

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV 2013/0531

IN THE MATTER of the Constitution of Saint Lucia contained in the Saint Lucia Constitution Order S.I. No 1901 of 1978
AND IN THE MATTER of an Application of CECIL TOUSSAINT (A person alleging that certain provisions of the said Constitution to wit Sections 1,3,6,7,8,16(3), 40, 41, 72, 89, 105(1), 106(1), of the said Constitution have been, are being and are likely to be contravened in relation to him) for redress in accordance with Section 16(1) and 105 of the said Constitution.
AND IN THEH MATTER of the Proceeds of Crime Amendment Act Nos. 4 of 2010 and No. 15 of 2011 and the Money Laundering (Prevention) Act Chapter 12:20 of the Revised Laws of Saint Lucia
AND IN THE MATTER of section 13(2) of the Crown Proceedings Ordinance Chapter 13 of the Revised LAWS OF Saint Lucia

BETWEEN:

CECIL TOUSSAINT

Claimant

and

(1) ATTORNEY GENERAL OF SAINT LUCIA
(2) COMMISSIONER OF POLICE
(3) NO.122 DETECTIVE SERGEANT, TROY LAMONTAGNE

Defendants

Appearances:

Mr. Daniel Francis for the Claimant
Ms. Kozel Creese for the Defendants

2018: April 13
August 02

JUDGMENT

- [1] SMITH J: The Claimant, Cecil Toussaint, challenges the constitutionality of the actions of the Royal Saint Lucia Police Force for the unlawful search of his premises, his unlawful arrest and the unlawful detention and forfeiture of his property pursuant to the Proceeds of Crime Act (**"the Act"**) Cap 3.04 of the Revised Laws of Saint Lucia as amended by the Proceeds of Crime Amendment Acts Nos. 4 of 2010 and 15 of 2011.

Relevant Background

- [2] On the 9th day of February 2012 members of the Royal Saint Lucia Police Force, upon the execution of a warrant to search for controlled drugs, entered into the premises of the Claimant. The police officers found no drugs, instead they found a sum of cash totaling XCD71,920.00, EURO1,460.00 USD4,249.00 and CAD20.00 which was seized from the home of the Claimant pursuant to the section 29A of the Act. The Defendants then sought to have the cash forfeited as the proceeds of crime pursuant to section 49A, 49B and 49C of the Act. That first warrant authorized the police officers to **search the premises of "One Ras" for controlled drugs**. A second search warrant was then issued, apparently following the discovery of the cash, to search the premises of Cecil Toussaint for documents evidencing money laundering.

Issues

- [3] The Claimant in his fixed date claim filed in 2013 sought an assortment of 28 **declarations and orders concerning the constitutionality of the Defendants' actions**. Happily, by the time his written submissions were filed on 16th March 2018, the issues had been narrowed down to three, namely:-
- (1) **Whether the search of the Claimant's premises was unconstitutional;**

- (2) Whether the arrest and subsequent detention of the Claimant was unconstitutional;
- (3) Whether the seizure of the cash and commencement of forfeiture proceedings are unconstitutional.

Search and Entry Unconstitutional?

- [4] Distilled to its essence, the argument submitted by Mr. Francis, counsel for the Claimant, was that: (1) section 7 of the Constitution of Saint Lucia (**“the Constitution”**) **protects a citizen from arbitrary** search and entry; (2) section 618 of the Criminal Code of Saint Lucia (**“the Criminal Code”**) **empowers a magistrate** to issue a warrant for the entry and search of property while section 578 sets out the form and requirements of the warrant; (3) section 578 mandates that no such warrant shall be issued without a complaint or other statement upon oath and every warrant shall state the name or otherwise describe the person to be arrested; (4) section 622 of the Criminal Code requires that the magistrate must be satisfied upon oath that there is reasonable ground for issuing the warrant; (5) **the warrant for the search of the property of “One Ras of Fond Assau, Babonneau”** did not provide sufficient detail of the owner, occupier or resident of the property to be searched contrary to section 578 of the Criminal Code; (6) no information under oath supporting the issue of the warrant was disclosed to the Claimant and no drugs were discovered on the premises therefore the magistrate did not really have any information on which he could have concluded that the officer had reasonable cause to suspect, **thereby rendering the search of the Claimant’s** premises arbitrary and unconstitutional.

- [5] The starting point for the determination of this issue must be a consideration of section 7 of the Constitution:-

“7. PROTECTION FROM ARBITRARY SEARCH OR ENTRY

- (1) Except with his or her own consent, a person shall not be subjected to the search of his or her person or his or her property or the entry by others on his or her premises.

- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
- (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or the development or utilisation of any property for a purpose beneficial to the community;
 - (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
 - (c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or to that authority or body corporate, as the case may be; or
 - (d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order, and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably **justifiable in a democratic society.**”

[6] It will readily be observed that the fundamental protection from arbitrary search and entry guaranteed by section 7 may be curtailed under the authority of a law which makes certain provisions that are detailed as items (a) through (d) of section 7(2). These provisions include that the law authorizing the curtailment is reasonably required in the interests of defence, public safety, public order (section 7(2) (a)) or is reasonably required for the purpose of protecting the rights or freedoms of others (section 7 (2) (b)). I do not think it necessary to burden this judgment with excessive citation supporting the proposition that, as a matter of **constitutional law, a person’s fundamental rights may be curtailed so long as it is** done in conformity with the derogation clauses which follow the conferment of each right.

- [7] Can the Criminal Code which authorizes **the entry upon and search of a citizen's** property under the authority of a warrant issued by a magistrate be considered a law which is reasonably required in the interests of public order or for the purpose of protecting the rights and freedoms of others? I think it can. A law which authorizes a magistrate to issue a search warrant – if he or she is satisfied that there is reasonable grounds to believe that a citizen has on his property an item/s used or to be used in or obtained from the commission of a crime – must surely be considered a law that is reasonably required in the interest of public order or for the protection of the rights and freedoms of others.
- [8] It must be right then for this court to conclude that the police officers in question **entered and searched Mr. Toussaint's property under the authority of a law (the** Criminal Code) that made provision for entry and search for items connected with illegal activity under a warrant issued by a magistrate and that that provision is reasonably required in the interest of public order. Such intrusion upon or curtailment of the protection from arbitrary search seems to me to be reasonably justified in a democratic society. Any arbitrariness is safeguarded against by detailed provisions which require, among other things, that a magistrate be reasonably satisfied that there are grounds to issue the search warrant.
- [9] But what happens when a police officer or a magistrate, in the execution of lawful statutory provisions authorizing search and entry, fails through oversight or otherwise to comply with procedural provisions of that law expressed in mandatory terms? Should their actions be declared unconstitutional? I do not think that is necessarily the case. Section 7 is intended to serve a higher purpose than ensuring compliance with procedural requirements of the authorizing statute. That is why redress is precluded by the proviso to section 16 (2) of the Constitution which provides that:-

“Provided that the High Court may decline to exercise its powers under this subsection if satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned **under any other law.”**

In the instant case, adequate means of redress was available under the ordinary law of trespass.

[10] In the case at bar, Mr. Toussaint contends that (1) there is no evidence that the warrant was issued based upon a complaint or other statement upon oath; (2) section 578 (6) of the Criminal Code **requires that “every such warrant shall state the name or otherwise describe the person to be arrested”**; (3) section 622 of the Criminal Code **requires that the magistrate “is satisfied upon oath that there is reasonable ground”**.

[11] The Privy Council in Attorney-General v Williams (Danhai) and Another¹ dealt **with the question of going behind the curtain of the magistrate’s recital on the face** of warrant that he was satisfied that there was reasonable grounds to issue the warrant. Lord Hoffman who delivered the opinion of the Board began by outlining the duties of the justice called upon to issue a warrant:

“The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the State. If the legislature has decided in the public interest that in particular circumstances it is right to authorize a policeman or other executive officer of the State to enter upon a person’s premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met.”

[12] How does the magistrate satisfy himself that the prescribed circumstances exist? Lord Hoffman made the following statement in this regard:-

“But sufficient information to establish the grounds for suspicion to his satisfaction must be stated on oath. The statute does not require the information to be provided in writing. An oral statement on oath is sufficient.

...

¹ (1997) 51 WIR 264.

Nevertheless, if the constitutional safeguards are to have any meaning, it is essential for the justice conscientiously to ask himself whether on the information given to him upon oath (in the case of section 203, either orally or in writing) he **is satisfied that the officer's suspicion is based upon reasonable cause.**"

- [13] Turning to the question of whether a magistrate actually had information to satisfy himself that a police officer in fact had reasonable grounds, this is what Lord Hoffman stated:-

"He has the responsibility of fulfilling the requirements of the statute, the effect of which is that for practical purposes the issue of the warrant is often likely to be incapable of effective review.

In the absence of any direct evidence of the information actually provided to the justice, the courts have to do the best they can with such inferences as can be drawn from the terms of the warrant itself and such other evidence as is available. In this case each warrant recited upon its face that the justice was satisfied that-

'there is good reason to believe that in a certain place to wit [the premises to be searched] is kept or concealed uncustomed goods ...or books, documents or instruments relating thereto.'

Prima facie, this statement must be accepted and their lordships agree **with both lower courts that if the justice was satisfied that 'there was good reason to believe' that uncustomed goods, etc were on the premises, it must follow that he was satisfied that the officer had reasonable cause to suspect this to be the case."**

- [14] As in Williams, in the case at bar, the court has no direct evidence of the information actually provided to the magistrate. I must, as in Williams, do the best that I can with such inferences as can be drawn from the terms of the warrants themselves.

- [15] The first search warrant dated 9th February 2012 provided as follows:-

"To all police officers

Whereas it appears on the oath of Troy Lamontagne Sergeant (Ag) No.122 that there is reason to believe that documents evidencing income and expenditure and ownership in property.

And any other documents that would afford evidence in the commission of an offence to wit Money Laundering Contrary to section 8 of the Money

Laundering Prevention (Amendment) Act No. 9 of 2011 are in the premises of Cecil Toussaint located at Fond Assau, Babonneau situate in the quarter of Castries within the First Judicial District of this state

This is, therefore to authorize and require you to enter, into the said premises, and to search for the said documents, and to bring the same **before the Magistrate...**"

- [16] The second search warrant also dated 9th February 2012 also provided as follows:-

"To all police officers

Whereas it appears on the oath of Felix Cools Ag. Sgt. 288 that there is reason to believe that controlled drugs are concealed on the premises of **One "Ras" of Fond Assau situate in the quarter of Babonneau within the First Judicial District of this state**

Contrary to section 8(2) of the Drug (Prevention of Misuse) chapter 3.02 of 2001. This is, therefore to authorize and require you to enter, if need be by force, between the hours of and into the said premises, and to search the said premises for any controlled drug and to seize and detain the said thing and bring the same before **the Magistrate...**"

- [17] Plainly, as in Williams, the recital in each warrant is that the magistrate is satisfied that **"it appears on oath [of the officer] that there is reason to believe"**. The Criminal Code does not require that oath to be in writing. Adopting the words of Lord Hoffman in Williams, I find that prima facie, the recital in each warrant must be accepted. **If the magistrate was satisfied that the officer had 'reason to believe'** what was stated on the face of the warrant, it must follow that that he was satisfied that the officer had reasonable cause to suspect this to be the case.

- [18] **On the evidence, it appears that Mr. Toussaint's property was searched on the 9th February 2012 under the authority of a warrant to search for controlled drugs in the premises on "One Ras". Mr. Toussaint's evidence is that he has never been known by that name. The Defendants have not put forward any evidence to show that he was. In fact the second warrant was then issued to search the premises of "Cecil Toussaint" for documents. I have little doubt that the warrant authorizing the search for controlled drugs is defective. As I understand it, persons who have**

dreadlocks are commonly referred to as “Ras” in Saint Lucia. On the face of it, that search warrant could have been directed to any number of “Rasta men” in Fond Assau. The law gives to the citizen whose premises are entered upon to be searched the right to examine the search warrant to see if it is indeed directed to him. Mr. Toussaint is entitled to say that the search warrant under which his premises was searched and the cash discovered was not directed at him. It matters not that the second warrant was properly issued since the initial search was based on a defective warrant. I therefore conclude that the search of the Claimant’s property was unlawful

Arbitrary Deprivation of Liberty?

- [19] Mr. Toussaint contends that: (1) his arrest on 9th February 2012 was arbitrary because the police officers failed or refused to disclose the reasons for his arrest, simply took him to the Royal Saint Lucia Police Force where they counted the moneys seized and then released him without charge; (2) his arrest on 10th February 2012 was arbitrary because he was summoned to the police station to provide the police with information and upon arrival was immediately arrested for the offence of money laundering, interviewed under caution and released; (3) his arrest on the 26th June 2012 was arbitrary because he was again summoned to the police station to provide the police with information and upon arrival was immediately arrested for the offence of money laundering, interviewed under caution and released without ever being charged for the offence of money laundering; (4) the police had no reasonable suspicion that the offence of money laundering had been committed since no evidence was led of the prescribed offence upon which it is found that the funds were derived; and (5) there is no offence under the Criminal Code or the Proceeds of Crime Act for the possession of moneys believed to be the proceeds of crime.
- [20] The starting point in determining whether there has been any arbitrary deprivation of **Mr. Toussaint’s liberty is** section 3 of the Constitution which provides:-

“PROTECTION OF RIGHT TO PERSONAL LIBERTY

(1) A person shall not be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say—

- (a) In consequence of his or her unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether established for Saint Lucia or some other country, in respect of a criminal offence of which he or she has been convicted;
- (b) In execution of the order of the High Court or the Court of Appeal punishing him or her for contempt of the High Court or the Court of Appeal or of another court or tribunal;
- (c) Execution of the order of a court made to secure the fulfillment of any obligation imposed on him or her by law;
- (d) For the purpose of bringing him or her before a court in execution of the order of a court;
- (e) Upon a reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under any law

.....

(3) Any person who is arrested or detained—

- (a) For the purpose of bringing him or her before a court in execution of the order of a court; or
- (b) Upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under any law and who is not released, shall be brought before a court without undue delay and in any case not later than 72 hours after such arrest or detention.

[21] Was Mr. Toussaint arrested under a law which authorized his arrest upon a reasonable suspicion of his having committed or about to commit a criminal offence?

[22] Section 570 of the Criminal Code provides that:-

- (1) “A police officer may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be in the act of committing or about to commit an offence.
- (2) Where a police officer, with reasonable cause, suspects that an offence has been committed, he or she may arrest without warrant anyone whom he or she, with reasonable cause, suspects committed the offence.

- [23] Section 3 (1) (e) of the Constitution plainly provides that a person may be deprived of his personal liberty under a law that that so authorizes it where there is reasonable suspicion of his or her having committed, or being about to commit, a criminal offence. Such a provision as is contained in the Criminal Code is self-evidently reasonably justified in a democratic society. The law under which Mr. Toussaint was arrested and detained is constitutional and so the actions of the police cannot be said to be unconstitutional. The proviso to section 16 (2) of the Constitution is again applicable since, if the police officers arrest of Mr. Toussaint was in fact done without reasonable suspicion of his having committed an offence this would amount to false imprisonment for which adequate alternative means of redress exist.
- [24] Mr. Toussaint contends that the police had no reasonable suspicion that the offence of money laundering had been committed. The evidence of Detective Sergeant Troy Lamontagne is that his reasonable grounds for suspecting that the monies represented proceeds of or were intended for use in criminal conduct are: (1) it is unusual for someone to keep such large amounts of legitimate funds on their premises instead of depositing it at a bank; (2) it is common practice for criminals to transact business with bulk cash, thereby avoiding the financial system which leaves a trail of records enabling the source of the funds to be **traced; (3) on the face of it, Mr. Toussaint's income less his living expenses is** unable to generate this large amount of cash; (4) he has never declared any income to Inland Revenue Department.
- [25] The police officers who arrested Mr. Toussaint upon searching his house for controlled drugs and discovering the cash would not have at that time known **anything about his "income less expenses" or whether he had declared any** income to the Inland Revenue Department. Are the remaining grounds sufficient to establish a reasonable suspicion?

[26] In *Everette Davis v Attorney General of St. Christopher and Nevis*, Ramdhani J provided the following exegesis on the power to detain, arrest and charge on reasonable suspicion:-

“The Power to Detain, Arrest and Charge on Reasonable Suspicion

[12] The law gives the police the right to detain and or arrest anyone upon reasonable and probable cause that that person has or is about to commit an offence. The test as to whether there is reasonable and probable cause is both subjective and objective. The perceived facts must be such as to allow the reasonable third person and actually cause the officer in question to suspect that the person has committed or is about to commit a crime. It does not matter if the information available to the police leads equally or more to a view that the person may be innocent of the offence, once it leads reasonably to a conclusion that he may have committed, or is about to commit the offence, that is sufficient to ground the arrest. The reasonable police officer is assumed to know the law and possessed of the information in the possession of the arresting officer, and would have believed that the claimant was guilty of **the offence for which he was arrested. The term ‘reasonable suspicion’ relates to the existence of facts at the time.** It does not relate to a perception on the state of the law.

[13] It is significant to note that there is no need for the officer to have admissible evidence amounting to a prima facie case to ground reasonable suspicion when it comes to mere detention without charge. A lower standard is permissible and can be founded on inadmissible evidence. Of course reasonable suspicion can also be founded on admissible evidence. Such reliance on either admissible or inadmissible evidence must be shown to have actually existed and was reasonable in the circumstances.

[14] Reasonable suspicion may arise from the overt acts of the person who becomes the suspect. It may also arise from statements made by that person. Statements from known third persons may also provide such grounds. Thus information from an informer or a tip off from a member of the public may provide such reasonable grounds. It is debatable whether information from an anonymous telephone caller can provide grounds for reasonable suspicion. Much would ultimately depend on the type of information being conveyed. A statement by one officer to a second officer that X is a suspect is not sufficient to ground suspicion in that second officer. However, a police briefing outlining the reasons for the suspicion, might provide reasonable

grounds for suspicion, and so too might a police bulletin providing sufficient information.

[27] Applying those principles to the instant case, I find that Mr. Toussaint who said he owned a bus and being in possession of EC\$71,920.00, EU1,460.00 USD \$4,249.00 and CAD\$20.00, and not being able to rationally account for these sums of cash, the police officer formed a reasonable suspicion that it might be the proceeds of criminal activity or connected to criminal activity. I therefore find that his detention and arrest was not unlawful.

Constitutionality of Proceeds of Crime Act

[28] Mr. Toussaint asserts that the jurisdiction **vested in the Magistrate's Court under** sections 29A, 49A, 49B and 49C of the Proceeds of Crime Act constitutes an impermissible amendment of the jurisdiction of the Supreme Court effected in a manner inconsistent with the provisions of section 41 of the Constitution and is therefore void, the Act having been passed by a simple majority.

[29] By Act 10 of 1993, the Proceeds of Crime Act was enacted and came into force in 1995. It provided that where a person was convicted of a scheduled offence, the Director of Public Prosecutions shall apply to the High Court for a forfeiture order and/or a confiscation order. Detailed provisions then follow for the giving of notice to persons to be affected, the procedure on application, the making of forfeiture orders on conviction, protection of third parties, discharge of forfeiture order on appeal and an array of other related provisions.

[30] By Act No. 4 of 2010, section 49 A, 49B and 49C were introduced. These were wholly new provisions that provided, for the first time, for forfeiture of cash by a Magistrate as follows:-

“4.The principal Act is amended by inserting after section49 the following sections 49A, 49B and 49C:

“Forfeiture order for cash

49A. (1) A court of summary jurisdiction may make an order ordering the forfeiture of any cash which has been seized under section 49 if satisfied, on an application made by a police officer

while the cash is detained under that section, that the cash directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in, the commission of 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 cash 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 30 days beginning with the date on which it is made, appeal to the 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 the cash to which the forfeiture order relates as it considers appropriate to enable him or her to meet his or her legal expenses in connection with the appeal.

(5) An appeal under this section must be by way of a hearing de novo, and the court may make such order as it considers appropriate and, in particular, may order the release of the cash (or any remaining cash) together with any accrued interest.
Interest on cash forfeited

49B. — (1) Cash consisting of coins and bank-notes seized under this Part and detained for more than 48 hours is where practicable, unless required as evidence of an offence, to be held in an interest-bearing account, and the interest accruing on any cash must be added to that cash on its forfeiture or release.

(2) An order under section 49A must provide for notice to be given to persons affected by the order.

(3) Without prejudice to the generality of any existing power to make rules provision may be made by rules of court —

- (a) with respect to applications to any court under this Part;
- (b) for the giving of notice of applications to persons affected;
- (c) for the joinder of persons as parties; and
- (d) generally with respect to the procedure under this Part before any court.

Cash defined

49C. For the purposes of sections 49A and 49B, "cash" means —

- (a) coins and bank-notes in any currency; and
- (b) negotiable instruments.”

[31] By Act No. 15 of 2011, a further amendment was made to the Act as follows:

The principal Act is amended by inserting immediately after section 29 the following section 29A:

“Seizure and detention of cash

29A.(1) A police officer not below the rank of corporal may seize and detain, in accordance with this Part, any cash in Saint Lucia if the officer has reasonable grounds for suspecting that it directly represents any **person’s proceeds of criminal conduct or is intended by any person for use in any criminal conduct.**

(2) Cash seized by virtue of this section must not be detained for more than forty-eight hours unless its continued detention is authorized by an order made by a Magistrate; and no such order must be made unless the Magistrate is satisfied -

- (a) that there are reasonable grounds for the suspicion mentioned in subsection (1); and
- (b) that continued detention of the cash is justified while its origin or derivation is further investigated or consideration is given to the institution, whether in Saint Lucia or elsewhere, of criminal proceedings against any person for an offence with which the cash is connected.

(3) Any order under subsection (2) must authorize the continued detention of the cash to which it relates for such period, not exceeding three months beginning with the date of the order, as may be specified in the order; and a Court of summary jurisdiction, if satisfied as to the matters mentioned in that subsection, may thereafter from time to time by order authorized the further detention of the cash except that —

- (a) no period of detention specified in such an order must exceed three months beginning with the date of the order; and
- (b) the total period of detention must not exceed two years from the date of the order under subsection (2).

(4) Any application for an order under subsection (2) or (3) shall be made by a police officer.

(5) At any time while cash is detained by virtue of this section —

- (a) a Court of summary jurisdiction may direct its release if satisfied —
 - (i) on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, that there are no, or are no

- longer, any such grounds for its detention as are mentioned in subsection (2); or
- (ii) on an application made by any other person, that detention of the cash is not for that or any other reason justified; and
- (b) the Commissioner of Police or any police officer authorized by him or her may release the cash if satisfied that its detention is no longer justified but shall first notify the Magistrate or Court of summary jurisdiction under whose order it is being detained.

(6) Cash detained by virtue of this section must not be released until any proceedings pursuant to the application or, as the case may be, the **proceedings for that offence have been concluded.**”

[32] **Mr. Francis’s** argument is that the Act now vests in the magistrate’s court the jurisdiction – hitherto exercised by the High Court – to hear and determine a civil process in which that court has the power to forfeit any amount of cash without limitation. That is unconstitutional, he submits, because the jurisdiction of the high court to hear and determine matters involving property in excess of the statutory limit for the magistracy is constitutionally protected and can only be amended to transfer such jurisdiction to the magistracy by an amending Act which alters that provision of the constitution as prescribed by section 41 of the Constitution.

[33] Section 41 provides that:

“ALTERATION OF CONSTITUTION AND SUPREME COURT ORDER

- (1) Parliament may alter any of the provisions of this Constitution or of the Supreme Court Order in the manner specified in the following provisions of this section.
- (2) A bill to alter this section, Schedule 1 to this Constitution or any of the provisions of this Constitution specified in Part I of that Schedule or any of the provisions of the Supreme Court Order specified in Part II of that Schedule shall not be regarded as being passed by the House unless on its final reading in the House the bill is supported by the votes of not less than $\frac{3}{4}$ of all the members of the House.”

[34] Chapter VIII which is the chapter dealing with the Judiciary is specified in the schedule to the Constitution which means that it cannot be amended by an Act of Parliament passed by a simple majority.

[35] In attempting to resolve the issue of the constitutionality of section 49A, I must unavoidably walk in the footsteps of Lord Diplock and retrace his reasoning in the seminal case of *Hinds v R*.² What was being directly attacked in *Hinds* was the constitutional validity of provisions of the Gun Court Act which purported to confer jurisdiction to try offences on a Full Court Division comprised of three resident magistrates where such jurisdiction was previously exercised by a high court judge and with sentencing powers co-extensive with that of the Supreme Court.

[36] **From Lord Diplock's opinion, I distill the following essential principles which I think formed the *ratio* of the case.**

- (1) Where a Westminster model constitution speaks of a court already in existence when the constitution comes into force, this means all those judges who are entitled to exercise the jurisdiction exercised by that court before the constitution came into force.
- (2) The practical consequence of the provision of mandatory transfer for trial by the Gun Court of cases involving a firearm offence is to ensure that all offences falling within the jurisdiction conferred on a Full Court Division of the Gun Court shall be tried by that division to the exclusion of the circuit court of the Supreme Court.
- (3) The Gun Court Act purports to confer on a court consisting of persons qualified and appointed as resident magistrates a jurisdiction which under the provisions of Chapter VII of the Constitution is exercisable only by a person qualified and appointed as a judge of the Supreme Court.
- (4) This deprives the individual citizen of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

² [1976] 1 All ER 353

[37] Keeping these principles in mind, I return to examine the provisions of the Act sought to be impugned. I think I can deal shortly with the challenge to section 29. The power to detain in section 29 A is preemptive and provisional. It appears to be an interim measure, protective in nature, does not determine finally the civil rights and obligations. At the detention order stage, the court makes no final decision as **a person's "benefit" or "realizable property"**. It is clear that the practical effect of the detention order under section 29A is not to determine any civil right or obligation. In the circumstances, section 29A does not violate any constitutional protections.

[38] I now turn to section 49A and in applying the Hinds principles, I make the following observations:

- (1) In Saint Lucia, the jurisdiction to determine civil matters wherein the amount or value of the property or damages demanded does not exceed \$5,000³ vested in the District Court prior to the enactment of the Constitution, while the jurisdiction to determine all suits above that value vested in the High Court at the time of the enactment of the Constitution.
- (2) Section 49A purports to transfer exclusively to a court of summary jurisdiction the power to forfeit any cash detained under section 29A, regardless of the amount of cash. No such power to forfeit cash detained under section 29A is conferred on the High Court under the Act.
- (3) The security of tenure enjoyed by High Court judges under the Supreme Court Act is clearly greater than that of magistrates.

[39] Based on the above observations, I conclude that, firstly, the practical consequence of section 49A is to ensure that all applications for seizure of cash detained under section 29A of the Act are heard by a court of summary jurisdiction to the exclusion of the High Court. Secondly, the Act purports to confer on a court of summary jurisdiction presided over by a person qualified and appointed as a

³ This was amended to increase that value to \$25,000 by an amendment to the Code of Civil Procedure, Act No. 21 of 2016.

magistrates a jurisdiction which, under the provisions of Chapter VIII of the Constitution, is exercisable only by a person qualified and appointed as a high court judge. Thirdly, this deprives the individual citizen of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

[40] Section 49A of the Proceeds of Crime Act is inconsistent with the Constitution to the extent that it confers jurisdiction on the magistracy to hear and determine applications for the forfeiture of any amount of cash which is outside the jurisdiction of the lower judiciary of Saint Lucia.

[41] Section 120 of the Constitution provides that:-

“The Constitution is the supreme law of Saint Lucia and, subject to the provisions of section 1, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

[42] However, section 2 of Schedule 2 of the Saint Lucia Constitution Order provides that:-

“The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.”

[43] Recently, in *Jabari Nervais and the Queen*⁴, the Caribbean Court of Justice, in considering the approach to be taken when applying a similar modifications provision under the Barbados Constitution, stated:-

“Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution. In our

⁴ [2018] CCJ 19 (AJ)

view, the Court has the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches **and vindicates those rights guaranteed by the Bill of Rights.**”

I will therefore try to adopt this approach in trying to bring section 49A of the Act into conformity with the Constitution.

Disposition

[44] **The Claimant’s claim sought compensatory, vindicatory and exemplary** damages for the unlawful seizure and detention of his property. However, in his written submissions he limited the relief claimed to the declarations of unlawfulness and unconstitutionality and for restitution of the confiscated cash. I therefore make the following orders:-

- (1) A Declaration is granted that **the search of the Claimant’s** property on 9th February 2012 was unlawful.
- (2) A Declaration is granted that section 49A of the Proceeds of Crime Act is inconsistent with the Constitution and shall be modified and qualified by **inserting the words “not exceeding such sum as may, from time to time, be prescribed as its jurisdictional limit set by the Code of Civil Procedure” after the words “forfeiture of any cash” appearing at section 49A (1) of the Proceeds of Crime Act.**
- (3) An Order of Restitution is granted for the immediate return to the Claimant of all sums seized from his property on 9th February 2012 under the defective search warrant.
- (4) No order as to costs.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar