

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2017/0024

BETWEEN

[1] DANIEL FORDE
[2] IAN FORDE

Appellants

and

THE ATTORNEY GENERAL OF ST. LUCIA

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Gertel Thom
The Hon. Mr. John Carrington, QC

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

Appearances:

Mr. Horace Fraser for the Appellants
Mr. Seryozha Cenac, Senior Crown Counsel for the Respondent

2019: April 8;
June 20.

*Civil appeal — Seizure and detention of cash pursuant to section 29A of Proceeds of Crime Act (amended) — **Jurisdiction of Magistrate’s Court to hear civil asset forfeiture matters under section 49A amendment to Proceeds of Crime Act — Whether section 49A amendment to Proceeds of Crime Act unconstitutional — Whether learned judge erred in finding that magistrate granted an order for the continued detention of the cash seized from the appellants***

The appellants, Mr. Daniel Forde and Mr. Ian Forde (“**the Fordes**”), were travelling in a motor vehicle from Canaries to Castries, Saint Lucia when they were stopped by the police. When the motor vehicle stopped, Mr. Ian Forde threw a black plastic bag out of the vehicle. The plastic bag was retrieved by the police and found to contain XCD\$11,7000. The Fordes were arrested and taken to the police station. They were released from custody without charge and were served with a notice of cash seizure and continued detention. The cash was seized and detained by the police, purporting to act pursuant to section 29A of the Proceeds of Crime Act, on the basis of reasonable

suspicion that it represented proceeds of criminal conduct as provided by section 49A of the Proceeds of Crime Act.

The Fordes were summoned to appear before **the Magistrate's Court** or District Court in relation to the cash that was seized from them. The police made an application in the **Magistrate's Court** for the continued detention of the cash. Following this, the police **applied for forfeiture of the cash in the Magistrate's Court**. Before that application was determined, the Fordes filed a claim in the High Court seeking relief under section 6 of **the Constitution of Saint Lucia (the "Constitution") for the unlawful seizure and detention** of the cash. They argued that section 49A of the Proceeds of Crime (Amendment) Act 2010 is unconstitutional. They complained that the amendment extended the jurisdiction **of the Magistrate's Courts** in a way that gives magistrates parallel jurisdiction to judges of the High Court.

The learned acting Justice Carter (as she then was) held that the section 49A amendment to the Proceeds of Crime Act was constitutional. The learned judge also held **that forfeiture proceedings before the Magistrate's Court** are civil proceedings and not criminal proceedings, and that it is only in respect of the forfeiture provisions that the jurisdiction of the magistrate has been enlarged to give greater effect to the Proceeds of Crime Act. The learned judge also found that the presiding magistrate had made an order that the police were entitled to the continued detention of the cash for a further sixty days from the date of the initial order.

The Fordes appealed against the decision of Carter J. The issues **arising for this Court's** determination are: (i) whether the section 49A amendment to the Proceeds of Crime Act is unconstitutional; and (ii) whether the learned judge erred in finding that the magistrate had granted an order for the continued detention of the cash. It is of significance that, during oral arguments before this Court, Senior Crown Counsel conceded the second issue in the face of the **learned judge's** detailed recitation of the order made by the magistrate for the continued detention of the cash.

Held: dismissing the appeal in relation to the constitutionality of section 49A of the Proceeds of Crime Act; allowing the **appeal in relation to the learned judge's finding that the magistrate had made an order for the continued detention of the cash seized**; making the declarations and orders set out at paragraph 46 of the judgment; and ordering that each party shall bear its own costs, that:

1. The section 49A amendment to the Proceeds of Crime Act introduced civil asset forfeiture in Saint Lucia, which is distinct from criminal asset forfeiture. Before the amendment, the High Court only had jurisdiction over criminal asset forfeiture **in relation to money laundering and a person's assets** could only have been forfeited after conviction. Civil asset forfeiture is a new regime created by Parliament which is also aimed at combating money laundering. The section 49A amendment empowers the magistrate to forfeit the assets of a person who has not been convicted, which is consistent with civil asset forfeiture.

Section 49A of the Proceeds of Crime Act Cap. 3:04, Revised Laws of Saint Lucia 2015 amended by Act No. 4 of 2010 and Act No. 15 of 2011 applied; Attorney General v Cecil Toussaint SLUHCVAP2018/0029 (delivered 5th June 2019, unreported) followed; Ahmed Williams v The Supervisory Authority ANUHCVAP2015/0035 (delivered 13th July 2017, unreported) followed.

2. There is no doubt that Parliament, in amending the Proceeds of Crime Act, did not amend the Constitution. Neither did it assign any jurisdiction to the **Magistrate's Court which was previously exercised by the High Court**. It is settled law that Parliament cannot vest a jurisdiction which was previously exercised by judges of **the High Court in the Magistrate's Court**. However, in relation to money laundering, the High Court never had jurisdiction in relation to civil asset forfeiture. Therefore, the issue of a parallel jurisdiction being exercised by the **High Court and the Magistrate's Court does not arise in this case**.

Hinds v R [1977] AC 195 distinguished.

3. The Code of Civil Procedure and the Proceeds of Crime Act are ordinary pieces of legislation, the latter of which has been amended. They must be read together. It is trite law that an Act of Parliament can overwrite an Act passed earlier in time. Therefore, there was no need for Parliament to expressly amend **the magistrate's jurisdiction under section 871 of the Code** of Civil Procedure so as to increase the civil jurisdiction of magistrates in relation to civil asset forfeiture. It is clear that Parliament was entitled to increase the civil jurisdiction of the magistrate by way of the section 49A amendment to the Proceeds of Crime Act. Additionally, the section 49A amendment does not contravene the Constitution as the Constitution **is not the source of the Magistrate's Courts' jurisdiction**.
4. Section 29A(2) of the Proceeds of Crime Act clearly states that the police can only detain cash seized for a period of forty-eight hours. Section 29A(3) states that in order for there to be continued detention of cash, there must be an order by the magistrate. Since the Crown has conceded that the magistrate made no such order, **even in the face of the learned judge's detailed recitation of the terms of the order made by the magistrate for the continued detention of the cash**, it follows that the continued detention was contrary to section 29A(3) of the Proceeds of Crime Act and was unlawful.

JUDGMENT

Introduction

- [1] BLENMAN JA: This is an appeal by Mr. Daniel Forde and Mr. Ian Forde (**"the Fordes"**) against the judgment of the learned acting Justice Marlene Carter (as she

then was), dated 3rd July 2017, in which the judge dismissed their claims for constitutional relief arising from the seizure and detention of cash belonging to them by members of the Royal Saint Lucia Police Force (**the “police”**), purporting to act under the Proceeds of Crime Act (as amended).¹ The Fordes in their appeal challenge two findings by the learned judge, namely: (1) that the section 49A amendment to the Proceeds of Crime Act does not create parallel jurisdictions **between the High Court and the Magistrate’s Court** or District Court and is therefore constitutional; and (2) that the magistrate granted an order for the continued detention of the cash and therefore its continued detention was lawful. The terms **“Magistrate’s Court”** and **“District Court”** are used interchangeably in this judgment.

Issues on appeal

- [2] Two issues arise for this Court to resolve on the appeal, namely:
- (1) whether the section 49A amendment to the Proceeds of Crime Act is unconstitutional; and
 - (2) whether the learned judge erred in finding that the magistrate had granted an order for the continued detention of the cash.
- [3] I will briefly set out the background to the appeal in order to provide the necessary context.

Background

- [4] On 10th August 2011, the Fordes were travelling in a motor vehicle en route to Castries from Canaries, Saint Lucia when they were stopped and searched by the police in the vicinity of Ti Colon, Castries. The police say that when the motor vehicle stopped, Mr. Ian Forde tossed a black plastic bag in a nearby gutter. The black plastic bag was retrieved by them and found to contain a sum of XCD\$11,700.00. The Fordes were then arrested and taken to the Central Police Station. They were released from custody without being charged and were served

¹ Cap. 3:04, Revised Laws of Saint Lucia 2015 as amended by Act No. 4 of 2010 and Act No.15 of 2011.

with a notice of cash seizure and continued detention. The Attorney General contends that the cash was seized and detained by the police acting pursuant to the section 29A of the Proceeds of Crime Act, on the basis of reasonable suspicion that it directly or indirectly represented proceeds of criminal conduct or was intended for such use.

- [5] The **Fordes were summoned to appear before the Magistrate's Court** in relation to the cash that was seized from them. On 11th August 2011, the police made an application for the continued detention of the cash in the **Magistrate's Court**. It is in dispute that the presiding magistrate made an order, upon hearing that application, that the police were entitled to the continued detention of the cash. Subsequently, on 12th October 2012, the police applied for a forfeiture order of the cash in the **Magistrate's Court**.

The Fordes' Case in the High Court

- [6] Before the determination of the application for forfeiture, the Fordes filed a claim in the High Court seeking relief under section 6 of the Constitution of Saint Lucia² **(the "Constitution") for the unlawful** seizure and detention of the cash. They contended that on the day in question they were only returning to Castries, having travelled to Canaries after a failed attempt to purchase a motor vehicle, when they were stopped by the police, arrested and had their cash seized. The Fordes maintained that they were not caught committing any offence or about to commit an offence. They also contended that up until October 2011, no process had been invoked by the police to authorise or validate the seizure of the cash as no charges had been brought against them. They argue that unless they were criminally charged, the police had no authority to seize their cash.

- [7] Also, the Fordes contended that the section 49A amendment to the Proceeds of Crime (Amendment) Act (Act No. 4 of 2010) is unconstitutional. They argued that the amendment extends the magistrate's jurisdiction in a way that gives them the

² Cap. 1.01, Revised Laws of Saint Lucia 2015.

same jurisdiction as a judge of the High Court. They contended that the High Court's **jurisdiction to order the forfeiture** of property derives from the Constitution, that **the Magistrate's Court does not derive this power from the Constitution** and, therefore, that a magistrate does not have jurisdiction to hear matters relating to forfeiture. They stated that the section 49A amendment to the Proceeds of Crime Act has in effect created two parallel jurisdictions within the Act for the confiscation of property and that this jurisdiction previously vested only in the High Court. They say that giving this jurisdiction to the magistrate is therefore contrary to law. They sought a number of declarations in the High Court which need not be recited.

- [8] The Attorney General resisted the Fordes' claim and urged the learned judge to find that the section 49A amendment to the Proceeds of Crime Act did not violate the Constitution. The Attorney General also stated that the amendment to the Proceeds of Crime Act introduced civil asset forfeiture in Saint Lucia, which never existed before the amendment.

Judgment Below

- [9] The learned judge, having considered the submissions made by learned counsel, declined to make any of the declarations sought in **the Fordes' claim**. In a very detailed and closely reasoned judgment, the learned judge held that the section 49A amendment to the Proceeds of Crime Act was constitutional. She held that forfeiture **proceedings before the Magistrate's Court** are not criminal in nature, but are a civil process. The learned judge stated at paragraph 29 of the judgment that:

"The Proceeds of Crime Amendment Acts, 2010 and 2011 are part of legislative initiatives aimed at ensuring success in the fight against drug trafficking and corruption with the direct aim of allowing authorities to confiscate the proceeds of criminal activity. The legislative objective is clearly sufficiently important to justify limiting a fundamental right. The measures designed to meet the legislative objective are rationally connected to it and the means to impair the right to freedom are no more than are necessary to accomplish the objective. As this court has identified above the means by which the legislature has sought to achieve its objective is the main area of the three with which the claimants take issue. This court has carefully considered the procedures and safeguards set out in these provisions. They contemplate a fair hearing before a

Magistrate, with a right of appeal. This court is not persuaded that the alleged offending provisions are not reasonably justifiable in a democratic society like St. Lucia.”

[10] Of particular relevance to the issues in this appeal are **the learned judge’s findings** at paragraphs 36 and 38 of the judgment in relation to the constitutionality of section 49A of the Proceeds of Crime Act. The learned judge stated that:

“[36.] Hinds v R is one of the leading authorities on the principle of separation of powers. This court has carefully considered that Privy Council decision and finds that the dicta therein does not assist the claimants in their argument on this point. In Hinds, the extension of the jurisdiction of a Resident Magistrate did not in and of itself render the provisions complained of unconstitutional. Rather, it was the establishment of a Full Court division consisting of three magistrates that was found to conflict with the Constitution because in extending to this Full Court the exercise of part of the jurisdiction which was being exercised by members of the higher judiciary at the time when the Constitution came into force, it was found that such persons should be appointed in the same manner and entitled to the same security of tenure as members of the higher judiciary. It was therefore the case that 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 Supreme Court extending to the trial not only of firearms offences but of all criminal offences, however serious, with the exception of capital offences.

...

[38.] **...it is not incompatible that a jurisdiction concurrent with that of a [High] Court should be conferred on inferior criminal courts to try a wide variety of offences, nor is it the case that solely because a Magistrate is empowered by Section 49A to impose a greater sentence than would normally obtain in the Magistrates Court that would, without more, cause the provision to be deemed unconstitutional. It is clearly the case as it applies to Section 49A and the Proceeds of Crime Act, that it is only in respect of the forfeiture provisions that the jurisdiction of the Magistrate has been enlarged in this way and it is only to this that the claimants have drawn the attention of this court. The degree to which the Magistrates Court’s jurisdiction has been enlarged in this regard has been found to be necessary in the circumstances of St. Lucia and to give greater effect to the Proceeds of Crime Act. The High Court maintains its supervisory jurisdiction over the Magistrates Court as evidenced by the right of appeal to the Court which is contained in [Section] 49A. The circumstances are entirely different from those relating to the provisions establishing the Full Court in Hinds.”**

[11] The appeal also concerns the finding of the learned judge which is stated at paragraph 3 of the judgment:

“On the 11th August 2011, the Police made an application for the continued detention of the cash to the B1 Gros-Islet District Court. On the 12th August 2011 the presiding Magistrate, upon hearing the application, ordered that the Police were entitled to the continued detention of the cash for a further sixty (60) days from that date. On the 12th day of October 2012, an application for a forfeiture order of the cash was made and heard in the said B1 Gros-Islet District Court.”

[12] The Fordes are dissatisfied with the **learned judge’s** judgment and have appealed. The Attorney General vigorously resists the appeal.

Submissions on behalf of the Fordes

[13] Learned counsel, Mr. Horace Fraser, argued that the judge erred in finding that the magistrate had jurisdiction in civil asset forfeiture proceedings. Mr. Fraser argued that Parliament amended the Proceeds of Crime Act by section 49A to allow for the forfeiture of cash by a magistrate, regardless of the amount, and in the absence of a conviction. He complained that this was unconstitutional. He pointed out that the civil jurisdiction of the magistrate under article 871 of the amended Code of Civil Procedure is \$25,000.00 in relation to all sums, amounts, property or damages claimed, but that when the matter came before the magistrate, the jurisdiction of the **magistrate’s court was \$5,000.00**. Mr. Fraser therefore contended that the section 49A amendment to the Proceeds of Crime Act allows a magistrate to make orders for the forfeiture of cash in excess of the **magistrate’s** jurisdiction under the Code of Civil Procedure and that Parliament, by so doing, in effect has given magistrates the jurisdiction of a judge of the High Court.

[14] Mr. Fraser contended that the result of the amendment is the creation of a parallel jurisdiction between the High Court and the **Magistrate’s Court under** the Proceeds of Crime Act. The crux of his contention was that the section

49A amendment to the Proceeds of Crime Act is unconstitutional in so far as it purports to give the magistrate the jurisdiction of a judge of the High Court. In support of his submission, he referred to the decision of the High Court in Cecil Toussaint v The Attorney General et al³ in which another learned judge concluded that section 49A of the Proceeds of Crime Act was unconstitutional and ordered that the amendment be modified to bring it into conformity with the Constitution. It is noteworthy that at the time of the hearing of this appeal, the decision in Cecil Toussaint was on appeal by the Attorney General.⁴

[15] Mr. Fraser also challenged the learned judge's **finding** that the magistrate had made an order on 12th August 2011 for the continued detention of the cash for a further sixty days from that date. He reminded this Court that section 29A of the Proceeds of Crime Act provides that cash seized under the section must not be detained for more than seventy-two hours unless its continued detention is authorized by an order made by a magistrate. He contended that there is no evidence upon which the learned judge could have arrived at that finding of fact. He stated that there is no evidence, whether by affidavit or an exhibit of the order of the court, that an initial detention order was made or that an order was made for the continued detention of the cash. Mr. Fraser stated that, on 12th October 2011, when the police made an application for forfeiture of the cash, no order for the continued detention of the cash was in place. Mr. Fraser referred the Court to the affidavit of Troy Lamontagne,⁵ the police officer who made the application for the continued detention of the cash, and contended that there was no evidence that the application was granted by the magistrate. He therefore posited that without that order, the police could not continue to detain the cash and as a consequence the forfeiture proceedings before the magistrate were a nullity as there must be a continued detention order in place.

³ SLUHCV2013/0531 (delivered 2nd August 2018, unreported).

⁴ This Court has recently **overturned the learned judge's** judgment in Attorney General v Cecil Toussaint SLUHCVAP2018/0029 (delivered 5th June 2019, unreported).

⁵ See core bundle, pp. 5-11.

[16] Mr. Fraser also reminded this Court that an order for continued detention could not be made for a period in excess of three months under the Proceeds of Crime Act. He therefore contended that even if an order for continued detention was made by the magistrate, it would have expired at the end of October or at the beginning of November 2011, and as a consequence there is no order permitting the police to detain the cash at present. Accordingly, he posited that the learned judge ought to have found that the continued detention of the cash without an order of the magistrate so permitting was unlawful and in contravention of section 6 of the Constitution.

[17] In concluding, Mr. Fraser urged this Court to allow the appeal on the grounds advanced and to **set aside the learned judge's findings and conclusion.**

Submissions on behalf of the Attorney General

[18] Learned Senior Crown Counsel, Mr. Seryozha Cenac, contended that the learned judge was correct in finding that section 49A of the Proceeds of Crime Act was constitutional. He stated that **the Magistrate's Court's jurisdiction** was established by neither the Constitution nor the Eastern Caribbean Supreme Court Order⁶ but by ordinary legislation, in particular, article 871 of the Code of Civil Procedure. He argues therefore that section 49A created a specific jurisdiction or, put another way, an exception to the general jurisdiction of the **Magistrate's Court** in relation to civil asset forfeiture matters. Mr. Cenac pointed out that the jurisdiction for civil asset forfeiture was never specifically assigned to the High Court. He contended that the jurisdiction for civil asset forfeiture was created by virtue of the section 49A amendment to the Proceeds of Crime Act **and specifically assigned by Parliament to the Magistrate's Court.** Mr. Cenac argued that Parliament was entitled to create that specific jurisdiction and therefore that the amendment to the Proceeds of Crime Act is constitutional.

[19] Mr. Cenac stated that the constitutional right to protection from deprivation of

⁶ Cap. 2:0, Revised Laws of Saint Lucia 2015.

property enshrined in section 6 of the Constitution is not an absolute right, but capable of qualification by any law which is reasonably justifiable in a democratic society. He posited that section 49A of the Proceeds of Crime Act qualifies that right and is constitutional because the amendment seeks to address the mischief of persons having cash in their possession which cannot be traced to a lawful origin. He argued that section 49A is reasonably justifiable because it establishes a legal presumption that if the cash cannot be proved to be from a legitimate source, then it is probably tainted, thereby inviting the person in whose possession it was found, to prove on a balance of probabilities that it was lawfully obtained.

[20] Mr. Cenac also argued that the section 49A amendment to the Proceeds of Crime Act **does not violate the Fordes' rights** under the Constitution, and in particular those rights under section 6 of the Constitution.

[21] Additionally, Mr. Cenac noted that by virtue of the nature of the inquiry required under section 49A, Parliament was justified in assigning the jurisdiction for civil asset forfeiture matters to the magistracy particularly as it is not consequent upon a conviction or pursuing property associated with a conviction.

[22] On the second issue, Mr. Cenac contended that the learned judge did not make such a finding of fact, but merely had restated the facts from the litigation papers which were not in dispute. On that basis, he argued that the Fordes cannot now seek to raise this issue before this Court. Mr. Cenac further argued that even if there is no formal order on the record, the learned judge was entitled to draw the inference that the order was made based on the following facts: the cash was detained on 11th August 2011; an application for continued detention was made on 12th August 2011; the seal of the exhibit containing the cash was broken for the purpose of depositing the cash on 29th August 2011; an application was made to forfeit the cash on 12th October 2011; and, as of 27th January 2012 when the application was heard, there was no evidence to suggest that the

Fordes raised the issue of unlawful detention and non-service of the order or **whether there was an appeal in connection with the magistrate's determination.**

[23] During his oral arguments, Mr. Cenac conceded that there was no evidence on which the learned judge could have arrived at the conclusion that the magistrate had made an order for the continued detention of the cash on 12th August 2011.

[24] Nevertheless, at the end of his oral submissions, Mr. Cenac urged this Court to dismiss the **Fordes'** appeal and to uphold the decision of the learned judge.

[25] I turn now to address the issues that have been identified above.

Discussion

Law

[26] I propose to first outline the relevant statutory framework before addressing the **issues that arise for this Court's determination.**

[27] Section 6 of the Constitution states that:

“6. Protection from deprivation of property

(3) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

...”

[28] Section 120 of the Constitution states that:

“120. Supreme Law

This Constitution is the supreme law of Saint Lucia and, subject to the provisions of section 41, 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.**”

[29] Parliament enacted the Proceeds of Crime Act in 1995 as a mechanism to combat money-laundering. Section 9 of the Proceeds of Crime Act (unamended) allowed the Director of Public Prosecutions to apply to the High Court for a forfeiture order against property relative to **a person's conviction**. Where the court was satisfied that such property was tainted property in respect of an offence, the court could order that the property be forfeited to the Crown. It is noteworthy that under the provisions of the principal act, a person must first have been convicted for a scheduled offence before a forfeiture order could be made. This is criminal asset forfeiture.

[30] By Act No. 4 of 2010, the amended sections 49A, 49B and 49C were introduced. These provisions provided for a new species of forfeiture of cash by a magistrate. Section 49A 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

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.

...”

[31] By Act No. 15 of 2011, an amendment was made to section 29 of the Act in the following terms:

“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 not be released until any proceedings pursuant to the application or, as the case may be, the proceedings for that offence have been **concluded.**"

Issue 1 – Constitutionality of Section 49A of the Proceeds of Crime Act

[32] I now turn to examine **Mr. Fraser's** contention in relation to the constitutionality of section 49A of the Proceeds of Crime Act. Let me say straight away **that I am not persuaded by Mr. Fraser's argument that** the section 49A amendment to the Proceeds of Crime Act created a parallel jurisdiction between **the High Court and the Magistrate's Court under the** Proceeds of Crime Act. On a close examination of section 49A of the Proceeds of Crime Act, it is clear that the enactment introduced civil asset forfeiture, which is distinct from the jurisdiction for criminal asset forfeiture previously given to the High Court in relation to money laundering. Under this new regime, there is no requirement for a person to have been convicted before his assets could be subject to civil asset forfeiture unlike the situation which obtains with respect to criminal asset forfeiture, the latter which must be based on a criminal conviction.

[33] In fact, in relation to money laundering, the High Court never had any jurisdiction in relation to civil asset forfeiture. Civil asset forfeiture is an entirely new legislative framework created by the section 49A amendment

which is also aimed at combating money-laundering. Parliament has created this entirely new regime of civil asset forfeiture and assigned the jurisdiction for hearing these matters to the Magistrate Court or District Court. As Parliament has the authority to enact legislation which vests a jurisdiction in any court, there is no doubt that Parliament was entitled to assign to the **Magistrate's Court** the jurisdiction to hear civil asset forfeiture matters.

[34] Recently, in *Attorney General v Cecil Toussaint*,⁷ the Attorney General of Saint Lucia challenged the judgment of another learned judge to the effect that the section 49A amendment to the Proceeds of Crime Act was unconstitutional on the basis that it breached the principles laid down in *Hinds v R* by seeking to give the jurisdiction of High Court judges to the **Magistrate's Court**. This Court, in allowing the appeal, held that the learned judge erred and 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.

...

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

⁷ SLUHCVAP2018/0029 (delivered 5th June 2019, unreported) followed.

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.”

[35] Prior to *Attorney General v Toussaint*, in *Ahmed Williams v The Supervisory Authority*⁸ which was delivered subsequent to *Carter J’s* judgment,⁹ this Court examined the amendments to the Money Laundering Prevention Act 1996 (the “MLPA”) of Antigua and Barbuda. The amendments made to the MLPA introduced civil asset forfeiture in Antigua and Barbuda, and are similar in terms to the amendments made to the Proceeds of Crime Act in Saint Lucia. This Court, in concluding that the amendments made to the MLPA were constitutional, held that:

“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.**”

[36] Similarly, I am fortified that Parliament, in amending the Proceeds of Crime Act,

⁸ ANUHCVP2015/0035 (delivered 13th July 2017, unreported) followed.

⁹ Both *Ahmed Williams v The Supervisory Authority* and *Attorney General v Cecil Toussaint* were delivered by this Court subsequent to *Carter J’s judgment in Daniel Forde et al v Attorney General* of Saint Lucia.

by way of section 49A, in no way amended the Constitution nor did they assign **jurisdiction to the Magistrate's Court which was previously exercised by the High Court**. Therefore, the issue of a parallel jurisdiction being exercised by High Court **and the Magistrate's Court** does not arise in this appeal. Accordingly, the learned judge correctly distinguished the decision of the Judicial Committee of the Privy Council in *Hinds v R*¹⁰ from the present case. In *Hinds v R*, the Jamaican Gun Court Act 1974 purported to confer the jurisdiction to adjudicate serious gun related offences on a full court division of three magistrates. Before the Gun Court Act was enacted, judges of the High Court had jurisdiction in relation to those serious gun related offences. The Gun Court Act therefore purported to assign a jurisdiction which was previously exercised by judges of the High Court to the Magistracy. The Privy Council held that those aspects of the Gun Court Act were unconstitutional. The Board observed at page 368 of the judgment 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.**”

- [37] The Board in *Hinds v R* emphasised 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

¹⁰ [1977] AC 195.

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)

[38] Based on the **Board's** reasoning in *Hinds v R*, it is settled law that Parliament cannot vest a jurisdiction which was previously exercised by judges of the High Court in the Magistracy. However, that is not what obtained in the present case. In Saint Lucia, judges of the High Court never had any jurisdiction for civil asset forfeiture in relation to money laundering. As such, the question of magistrates exercising a jurisdiction exclusive to judges of the High Court does not arise. On this issue, I therefore am in agreement with Mr. Cenac that Parliament amended the Proceeds of Crime Act in order to introduce a specific jurisdiction for civil asset forfeiture, alongside criminal asset forfeiture, and that the amendment to the Proceeds of Crime Act is constitutional. Accordingly, there is no basis for contending that Parliament took away part of the jurisdiction which the High Court exercised **and gave it to the Magistrate's Court.**

[39] I have no doubt that the amendment which introduced the civil asset forfeiture regime was constitutional since there is nothing in the Constitution which indicates the value of the claim over which magistrates cease to have jurisdiction. Therefore, an amendment to the Proceeds of Crime Act which has the effect of increasing the jurisdiction of magistrates, specifically in relation to civil asset forfeiture in money laundering matters, could not contravene the Constitution as the Constitution itself does not provide for the jurisdiction of the Magistracy. The **Magistrate's Court's jurisdiction is prescribed by the** Code of Civil Procedure and to a lesser extent, the District Courts Act.¹¹

[40] **Additionally, contrary to Mr. Fraser's contention, there was no need for Parliament to expressly state that it was amending the magistrate's jurisdiction under section**

¹¹ Cap. 2:02, Revised Laws of Saint Lucia 2015.

871 of the Code of Civil Procedure. The Proceeds of Crime Act and the Code of Civil Procedure are ordinary pieces of legislation. It is trite law that an Act of Parliament can overwrite an Act passed earlier in time. In my view, Parliament through the amendment to the Proceeds of Crime Act clearly increased the civil jurisdiction of the magistrate in so far as it relates to money laundering and civil asset forfeiture. This is clearly permissible in law. I therefore agree with Mr. Cenac that section 49A created a specific jurisdiction in relation to money laundering which was granted to the **Magistrate's Court** as an amendment to section 871 of the Code of Civil Procedure. Consequently, Parliament was entitled to amend the Proceeds of Crime Act to give magistrates the jurisdiction to determine civil asset forfeiture claims in relation to money laundering matters.

[41] I also agree with Mr. Cenac that Parliament was justified in assigning the jurisdiction for civil asset forfeiture matters to the Magistracy by virtue of the nature of the inquiry required under section 49A, particularly as civil asset forfeiture is not consequent upon a conviction or pursuing property associated with that conviction. It is expected that under this new regime, several types of applications would be required to be made. Indeed, the Proceeds of Crime Act provides for applications for pre-emptive and provisional orders for the seizure and detention of cash which must be made before forfeiture proceedings have commenced. Therefore, the **Magistrate's Court** would be required to revisit matters on a regular basis. In my view, and for obvious reasons, such an exercise would be better suited for the summary jurisdiction of the **Magistrate's Court** or the District Court as opposed to the High Court. Accordingly, there is sound legislative policy behind Parliament assigning the jurisdiction for civil asset forfeiture **to the Magistrate's Court** in relation to money laundering.

[42] In light of the matters discussed above, it is evident that I am of the view that the section 49A amendment to the Proceeds of Crime Act does not create a parallel **jurisdiction exercised by the High Court and the Magistrate's Court**. Also, I conclude that the amendment does not breach any provision of the Constitution,

and in particular section 6 of the Constitution which addresses protection from the deprivation of property. **The learned judge's decision on this issue cannot be** impugned and therefore the appeal on this issue fails.

Issue 2 – Whether judge erred in finding that there was an order for continued detention

[43] This is a short point. Section 29A(2) of the Proceeds of Crime Act is clear and states that the police can only detain seized cash for a period of forty-eight hours without an order from a magistrate for its continued detention. By virtue of section 29A(3), any order made by a magistrate for the continued detention of cash must not be for a period of over three months. The statutory scheme is clear and must be followed to the letter and any breach of this would render the seizure and continued detention unlawful.

[44] Quite interestingly, and despite the detailed recitation by the learned judge of the order made by the magistrate for the continued detention of the cash, including the date on which the order was allegedly made and the period of continued detention granted, learned Senior Crown Counsel Mr. Cenac conceded that there was no order for continued detention of the cash made by the magistrate.¹² I must say that it is passing strange that the learned judge had recited all those details of the **magistrate's** order for continued detention of the cash and yet the Crown has conceded that the magistrate had made no such order. Be that as it may, since the continued detention of the cash, in view of the Crown's **concession**, was not in accordance with section 29A(2) of the Proceeds of Crime Act, it therefore follows that it was unlawful. Accordingly, in my view, the cash seized from the Fordes should be returned to them. The appeal on this issue therefore succeeds.

¹² It is noteworthy that learned Senior Crown Counsel Mr. Cenac was not the officer who had conduct of **the matter in the Magistrate's Court**. Neither was he the law officer who originally had conduct of the case before the learned judge. However, he indicated during his oral arguments before this Court that he had not communicated with that officer. Nonetheless, learned Senior Crown Counsel felt able to concede the point based on his review of the records and in the face of the learned **judge's** detailed recitation of the terms of order made by the magistrate for the continued detention of the cash seized from the Fordes.

Costs

[45] Insofar as the Fordes have succeeded on one issue and the Attorney General has succeeded on the other issue, and bearing in mind that this matter is an appeal which concerns constitutional law issues, the appropriate costs order is that each party shall bear its own costs.

Conclusion

[46] For the above reasons, I would dismiss the **Fordes' appeal** in relation to the constitutionality of section 49A of the Proceeds of Crime Act and allow **the Fordes'** appeal in relation to the **learned judge's** finding that the magistrate had made an order for the continued detention of the cash seized. Accordingly, I would make the following declarations and orders:

- (1) The section 49A amendment to the Proceeds of Crime Act does not infringe any provision of the Constitution.
- (2) The Crown's **detention of the** cash seized from the Fordes is unlawful.
- (3) The Crown is directed to return the cash seized to the Fordes.
- (4) Each party shall bear its own costs.

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

I concur.
Gertel Thom
Justice of Appeal

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

By the Court

Chief Registrar

