

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUMCRAP2011/0021

BETWEEN:

DAVID PILGRIM

Appellant

and

PC 24 LUNCHEON

Respondent

Before:

The Hon. Dame Janice Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. John Carrington, QC

Chief Justice
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Al Elliott for the Appellant
Mr. Stephen Brette for the Respondent

2013: July 10;
August 7.

Criminal Appeal – appellant not party to proceedings - jurisdiction of court of appeal on a forfeiture order made pursuant to the Drugs (Prevention of Misuse) Act.

The appellant was the owner, of a vehicle which he gave to his repairman to conduct repairs. While in the repairman's care, and in the absence of the appellant, the vehicle was randomly stopped and searched by the police who uncovered three bales of plant material suspected to be cannabis. The vehicle was seized as a result, charges were laid under the Drugs (Prevention of Misuse) Act and one of the occupants (not the repairman) pleaded guilty. The appellant attended the sentencing hearing and his counsel asked the court to be heard in respect of the seized vehicle. After hearing submissions the magistrate made a forfeiture order.

The appellant has appealed the forfeiture order to this court by way of a magisterial appeal utilizing the appeal provisions under the Criminal Code. Counsel for the respondent argues that based on the authority of *R v Crown Court at Maidstone, ex parte Gill* and the provisions in the Criminal Code respectively, the Appellant's remedy lies by way of judicial review and not by way of an appeal to the Court of Appeal as the appellant was not a defendant or complainant, and was not convicted or sentenced by the Magistrate in terms of the provisions of the Criminal Code.

Held: dismissing the appeal for lack of jurisdiction to entertain it and making no order as to costs:

1. The Drugs (Prevention of Misuse) Act gives no right of appeal to the Court of Appeal on a forfeiture order made in respect of a person who was not a party to the criminal proceedings before the Magistrate. The Eastern Caribbean Supreme Court (St. Lucia) Act provides a right of appeal from the Magistrate's courts to the Court of Appeal, but this is expressly made subject to the provisions of the Criminal Code or any other enactment regulating appeals from such courts. Therefore the appellant who is not a party in any respect to the criminal proceedings from which the forfeiture order followed, may not properly be regarded as a complainant or a defendant. Consequently, the appellant may not take advantage of the right of appeal to the Court of Appeal given in section 720 of the Criminal Code.

Smalley v Warwick Crown Court [1985] 1 All ER 769 and *R v Crown Court at Maidstone, ex parte Gill* [1987] 1 All ER 129 applied.

JUDGMENT

- [1] PEREIRA CJ: This appeal, though arising from very simple facts, has given rise to very important legal questions at the forefront of which is one of jurisdiction to entertain an appeal arising out of a forfeiture order made pursuant to the Drugs (Prevention of Misuse) Act¹ ("the Act") in respect of a conveyance owned by a person who was neither convicted nor charged with any offence under the Act.

The background

- [2] On Wednesday, 19th January 2011, police officers whilst conducting an operation intercepted a green Sportage vehicle registration number 1356. There were three occupants two of whom was one Elvin Antoine and one Francis Noel. Mr Pilgrim, the appellant herein was not one of the occupants. He is however the owner of

¹ Chapter 3.02 Revised Laws of Saint Lucia 2008.

the vehicle. On searching the vehicle three bales of plant material suspected to be cannabis, an illegal drug, were found. The occupants were arrested and charged with offences under the Act. The vehicle was also seized by the police. Elvin Antoine pleaded guilty. It appears that the charges against Mr. Noel and the other occupant of the vehicle were withdrawn.

[3] Mr. Pilgrim attended the hearings before the Magistrate in respect of the occupants of the vehicle because he had an interest in seeking the release of his vehicle. Mr. Pilgrim was also represented by counsel Mr. Elliott, who made it plain at the sentencing hearing of Mr. Antoine that he wished to be heard in respect of the seized vehicle on behalf of Mr. Pilgrim. It appears that sometime earlier, the prosecution had given verbal notice of their intention to seek a forfeiture order in respect of the vehicle pursuant to section 38 of the Act.

[4] No summons as required by section 38(6) of the Act was ever served upon Mr. Pilgrim, seemingly due to the fact that he had been present during the proceedings involving Mr. Antoine. The Magistrate's note of 20th July 2011, states in part as follows:

"Mr. Elliott – absent – no information he is instructed re Forfeiture - vehicle" Prosecution – section 4 Proceeds of Crime Ordinance and s. 38 Drugs Act. – Gives formal verbal notice- forfeiture of vehicle. Will be dealt with on next occasion. Adjourned to 23rd August, 2011."

[5] On 23rd August 2011, Mr. Elliott appeared. This was also the day on which Mr. Antoine was sentenced by the Magistrate. Mr. Elliott informed the court that he was appearing in connection with section 38 of the Act in respect of the vehicle. He pointed out that Mr. Pilgrim was not one of the persons arrested and that his client Mr. Pilgrim was suffering loss of use by the continued detention of the vehicle and pressed for a hearing that same day on this aspect of the matter. The prosecution was not ready to proceed. The Magistrate's note at the end of the proceedings on that day states:

"Notice had been given re absence of the prosecution. Adjourned to 14th September, 2011..."

[6] On 14th September 2011, the Magistrate's note so far as is relevant to this appeal, states as follows:

"Prosecution proceeds with s.38 Misuse of Drugs Act – Forfeiture proceedings. Notes of evidence. The facts of the case are read out. Mr Elliott accepts them. Requests that Mr. Pilgrim give evidence. David Pilgrim is sworn and says: I am David Pilgrim yes I own a motor vehicle. It is a green and silver sportage registration number 1356. Yes it is registered in my name. ...Yes I recall Wednesday 19.1.11. I had my vehicle up to about 12:30- 1:00 p.m. Then I gave it to Francis Noel to get the back left window fixed. He is a friend of mine and I know his father. When the vehicle has a problem he usually takes care of it. No he didn't return it to me that day. I am a construction contractor. ... I have no other transportation. ... I've owned my vehicle for about three years. ... I would like my vehicle returned, I have to spend a lot on transportation."

[7] Counsel, Mr. Elliott, then made submissions urging the release of the vehicle. It would appear from the record that there was no cross-examination, or any evidence led by the prosecution, nor did they make submissions in response to Mr. Elliott. Indeed it would appear that the facts which were read out and said to be accepted by Mr. Elliott (not by Mr. Pilgrim) were the facts in relation to the guilty plea made by Mr. Antoine. The Magistrate's note of her decision is then recorded thus:

"Decision

Pursuant to S. 38(1) of the Drugs Act is satisfied. No cause has been shown to say that this should not be ordered. It is therefore ordered that the vehicle be forfeited. S.38(1) of the Drugs Act. Shown to satisfaction of court to relate to offence. Nexus – s.38 does not require a nexus – owner admits he knew the defendant² very well for many years ... and at least one of the other two occupants. All three were charged, but two withdrawn ... by the prosecution. ..."

[8] Mr. Pilgrim has appealed the forfeiture order to this court by way of a magisterial appeal utilizing the appeal provisions under the Criminal Code³. His grounds of appeal though contained in seven grounds, are in essence that:

1. the forfeiture proceedings were contrary to section 38 (6) of the Act;

² This appears to be a reference to Mr. Noel, his car repairman, who was not convicted.

³ Cap. 3.01 Revised Laws of Saint Lucia 2008.

2. the Learned Magistrate erred in failing to consider that he had shown cause why the vehicle should not be forfeited.
3. the forfeiture was wrongful and was an unlawful deprivation of property and thus contrary to section 6 of the Constitution.

Before proceeding to deal with these however, it is necessary to consider the jurisdictional point raised by counsel for the respondent as this may summarily dispose of the matter before this court.

The Jurisdiction of the Court of Appeal

[9] Counsel for the respondent says that the appellant is, in short, seeking relief in the wrong court. He posits, based on the authority of *R v Crown Court at Maidstone, ex parte Gill*⁴ and the provisions in the Criminal Code respectively, that the appellant's remedy lies by way of judicial review and not by way of an appeal to the Court of Appeal as the appellant was not a defendant or complainant, and was not convicted or sentenced by the Magistrate in terms of the provisions of the Criminal Code.

[10] It is to be noted that the Act, gives no right of appeal to the Court of Appeal in respect of a forfeiture order made in respect of a person who was not a party to the criminal proceedings before the Magistrate.⁵ There is no doubt that the person who was charged and convicted (and thus a defendant) has an undoubted right of appeal to the Court of Appeal under section 720 of the Criminal Code. The Criminal Code says that a

a "complaint" includes any information or charge' and a ' "complainant" includes any informant or prosecutor'. It defines a Defendant however as meaning ' ... the person against whom complaint has been made'.

⁴ [1987] 1 All ER 129.

⁵ This is unlike the Proceeds of Crime Act which under s.12 (6) gives a right of appeal to the Court of Appeal where a forfeiture is effected under that Act. The application for forfeiture however, engages a High Court procedure.

[11] Mr. Pilgrim cannot *be* classified as a complainant as he is not a person who or on whose behalf complaint has been made. Neither does he fit the definition of a defendant as he is not a 'person *against whom complaint has been made*'. The criminal proceedings pursued against Mr. Antoine cannot be said to be proceedings brought by or against Mr. Pilgrim from which a decision by the Magistrate amounts to an order made either in his favour or against him. The forfeiture provision of the Act, in my view is an order not as against 'a person' but as against 'the res'. It attaches to the property or thing irrespective of the person who owns or otherwise has an interest in it and irrespective of that person's culpability or lack thereof, the critical criterion for such an attachment being that it has been shown to be related to the offence charged under the Act and in respect of which a person (indeed any person) has been convicted.

The right of appeal

[12] The right of appeal to the Court of Appeal does not arise by way of equitable notions of fairness or to a desire to find a remedy by way of appealing to the Court of Appeal where, as here, the appellant seeks to quash the forfeiture order as being made contrary to principle. The right of appeal to the Court of Appeal must find expression in an enactment be it the Constitution or some other law. Section 720 of the Criminal Code, which provides the right of appeal from a District Court, is in these terms:

"Right to appeal

720.— (1) Where a District Court acting in the exercise of its summary jurisdiction —

- (a) refuses to make an order, or dismisses a complaint, the complainant may appeal to the Court of Appeal against such decision;
- (b) makes an order, the person against whom the order is made, whether complainant, or defendant, may appeal to the Court of Appeal against such decision." (my emphasis)

Section 720 also goes on to state in subsection (3) as follows:

"(3) Nothing in this section confers a right of appeal contrary to the provisions of any enactment, which provides that there is to be no appeal, or that the proceedings under the enactment are to be final."

The Eastern Caribbean Supreme Court (St. Lucia) Act⁶ provides a right of appeal from Magistrate's courts to the Court of Appeal, but this is expressly made subject to the provisions of the Criminal Code or any other enactment regulating appeals from such courts. It becomes apparent therefore that a person in the position of the appellant who is not a party in any respect to the criminal proceedings from which the forfeiture order followed, may not properly be regarded as a complainant or a defendant. Consequently, the appellant may not take advantage of the right of appeal to the Court of Appeal given in section 720 of the Criminal Code.

[13] Does this mean that a person in the appellant's position, where property belonging to him has been forfeited and where such an order was wrongly made, is without a remedy? Clearly not. Such a complaint can most appropriately be the subject of judicial review proceedings, where the remedy being sought is the quashing of the forfeiture order along with any concomitant right to compensation if applicable and/or sustainable. This is all the more so particularly where, as here, one of the main planks of the complaint is procedural irregularity or breach of natural justice principles. The propriety of this approach was addressed in the decision of the Queen's Bench Division in the United Kingdom in the case of Gill⁷.

[14] In Gill, the applicant (father) lent two cars to his son, who without his father's knowledge, used the cars for two separate journeys to supply prohibited drugs. The son was later charged with two offences of supplying heroin. He pleaded guilty to one charge and was sentenced. The other charge was not proceeded with. After passing sentence the judge made a forfeiture order under section 27 of the Misuse of Drugs Act, 1971 forfeiting the two cars. The applicant applied for certiorari to quash the forfeiture order. The Crown contended that the forfeiture order was a matter '*relating to trial on indictment*' and therefore under sec. 29(3) of the Supreme Court Act 1981 the court had no jurisdiction to consider the application. The court held that the forfeiture order in respect of the applicant's

⁶ Section 25.Cap.2.01 Revised Laws of Saint Lucia 2008.

⁷ Supra note 4.

cars was not a matter '*relating to trial on indictment*' for the purposes of sec. 29(3) of the Supreme Court 1981 Act because it was not an order which affected the conduct of the trial of the applicant's son in any way. Accordingly, the court was not excluded by that section from considering the application. (Applying the dictum in the case of *Smalley v Warwick Crown Court*⁸.)

[15] It is noteworthy that the Supreme Court Act of St. Lucia does not contain a provision similar to sec. 29(3) of the UK Supreme Court 1981 Act. The Civil Procedure Rules 2000, Part 56 deals with administrative orders, and provides that the term "judicial review" includes remedies (among others) of certiorari for quashing unlawful acts. Part 56 also gives the power to grant, either in addition to or instead of certiorari, an order for the return of any property real or personal; or restitution or damages. CPR Part 56.2 stipulates who may apply for judicial review. It says that '*an application for Judicial review may be made by any person... which has a sufficient interest in the subject matter of the application*' and '*this includes any person who has been adversely affected by the decision which is the subject of the application.*' The appellant in this case is clearly a person who has been adversely affected by the forfeiture order as he has been deprived of his motor vehicle, which was the subject matter of the forfeiture. An application by way of judicial review was clearly the appropriate course to adopt rather than launching an appeal in the absence of any provision affording him a right of appeal to the Court of Appeal in such circumstances. Accordingly, I am of the view that this court is not in a position to entertain the appeal on the substantive grounds put forward by the appellant.

[16] It may very well be that it is still open to the appellant to pursue judicial review proceedings notwithstanding that he may have to overcome hurdles of delay in so doing. In light of this, I refrain from making any observations in respect of the conduct of the forfeiture proceedings or from dealing with the substantive issues raised by the grounds of appeal. I wish however to remind magistrates that having

⁸ [1985] 1 All ER 769.

regard to the penal nature of forfeiture proceedings it would be a counsel of prudence to ensure that there is strict adherence to any requirements laid down under any enactment in respect of forfeiture provisions contained therein.

Conclusion

- [17] For the reasons given, I would dismiss this appeal for lack of jurisdiction to entertain it and make no order as to costs.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal [Ag.]

I concur.

John Carrington, QC
Justice of Appeal [Ag.]