant offence" is also defined under section 3 and is stated to mean (a) any indictable offence in Bermuda other than a drug trafficking offence; (b) any act or omission which, had it occurred in Bermuda, would have constituted an indictable offence other than a drug trafficking offence; or (c) any criminal act or omission in relation to any tax lawfully established in a jurisdiction outside Bermuda which, notwithstanding section 2 of the Taxes Management Act 1976, would have constituted an offence contrary to section 37(2) of that Act, had it occurred in Bermuda.

23. The term "property" is broadly defined by section 4 of the Act to mean "money and all other property, movable or immovable, including things in action and other intangible or incorporeal property".

24. The Supreme Court's appellate jurisdiction is invoked by section 51(3) where any party, other than the applicant, seeks to appeal a forfeiture order made by a court of summary jurisdiction. Seemingly, it would not have been open to the Crown, therefore, to appeal against the Magistrates' Order for forfeiture, notwithstanding that only a portion of the sum seized was forfeited.

25. Subsection (5) states that an appeal under section 51 shall be by way of rehearing and it empowers the Supreme Court to make any such order as it considers appropriate. A rehearing of the case simply means that the appeal will be determined by a re-investigation into the merits of the application itself rather than on an assessment of the lower Court's conduct of the proceedings. As such, the Crown is not bound to present its case in the same was as it did in the Magistrates' Court and each party may call any relevant and admissible evidence in support of its case, whether or not such evidence was adduced in the lower Court. Further, the Supreme Court is entitled to find that the application has or has not been proved on a basis other than the findings made by the Magistrates' Court. (See Halsbury's Laws of England para 680).

Analysis and Decision:

26. Having heard and considered the able submissions of Counsel and the affidavit evidence filed in these proceedings, I find that the only standing that the 4th Appellant has is in his own right. For the purposes of this appeal, I need not determine whether the 4th Appellant has adequately demonstrated his competence to appear as a representative of MS' estate because the competing interests in the property in question are those of the 1st, 2nd and 4th Appellants

in their personal rights. Clearly, the 4th Appellant is in no position to properly prosecute any alleged interests of the 1st or 2nd named Appellants, MJ or RJ.

27. In my judgment the evidence that the $5000 sum (consisting of $2,500 contributions by MJ and RJ each) was intended for use in criminal conduct is strong. It cannot be ignored that MS willfully attempted to deceive the US customs officers about the sum of cash on his person when he was at the airport. It is certainly inconceivable that he was genuinely mistaken about the fact that he was travelling with $7000 cash. The dishonest conduct of MS did not stop there. He clearly presented a fraudulent document to the authorities with the purpose of making the relevant officers believe that he had not previously been convicted of a criminal offence. The irresistible inference is that his efforts to conceal and deceive were deliberate and pre-calculated.

28. I find that the explanation provided by MS as to the source and purpose of the funds was inconsistent with what police were told by MJ. Additionally, the explanation provided by MS in support of his account that the monies were intended for a down-payment on unknown property in Jamaica was unreasonably vague and unbelievable. Equally, I find that MJ's early but dim assertions to police that the monies provided were for investment purposes to be unworthy of belief. This is aggravated by the clear and suspicious disinterest of her and her sister, RJ, to take any steps in reclaiming these seized, detained and forfeited sums.

29. In respect of the $2000 sum originating from the 4th Appellant, I express some doubt. There was an obvious inconsistency between the stated purpose of the funds between MS' account and that of the 4th Appellant himself. It is also curious and even odd that the 4th Appellant was unable to report the name of the bus transportation business which was to be the beneficiary of his $2000. However, in the end, the 4th Appellant maintained that this was money which was to be handed over to his wife in aid of this business and I am unable to ignore the lingering doubt that leaves me short of being satisfied that the Crown has proved its case.

Conclusion

30. For these reasons, the learned magistrates' decision shall stand and the appeal is dismissed.

31. Unless either party files a Form 31TC within the next 7 days to be heard on the issue of costs, I order that costs shall be in the appeal, in favour of the Respondent. Such costs shall be on a standard basis to be taxed if not agreed.

Thursday 17 January 2019

SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT