EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2018/0029

BETWEEN

ATTORNEY GENERAL

Appellant

and

CECIL TOUSSAINT

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. John Carrington	Justice of Appeal [Ag.]

Appearances:

Mrs. Brender Portland-Reynolds, Solicitor General, Mr. Rene Williams, Senior Crown Counsel and Ms. Kozel Creese, Crown Counsel for the Appellant
Mr. David Francis for the Respondent

2019: April 11;
June 5.

Civil appeal — Seizure and detention of cash under Proceeds of Crime Act of Saint Lucia (as amended) — Whether amendment to Proceeds of Crime Act unconstitutional — Whether learned judge erred in holding that search of appellant's premises was unlawful — Whether learned judge erred in ordering return of cash seized from appellant's premises

Members of the Royal Saint Lucia Police Force ("the police") purporting to act pursuant to section 29A of Proceeds of Crime Act searched the home of the appellant, Mr. Cecil Toussaint, and seized cash. The police say that the search was authorised by a search warrant which permitted them to search the premises of "One Ras of Fond Assau, Babonneau" for controlled drugs. The police then sought to have the cash forfeited as proceeds of crime pursuant to sections 49A, 49B and 49C of the Proceeds of Crime Act (as amended). Mr. Toussaint was arrested and questioned as part of the police's investigation, on the basis of reasonable suspicion that he had committed breaches of the law.

Mr. Toussaint filed a claim in which he challenged the constitutionality of the police's actions in relation to the search of his premises, the seizure of his cash and attempts to forfeit it. He argued that the search of his premises was unlawful since the warrant indicated that the police were to search the property of "One Ras of Fond Assau, Babonneau" and that that was not his name. In addition, he sought to challenge the constitutionality of his arrest.

The learned judge allowed the Mr. Toussaint's claim, declared that the search of his premises was unlawful and ordered that the cash seized as a consequence of the search should be returned to him. The judge also declared that section 49A of the Proceeds of Crime Act (as amended) was inconsistent with the Constitution of Saint Lucia (the "Constitution") and therefore should be modified so as to bring it into conformity with the Constitution. However, the learned judge held that the police had reasonable suspicion that Mr. Toussaint had committed an offence.

The Attorney General is dissatisfied with the learned judge's decision and has appealed. The issues arising for this Court's determination are: (i) whether the learned judge erred in concluding that the amendment of the Proceeds of Crime Act was unconstitutional; (ii) whether the learned judge erred as a matter of law in holding that the search of Mr. Toussaint's premises was unlawful; and (iii) whether the learned judge erred as a matter of law in ordering restitution of the cash seized from Mr. Toussaint's premises.

Held: allowing the appeal; setting aside the declarations made by the learned judge; making the declarations set out at paragraph 66 of the judgment; and ordering that each party shall bear their own costs; that:

1. The amendments to the Proceeds of Crime Act, in particular section 49A, do not infringe or breach any provision of the Constitution, neither do they infringe Mr. Toussaint's constitutional rights. It is clear that before the relevant amendments were enacted, only criminal asset forfeiture existed in relation to money laundering. A person's assets could have been subject to forfeiture only after a conviction. The amendments introduced civil asset forfeiture, a new regime that is separate and distinct from criminal asset forfeiture which originally existed. Insofar as civil asset forfeiture is concerned, the Magistrate's Court or District Court is clothed with the jurisdiction to forfeit the assets of a person who has not been convicted. This is an entirely new legislative framework that is also aimed at combating money-laundering.

   Section 49A of the Proceeds of Crime Act Cap. 3.04, Revised Laws of Saint Lucia 2015 amended by Acts No. 4 of 2010 and No. 15 of 2011 applied; Ahmed Williams v The Supervisory Authority ANUHCVAP2015/0035 (delivered 13th July 2017, unreported) followed.

2. There is nothing in the Constitution which prohibits Parliament from creating a civil asset forfeiture regime through section 49A of the Proceeds of Crime Act and clothing magistrates as distinct from the judges of the High Court with the jurisdiction to hear these claims. It is settled law that Parliament has the authority

to introduce legislation which vests a new jurisdiction in the Magistracy. However, it is the law that Parliament cannot vest a jurisdiction which was previously exercised by judges of the High Court in the Magistracy. Judges of the High Court never had any jurisdiction for civil asset forfeiture in relation to money laundering. The question of taking away the jurisdiction of judges and giving it to magistrates in civil asset forfeiture does not arise. The learned judge therefore erred in concluding that the amendments made to the Proceeds of Crime Act were inconsistent with the Constitution.

Hinds v R [1976] 1 ALL ER 353 distinguished.

3. The Proceeds of Crime Act (as amended) postdated the Constitution. There could be no question of seeking to modify the amendments to the Proceeds of Crime Act to bring them into conformity with the Constitution by utilising the savings law clause. The savings law clause is utilised only in circumstances where a law which predated the Constitution is inconsistent with it. As such, the savings law clause contained in section 2 of schedule 2 of the Constitution is not engaged. Therefore, the learned judge erred in relying on section 2 of schedule 2 of the Constitution which is the savings law clause to modify the amendment to the Proceeds of Crime Act.

   Jabari Sensimania Nervais v The Queen [2018] CCJ 19 (AJ) distinguished.

4. There is no basis on which the search warrant could be held to be defective. There is nothing in law which states that a warrant should indicate the person's correct name. In fact, it would have been perfectly lawful for the warrant to have simply authorised the search of the premises situate at Fond Assau, Babonneau. The fact that Mr. Toussaint was not called "One Ras" is of no significance. The clear evidence that was placed before the judge indicates that the police intended to search his premises for drugs irrespective of his name and read the warrant to him at his premises at Fond Assau, Babonneau. There was nothing before the judge on which it could have been correctly concluded that the search warrant was not regularly and properly obtained from the magistrate. Accordingly, the search of Mr. Toussaint's premises was lawful. Further, pursuant to section 49A of the Proceeds of Crime Act, the seizure and detention of the cash were permissible.

   Attorney General of Jamaica v Williams (Danhai) et al [1997] UKPC 22 applied.

5. Insofar as the search of Mr. Toussaint's premises was lawful and the seizure and detention of the cash were appropriate, the learned judge erred in ordering restitution of the cash seized from Mr. Toussaint.

JUDGMENT

Introduction

[1] BLENMAN JA: This is an appeal by the Attorney General against the decision of the learned judge in which the judge declared that the search of Mr. Cecil Toussaint's ("Mr. Toussaint") premises was unlawful and ordered that the cash seized as a consequence of the search should be returned to him. Of greater significance, is the appeal against the learned judge's declaration that section 49A of the Proceeds of Crime Act[1] (as amended) was inconsistent with the Constitution of Saint Lucia[2] (the "Constitution") and therefore should be modified so as to bring it into conformity with the Constitution.

[2] The main focus of this appeal is the challenge to the constitutionality of section 49A of the Proceeds of Crime Act (as amended) and the legality of the search, seizure and detention of the cash that was obtained from Mr. Toussaint's premises based on a search warrant. This appeal also interrogates the lawfulness of the seizure of the cash from Mr. Toussaint and the correctness of the learned judge's decision to order restitution of the cash seized from Mr. Toussaint.

[3] The Attorney General is dissatisfied with the decision of the learned judge and has filed a number of grounds of appeal against the judge's findings of fact and law. Critically, the Attorney General also seeks to impugn the judge's application of the law and his conclusion.

[4] Of interest to the Court is the fact that learned counsel, Mr. David Francis, who appeared on behalf of Mr. Toussaint, in his written submissions, urged the Court to uphold the judge's reasoning and conclusion. However, when faced with the oral submissions on behalf of the Attorney General, he did not vigorously oppose the Attorney General's position during his oral arguments. In fact, during the oral arguments on all the major points in issue, Mr. Francis came very close to

[1] Cap. 3.04, Revised Laws of Saint Lucia 2015 amended by Act No. 4 of 2010 and Act No. 15 of 2011.
[2] Cap. 1.01, Revised Laws of Saint Lucia 2015.

conceding the points. Be that as it may, I will now refer to the background and treat with the appeal in its entirety.

Background

[5] Members of the Royal Saint Lucia Police Force ("the police") purporting to act pursuant to section 29A of Proceeds of Crime Act searched the home of Mr. Toussaint and seized XCD$71,920.00, Euro 1,460.00, USD$4,249.00 and CAD$20.00. The police say that the search was authorised by a search warrant which permitted them to search the premises of "One Ras" for controlled drugs. Mr. Toussaint's premises were searched on the basis of the search warrant which was read to him. The police then sought to have the cash found from the search forfeited on the basis of money laundering pursuant to sections 49A, 49B and 49C of the Proceeds of Crime Act (as amended).

[6] Mr. Toussaint was also arrested and questioned as part of the police investigation, on the basis of reasonable suspicion that he had committed breaches of the law.

Mr. Toussaint's case below

[7] Mr. Toussaint filed a claim in which he challenged the constitutionality of the police's actions in relation to the search of his premises, the seizure of his cash and attempts to forfeit it. In addition, he sought to challenge the constitutionality of his arrest. He highlighted the fact that the search warrant, upon which the police relied, was read to him and indicated that it authorised the search of the house of "One Ras" for controlled drugs. However, Mr. Toussaint said that he had never been referred to as the alias "Ras" or carried the alias "One Ras". It was on that basis that he argued that the search warrant was defective and that everything that followed therefrom was unlawful.

[8] Also, Mr. Toussaint argued that the search of his premises was unlawful since the warrant indicated that the police were to search the property of "One Ras of Fond Assau, Babonneau" and that was not his name. He therefore said that insofar as

his property was searched in the absence of a lawful search warrant, the search was in breach of section 7 of the Constitution and therefore unlawful. Mr. Toussaint also said that he was wrongfully arrested in breach of his constitutional rights. He complained that the police, at the time of his arrest, failed to disclose the reason for his arrest; they simply took the cash which belonged to him, seized it while arresting him, and then released him. He further complained that, subsequently, he was summoned the following day to the police station to provide information to the police and was again arrested for the offence of money laundering, after which he was interviewed under caution and released. He said that the police had no reasonable suspicion that he had committed any offence of money laundering since no evidence was led of the prescribed offence upon which it was alleged that the funds were derived. Finally, he argued that there is no offence under the Criminal Code[3] or the Proceeds of Crime Act for the possession of cash believed to be the proceeds of crime, for which the penalty imposed is seizure. He therefore sought the return of his cash.

[9] The Attorney General resisted Mr. Toussaint's claim and argued that all of the relevant acts of the police were constitutional. The Attorney General said that the police placed evidence before the High Court that they had received information that controlled drugs were concealed on Mr. Toussaint's premises and obtained a warrant from the Magistrate's Court to search his premises at Fond Assau, Babonneau.

It is noteworthy that Mr. Toussaint is a rastafarian who takes pride, as he should, in sporting his 'locs'. The police also deposed to the fact that they read the warrant to him which had the name "One Ras" and that they searched his house for drugs. They recovered cash which was concealed and asked Mr. Toussaint whether he was the owner of the cash and he said "yes". The police also placed evidence before the court of having searched a wardrobe in Mr. Toussaint's home that had a false compartment where two bundles of cash were recovered.

[3] Cap. 3.01, Revised Laws of Saint Lucia 2015.

[10] Also, the police provided the court with affidavit evidence that Mr. Toussaint was the owner of several vehicles and had given conflicting statements about the cash that was found and his savings in general. The police said that they had reason to believe that the cash constituted proceeds of criminal conduct or was intended to be used for criminal conduct and that it was seized under the provisions of the Proceeds of Crime Act. The police also stated that they served Mr. Toussaint with a copy of a notice of cash seizure for the cash which was seized and a continued detention form. They also indicated that they obtained a second search warrant and searched Mr. Toussaint's premises, which appeared to have been recently constructed, for documents to show ownership of the property or evidencing his income but found none. They indicated that later Mr. Toussaint was arrested on suspicion of money laundering. He was released shortly thereafter.

[11] The police officer who spearheaded the investigation deposed to having reasonable grounds for suspecting that the cash which was seized represented Mr. Toussaint's proceeds of crime. The police officer then applied for and obtained orders from the magistrate for the continued detention of the cash which was seized. Subsequently, the police officer applied to the Magistrate's Court for a forfeiture order. The forfeiture proceedings are stayed pending the determination of this appeal.

[12] As indicated earlier, Mr. Toussaint filed a constitutional claim which the Attorney General strenuously resisted.

Judgment Below

[13] The learned judge held that since the police acted pursuant to the search warrant which stated "One Ras" the warrant was defective insofar as Mr. Toussaint was not known as "Ras". Further, on the face of it, that search warrant could have been directed to a "number of Rastamen" in Fond Assau. Accordingly, the judge held that the search of Mr. Toussaint's premises was unlawful. However, on the

facts, the learned judge felt able to conclude that, Mr. Toussaint having been found in possession of XCD$71,920.00, Euro 1,460.00, 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 proceeds of criminal activity. The learned judge therefore concluded that Mr. Toussaint's detention and arrest were not unlawful. Obviously, there is no appeal against that conclusion.

[14] However, the Attorney General's major complaints are in relation to paragraphs 38-39 of the judgment which state as follows:

> "[38] I now turn to section 49A and in applying the Hinds principles, I make the following observations:
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> (1) In Saint Lucia, the jurisdiction to determine civil matters wherein the amount or value of the property or damages demanded does not exceed $5,000.00 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.
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> (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.
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> (3) The security of tenure enjoyed by High Court judges under the Supreme Court Act is clearly greater than that of magistrates.
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> [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 magistrate a jurisdiction which, under the provisions of Chapter VII 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.

[15] Also, the learned judge at paragraph 40-43 of the judgment stated as follows:

> "[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.
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> [41] Section 120 of the Constitution provided that:
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> > '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.'
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> [42] However, section 2 of Schedule 2 of the Saint Lucia Constitution Order provides that:
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> > "The existing laws shall, as from 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."
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> [43] Recently, in Jabari Nervais and the Queen, the Caribbean Court of Justice in considering the approach to be taken when applying a similar modifications provision under the Barbados Constitution, stated:
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> > "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 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."

Issues on Appeal

[16] There are three main issues which arise for this Court to resolve on the appeal

namely:

(a) Whether the learned judge erred in concluding that the amendment to the Proceeds of Crime Act, namely section 49A, was inconsistent with the Constitution;

(b) Whether the learned judge erred as a matter of law in holding that the search of Mr. Toussaint's premises was unlawful; and

(c) Whether the learned judge erred as a matter of law in ordering the return of the cash seized from Mr. Toussaint's premises.

Submissions on behalf of the Attorney General

[17] Learned Crown counsel, Ms. Kozel Creese, stated that the learned judge erred in holding that the warrant was defective. She said that the judge failed to assess the significance of the warrant referring to "One Ras" instead of to Mr. Toussaint's full name against the public interest which is to combat the scourge of money laundering. Further, Ms. Creese reminded this Court that there is a presumption of regularity which attaches to judicial acts. For example, where a warrant was issued by a magistrate there is a presumption that it was issued conscientiously so it would be assumed that the magistrate had sufficient information before him to establish the necessary grounds. In support of this argument, Ms. Creese sought to rely on Regina v Inland Revenue Commissioners ex parte Rossminister Ltd.[4] Accordingly, Ms. Creese argued that the judge's ruling is erroneous and should be set aside.

[18] Ms. Creese said that the learned judge erred by, having concluded that the police officers formed a reasonable suspicion that the cash might be proceeds of criminal activity, ordering the restitution of the cash that was seized from Mr. Toussaint. She opined that the judge ought not to have made the restitution order in view of the fact that the forfeiture proceedings are still ongoing, and the State has a public

[4] [1980] AC 952.

interest in the cash. She therefore urged this Court to set aside the judge's ruling that the cash which was seized should be returned to Mr. Toussaint.

[19] Ms. Creese reminded this Court that pursuant to section 40 of the Constitution, Parliament has the powers to "make laws for the peace, order and good government of Saint Lucia". She pointed out that, pursuant to this power, Parliament enacted the Proceeds of Crime Act which allows for the forfeiture of any cash seized that may directly or indirectly represent proceeds of crime.[5] Section 8(8) of the Constitution states that any court or other authority, prescribed by law, for the determination of the existence or the extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time. She said that there is no indication that the Magistrate's Court is incapable of exercising its duties pursuant to section 8(8) of the Constitution. Furthermore, she contended that Parliament, at the time of passing the Proceeds of Crime Act, recognised the limited jurisdiction imposed on the Magistrate's Court by the Code of Civil Procedure[6] yet Parliament extended the magistrate's jurisdiction to take into account the novel area of money laundering matters.

[20] In addition, Ms. Creese correctly pointed out that the Proceeds of Crime Act is not the only legislation in Saint Lucia in which the magistrate's forfeiture powers are extended regardless of the amounts. She said that this is perfectly permissible and pointed out that under the Drugs Misuse and (Preventative) Act,[7] magistrates have the power to forfeit any conveyance used in the commission of an offence regardless of the value of the conveyance. As such, she submitted that the intention of section 871 of the Code of Civil Procedure was not to curtail the Magistrate's Court's jurisdiction in forfeiture matters but merely to increase the

[5] Section 49A of the Proceeds of Crime Act amended by Act No. 4 of 2010.
[6] Act No. 21 of 2016, Laws of Saint Lucia.
[7] Cap 3.02, Revised Laws of Saint Lucia 2015.

jurisdiction in all other civil matters.

[21] Alternatively, Ms. Creese pointed out that the District Courts Act,[8] provides for the civil jurisdiction of the District Court and specifically makes reference to the Code of Civil Procedure as it relates to that jurisdiction. Section 7 of the District Courts Act states:

> "7. Civil Jurisdiction of the Court
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> (1) A court shall have and exercise jurisdiction in the civil causes and matters within the district in the civil manner and to the extent specified in the Code of Civil Procedure.
>
> (2) The cost of civil causes and matters before the court shall be in the discretion of the court and the court shall have full power to award and apportion costs in any manner it may consider proper."

[22] In addition, she referred the Court to section 12 of the Interpretation Act[9] which stipulates that:

> "12. Amending provisions
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> (1) An Act may be amended, altered or repealed in the same session of the Legislation.
>
> (2) An amending enactment shall, so far as consistent with the tenor thereof, operate and be construed as part of any enactment which it amends, and, without prejudice to section 14 (1) shall, as from the date on which it comes into operation, have effect accordingly for the purpose of the construction and operation of any other enactment which refers to, or is incorporated with the enactment which refers to, or is incorporated with the enactment which it amends."

[23] Ms. Creese submitted that the Interpretation Act acknowledges the amendment of enactments by Parliament and states that an amending enactment must be used to construe or consider the operation of statutes in pari materia. In the case of R v Loxdale,[10] Lord Mansfield LC stated that:

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[8] Cap. 2.02, Revised Laws of Saint Lucia 2015.
[9] Cap. 1.06, Revised Laws of Saint Lucia 2015.
[10] (1758) 1 Burr 445 at p. 447.

> "Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken to be construed together as one system, and as explanatory of each other."

[24] Ms. Creese argued that the District Courts Act, the Code of Civil Procedure and the Proceeds of Crime Act are all laws in pari materia as they all provide for the civil jurisdiction of the District Court. These legislations are ordinary legislation and have no superiority over each other. Consequently, based on the Interpretation Act and the decision in R v Loxdale, the provisions in each Act must be read together although reference is not made to each other. She also stated that there is nothing which prevented Parliament from conferring the jurisdiction in relation to the Proceeds of Crime Act on the District Court.

[25] The District Courts Act gives general jurisdiction to the District Court in civil matters and makes reference to the Code of Civil Procedure. The Code of Civil Procedure fixed an amount for the jurisdiction of the Court. The Code of Civil Procedure does not expressly provide for a civil jurisdiction for cash forfeiture.

[26] Ms. Creese said that it was within the power of Parliament to confer the jurisdiction on the Magistrate's Court to hear matters relating to the seizure and detention of cash under the Proceeds of Crime Act. She contended that the Proceeds of Crime Act allocates jurisdiction over the forfeiture of cash after detention and seizure to the Magistrate's Court and that the jurisdiction of the Magistrate's Court under sections 29A and 49A of the Proceeds of Crime Act is limited to that particular class of matters.

[27] Ms. Creese stated that the Proceeds of Crime Act provides a statutory scheme to deal with the detention and forfeiture of cash representing the proceeds of crime for which the Magistrate's Court has jurisdiction. She contended that this allocation of jurisdiction to the Magistrate's Court by Parliament was never exercised by the High Court. As such, Ms. Creese argued that no jurisdictional

issues arose and the application of the case of Hinds v R[11] by the learned judge is erroneous.

[28] Ms. Creese said that the nature of the proceedings under sections 29A and 49A of the Proceeds of Crime Act are in rem proceedings, in that these proceedings are against the cash and not the person. Therefore, there is no penalty attached to the person for having been found with cash that meets the criteria detailed in section 49A of the Proceeds of Crime Act. In the case of Attorney General of Ontario v $2,023.00 Canadian Currency (in rem) and Omar Rashid-Ghader,[12] the Supreme Court of Ontario in Canada, having done an analysis of the provisions of the Remedies for Organized Crime and Other Unlawful Activities Act, 2001[13] found at paragraph 17, that:

> "Proceedings which deal with proceeds of unlawful activity and with instruments of unlawful activity are in rem proceedings, as against the property, rather than in personam proceeds [sic], as against the person."

At paragraph 24, the court relied on a statement by Crane J in Ontario (Attorney General) v Chow et al[14] where he stated:

> "I do not read the Act to require the applicant to show that Mr. Tong or any particular person named or not named had these intentions or did these acts, simply that the subject monies were obtained by, or intended to be used for, drug transactions. Put another way, this statute does not require finding of fault, either criminal or civil, against a person."

[29] In the circumstances, Ms. Creese urged this Court to allow the appeal and she contended that the judgment delivered by the learned judge should be set aside in its entirety. She also urged this Court to set aside the declarations that the judge made.

Submissions on behalf of Mr. Toussaint

[30] Learned counsel, Mr. David Francis, stated in his written submissions that the

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[11] [1976] 1 ALL ER 353.
[12] 2006 Canlii 36954 (ON SC).
[13] S.O. 2001, c. 28.
[14] 2003 O.J. No. 5387.

central question in this appeal is whether the relevant sections of the Proceeds of Crime Act were enacted in a manner inconsistent with the Constitution. He argued that even if it was the intention of Parliament to extend the jurisdiction of the Magistracy with respect to the disposition of matters involving the proceeds of crime, it is incumbent on Parliament to pass legislation in a manner which is consistent with the Constitution. He reminded this Court that the Constitution is the supreme law and governs the manner in which the Legislature must pass law which conforms with the Constitution. He reminded this Court that the provisions regarding the jurisdiction of the High Court under Chapter VIII of the Constitution are entrenched provisions and should not be altered in a manner inconsistent with section 41 of the Constitution.

[31] He pointed out that section 41 requires a Bill which alters the provisions of the Constitution to be passed by a special majority. He argued that the Proceeds of Crime Act was not passed in accordance with section 41. He said that the amendment to the Proceeds of Crime Act (Act No. 4 of 2010) served to confer the power to make a forfeiture order under the Proceeds of Crime Act to the magistrate, a jurisdiction previously enjoyed by the High Court.

[32] Mr. Francis posited that the jurisdiction of a magistrate, prior to the passing of the amendment to the Proceeds of Crime Act (Act No. 4 of 2010) was limited to issuing warrants and making records of seized items. He said that the right to make an order for forfeiture was vested in the High Court on an application from the Director of Public Prosecutions. In those circumstances, there was no issue relative to jurisdiction as the High Court enjoys an unlimited jurisdiction. He said it is difficult to agree with the Attorney General's argument, that the intention of section 871 of the Code of Civil Procedure was not to curtail the District Court's jurisdiction in forfeiture matters but merely to increase the jurisdiction in all other civil matters, in light of the express wording of section 871. He argued that section 871 gives the District Court jurisdiction "in all suits wherein the property or value of the property or damages demanded does not exceed $25,000.00" and the matter

does not fall into any of the exceptions listed in the section. He said Parliament had the opportunity to insert new exceptions when section 871 of the Code of Civil Procedure was amended in 2016, but it chose not to.

[33] Mr. Francis stated that the amendment to the Proceeds of Crime Act enacted by Act No. 4 of 2010, particularly section 49A, extends the jurisdiction of the Magistracy into that which was previously exercised by the High Court and thus should have been enacted in accordance with section 41 of the Constitution. He said that the practical effect of the amendment is that it purportedly confers upon the magistrate, the power to make orders in excess of his/her jurisdiction under section 871 of the Code of Civil Procedure and by extension the District Courts Act and hear all applications for the seizure and forfeiture of cash detained (regardless of quantum) under section 49A of the Proceeds of Crime Act to the exclusion of the High Court.

[34] Mr. Francis argued that section 49A confers to the magistrate a jurisdiction which, under the provisions of Chapter VIII of the Constitution are to be exercised by the High Court, thereby depriving the citizenry of the safeguards which the makers of the Constitution regarded as necessary. He stated that, when a body is given the power to exercise the jurisdiction of High Court, they must be appointed in the manner and on the terms prescribed by Chapter VIII of the Constitution.

[35] Mr. Francis opined that the argument that the Acts are in pari materia and should be read together would be better suited in a jurisdiction which enjoys a parliamentary supremacy e.g. the United Kingdom. He contended that the essence of the issue before the Court is that the Legislature has not complied with the provisions of the Constitution.

[36] Initially, learned counsel, Mr. Francis indicated that the learned judge was correct in holding that the search warrant under which Mr. Toussaint's premises were searched was defective and therefore the search was unlawful. He also said that

any presumption of regularity was rebutted even though he did not point out the basis for his assertion.

[37] It is right that it should be emphasised at the outset that, learned counsel, Mr. Francis in his oral submissions did not vigorously defend the judgment. In fact, to the contrary, in the face of compelling arguments from Ms. Creese against the judgment, Mr. Francis, in my view, came very close to conceding the appeal.

[38] At the Court's invitation to examine the case of Ahmed Williams v The Supervisory Authority[15] Mr. Francis, having perused the case and the Court having underscored the salient parts of the judgment, seemed to have been persuaded as to the correctness of the Attorney General's case and did not strenuously press his case any further. At several stages of his address to the Court, he indicated that he would not pursue his arguments further on the issues that were raised to be resolved by this Court.

[39] Out of deference to the submissions that were made and being cognizant of the importance of the issues raised, I will nevertheless proceed to address the issues that have been identified with a view of bringing some clarity to the matter.

Law

[40] By Act No. 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 the forfeiture order on appeal and an array of other related provisions.

[15] ANUHCVAP2015/0035 (delivered 13th July 2017, unreported).

[41] By Act No. 4 of 2010, section 49A, 49B and 49C were introduced. These were wholly new provisions that provided, for the first time, for forfeiture of cash by a magistrate. Of relevance to the issues in this appeal is section 49A which is in the following terms :

> "4. The principal Act is amended by inserting after section 49 the following sections 49A, 49B and 49C.
>
> "Forfeiture order for cash
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> 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.
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> (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.
> …"

[42] 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 of 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 authorize 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 any 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 be released until any proceedings pursuant to the application or, as the case may be, the proceedings for that offence have been concluded."

[43] Section 7 of the Constitution states:

> "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."

Issue 1 - Constitutionality of Section 49A

[44] In my view, it is clear from a close reading of the legislative provisions of the Proceeds of Crime Act and their amendments that the amendments made to the Act introduced a civil asset forfeiture regime. It is clear that before the relevant amendments were enacted a person's assets could have been subject to forfeiture only after a conviction. Insofar as civil asset forfeiture is concerned, the Magistrate's Court or District Court is now clothed with the jurisdiction in relation to

civil asset forfeiture in circumstances where the person in question has not been convicted. This is an entirely new legislative framework that is also aimed at combating money-laundering.

[45] Let me say straight away that the amendments to the Proceeds of Crime Act that are under review address a totally different and new regime from the criminal asset forfeiture regime that originally existed. Against this backdrop, it has to be ascertained whether it violates any of the provisions of the Constitution. Equally, this Court has to examine the Attorney General's complaint that the learned judge erred in holding that the amendments infringe section 41 of the Constitution which indicate that the scheduled provisions could only be altered on a Bill of the House of Representatives provided it has the support of three-quarters of the members of the house.

[46] I fail to see how the supreme law clause contained in section 120 of the Constitution could be engaged. Parliament, in amending the Proceeds of Crime Act, in no way sought to amend nor did they amend the Constitution, nor did they give any jurisdiction to the Magistrate's Court which was previously exercised by the High Court. In Hinds v R, the Judicial Committee of the Privy Council considered the principle of separation of powers. At page 368 of the judgment, the Board emphasised that:

> "As with so many questions arising under constitutions on the Westminster model, the question whether the jurisdiction vested in the new court is wide enough to constitute so significant a part of the jurisdiction that is characteristic of a Supreme Court as to fall within the constitutional prohibition is one of degree. The instant case is concerned only with criminal jurisdiction. It is not incompatible with the criminal jurisdiction of a 'Supreme Court', as this expression would have been understood by the makers of the Constitution in 1962, that jurisdiction to try summarily specific minor offences which attracted only minor penalties should be conferred on inferior criminal courts to the exclusion of the criminal as distinct from the supervisory jurisdiction of a Supreme Court. Nor is it incompatible that a jurisdiction concurrent with that of a Supreme Court should be conferred on inferior criminal courts to try a wide variety of offences if in the particular case the circumstances in which the offence

was committed makes it one that does not call for a severer punishment than the maximum that the inferior court is empowered to inflict."

[47] The present case is distinguishable from Hinds v R. In Hinds v R, the legislature in Jamaica, by the Gun Court Act 1974, purported to confer on a full court division of three magistrates, the jurisdiction to adjudicate serious gun related offences; a jurisdiction which was previously exercised by judges of the High Court. The Privy Council, in concluding that those aspects of the Gun Court Act were unconstitutional, observed that where Parliament established a new court to exercise part of the jurisdiction which was being exercised by members of the higher judiciary at the time when the Constitution came into force, the persons appointed to be members of that court were to be appointed in the same manner and entitled to the same security of tenure as members of the higher judiciary. Further, the Constitution did not entitle the Jamaican Parliament to set up a new court composed of members of the lower judiciary with a jurisdiction characteristic of the High Court (emphasis added).

[48] In this case, the amendments to the Proceeds of Crime Act introduced the entirely new regime of civil asset forfeiture in relation to money laundering which was never given by Parliament to judges of the High Court. It is settled law that Parliament has the authority to introduce legislation which vests a new jurisdiction in the Magistracy. However, it is the law that Parliament cannot vest a jurisdiction which was previously exercised by judges of the High Court in the Magistracy. Judges of the High Court never had any jurisdiction for civil asset forfeiture in relation to money laundering. As such, the question of taking away the jurisdiction of judges and giving it to the magistrate does not arise. Equally, the issue of magistrates not having the security of tenure of judges of the High Court is of no moment in this case. I therefore am in total agreement with Ms. Creese that the well-known principles that were laid down in Hinds v R are inapplicable to the case at bar. In my view, there could be no doubt that Parliament amended the Proceeds of Crime Act in order to introduce a civil asset forfeiture regime and it

was entitled to do so. There is nothing unconstitutional about that.

[49] I am of the view that the learned judge was led into error when he was referred to the question of the jurisdiction of judges as distinct from that of magistrates and used this perceived distinction as a basis to conclude that the amendments to the Proceeds of Crime Act were unconstitutional.

[50] It is worthy of emphasis that the amendments which created the civil asset forfeiture regime were permissible since there is nothing in the Constitution which indicate the value of the claim over which magistrates cease to have jurisdiction. In this regard, I agree with Ms. Creese that Mr. Francis' submissions were misconceived.

[51] I also agree with Ms. Creese that, in any event, the District Courts Act and the Code of Civil Procedure are ordinary pieces of legislation. They are Acts of Parliament that can be amended by simple majority. It is also trite law that a subsequent Act of Parliament amends the former. In circumstances such as the present, where there is no requirement for a special majority, Parliament was perfectly entitled to enact amendments to the Proceeds of Crime Act so as to clothe magistrates with the jurisdiction to determine civil asset forfeiture claims. It seems to me that there is some misunderstanding that the Constitution in some way indicates the value of claims over which the High Court has jurisdiction. It does not. Neither does the Constitution indicate the value of claims that should be dealt with by a magistrate.

[52] By way of emphasis and in any event, the amendments to the Proceeds of Crime Act, in particular section 49A, do not infringe or breach any provision of the Constitution, neither do they infringe Mr. Toussaint's constitutional rights.

[53] It would be surprising to find a provision in the Constitution which prohibits Parliament from creating a civil asset forfeiture regime and clothing the

magistrates as distinct from the judges of the High Court with the jurisdiction to hear these claims. In any event, in my view, there is good legislative policy for clothing the magistrates with the jurisdiction to hear civil asset forfeiture claims. These are self-evident and do not need to be spelt out. Suffice it to say, that the magistrates, as part of the new statutory regime, are authorised to make pre-emptive and provisional orders for seizure of cash; the retention and continued retention of cash in circumstances where there has been money laundering. It is obvious that there could be numerous applications for the continued retention of cash. In fact, the summary courts, in my view, are ideally suited for the determination of civil asset forfeiture claims with the numerous and various types of applications that are recognisable under this new regime. Parliament in its wisdom recognised that the District Court would have been required to review the orders that it had made on a fairly regular basis and therefore quite wisely gave the jurisdiction for civil asset forfeiture to magistrates.

[54] Indeed, Parliament has determined that money laundering is a matter that should be addressed in a holistic manner. It is clear that it has determined that civil asset forfeiture should be introduced in Saint Lucia to complement criminal asset forfeiture. In my view, there is nothing unconstitutional about clothing magistrates with the requisite jurisdiction to deal with civil asset forfeiture matters of unlimited value through section 49A of the Proceeds of Crime Act.

[55] In my view, it is unfortunate that this constitutional claim was heard on paper and the learned judge did not have the benefit of engaging with counsel on their written submissions. It is also regrettable that neither side brought to the judge's attention the decision of this Court in Ahmed Williams v The Supervisory Authority. In that case, this Court reviewed the amendments made to the Money Laundering Prevention Act 1996 of Antigua and Barbuda (the "MLPA"). The amendments made to the MLPA introduced civil asset forfeiture in Antigua and Barbuda and are similar to the amendments made to the Proceeds of Crime Act in Saint Lucia. This Court held thus:

"1. The civil asset forfeiture regime which was introduced with the amendments made to section 20A of the MLPA, is distinct and separate from the criminal asset forfeiture regime which had been in existence for several years in the MLPA in its original form. In the case of civil asset forfeiture, there is absolutely no requirement for the defendant to have been charged with a criminal offence. In particular, in this regime, the Crown is able to recover property identified as being obtained merely from 'money laundering activity'; the owner of the property need not have been charged with a money laundering offence for forfeiture to take place. On the other hand, the legislature stipulates that criminal asset forfeiture can only follow a conviction. The two separate and distinct regimes should not be conflated.

2. The civil asset forfeiture regime provides extensive due process of law guarantees, which guarantees Mr. Williams took full advantage of. He had a full trial and was given the opportunity to oppose the freeze order, lead evidence, and also cross examine witnesses. He therefore cannot properly complain that he was not afforded procedural fairness as provided by section 3(a) of the Constitution. Section 3(a) was not infringed, but rather, the appellant was afforded the full due process of law."

[56] In my view, had this decision been drawn to the court's attention, the learned judge may well have reached a different conclusion on the constitutionality of the section 49A the amendments to the Proceeds of Crime Act.

[57] In light of the foregoing, I am of the view that section 49A of the Proceeds of Crime Act in its pristine state does not abrogate any provision of the Constitution. The Attorney General's appeal on this issue therefore succeeds.

[58] For the sake of completeness, insofar as the learned judge relied on section 2 of schedule 2 of the Constitution which is regarded as the "savings law clause" to modify the amendment, it is important to state at the outset that the Constitution was enacted in 1979 and section 49A of the Proceeds of Crime Act was enacted in 2010, and therefore postdated the Constitution. The savings law clause is utilised only in circumstances where a law which predated the Constitution is inconsistent with it. There could be no question of seeking to modify the amendments to the Proceeds of Crime Act to bring them into conformity with the

Constitution by utilising the savings law clause. Put another way, it is therefore clear that there could be no question of there being a breach of the Constitution by an existing law when the Constitution was in existence before the relevant amendments and therefore section 2 of schedule 2 of the Constitution is not engaged. In my view, the savings law clause has no relevance to the case at bar. Accordingly, the reliance on Jabari Sensimania Nervais v The Queen[16] to modify section 49A is misplaced.

Issue 2 – Whether the search was unlawful

[59] In my view, it is a very short point whether the search warrant was defective and therefore rendered the search unlawful.

[60] There was evidence that the police officers went to search Mr. Toussaint's premises for controlled drugs and the warrant which had "One Ras" was read to him. There is nothing in law which states that a warrant should indicate the person's correct name. In fact, as a matter of law, it would have been perfectly lawful for the warrant to have simply authorised the search of the premises situate at Fond Assau, Babonneau. Any other view would mean that police officers would be unable to execute search warrants on premises which they suspect have controlled drugs or even guns unless they know the correct name of the occupant. This is not the law and the authority for this well-known principle is Attorney General of Jamaica v Williams (Danhai) et al[17] and it needs no recitation.

[61] It is noteworthy that the search warrant was read to Mr. Toussaint and the fact that it stated "One Ras" is irrelevant. The police officers went to search his premises. Here again, the learned judge may have benefitted from oral arguments which addressed the affidavit evidence that was placed before the court and the circumstances that influenced the magistrate's issuance of the search warrant.

[16] [2018] CCJ 19 (AJ).
[17] [1997] UKPC 22.

[62] I fail to see on what basis the search warrant could have been held to be defective. The fact that he was not called "One Ras" is of no significance. The clear evidence that was placed before the judge indicates that the police officers intended to search his premises for drugs irrespective of his name. On the face of the affidavit, there was evidence that the warrant was read to him by the police and there is no evidence that he was not "One Ras". There is also evidence that the police intended to search his house, even though they referred to him as "One Ras". It must be underscored that he quite properly sports his 'locs' as a Rastafarian. To buttress the above position, in my view, there was nothing before the judge on which it could have been correctly concluded that the search warrant was not regularly and properly obtained from the magistrate. The presumption of regularity was not rebutted.

[63] In view of the above, I am of the considered opinion that the search warrant was in no way defective. It therefore follows that the search of Mr. Toussaint's premises was lawful and the seizure and detention of the cash were permissible pursuant to section 49A of the Proceeds of Crime Act.

Issue 3 - Whether learned judge erred in ordering restitution of the cash

[64] Insofar as I have already indicated that section 49A of the Proceeds of Crime Act is constitutional, that the search of Mr. Toussaint's premises was lawful and the seizure and detention of the cash was permissible, it follows that the learned judge erred in ordering restitution of the cash seized from Mr. Toussaint. The State is hereby authorised to proceed with the forfeiture proceedings.

Conclusion

[65] In view of the foregoing, the Attorney General's appeal against the judgment of the learned judge is allowed in its entirety. I would therefore set aside the declarations that the learned judge made and substitute the following:

It is hereby ordered and declared as follows:

(1) The Royal Saint Lucia Police Force's search of Mr. Toussaint's premises on 9th February 2012 was lawful;

(2) Section 49A of the Proceeds of Crime Act does not infringe section 7 of the Constitution of Saint Lucia;

(3) The State's seizure and detention of the cash found on Mr. Toussaint's premises on 9th February 2012 were permissible pursuant to section 49A of the Proceeds of Crime Act;

(4) The State is entitled to retain the cash seized and to proceed with its forfeiture proceedings; and

(5) Each party shall bear their own costs.

[66] I gratefully acknowledge the assistance of learned counsel.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
John Carrington
Justice of Appeal [Ag.]

By the Court

Chief Registrar