

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0105

BETWEEN:

THE COMMISSIONER OF POLICE

CLAIMANT

AND

THE SUM OF EC \$41,390.00

FIRST DEFENDANT

CALFORD GEORGE

SECOND DEFENDANT

PENG ZHANG

THIRD DEFENDANT

Appearances:

Ms. Kaywana Jacobs for the Claimant

Mr. Grant Connell for the Defendants

2019: July 16
July 24
September 17

JUDGMENT

Byer, J.:

- [1] A man under instructions from his employer prepares to board a ferry to take him to a neighbouring Grenadine island and when he is stopped and a search of his bag and person is undertaken it is found that he is in possession of large quantities of cash, offers several different explanations and these proceedings are commenced.
- [2] This is an appeal, pursuant to Section 114 (1) of the Proceeds of Crime Act No. 38 of 2013 as amended by Act No. 18 of 2017 (hereinafter referred to as 'POCA') by the claimant against the

decisions of the Learned Chief Magistrate who ordered that the sum of Forty One Thousand, Three Hundred and Ninety Eastern Caribbean Dollars (EC \$41,390.00) be released on the basis that on a balance of probabilities, this sum did not represent recoverable cash. The claimant asks this court to overturn the decision of the Learned Chief Magistrate on the basis that there were reasonable grounds to satisfy the lower court that the cash is recoverable cash.

Background Facts

- [3] The Second defendant was approached by Police Constable No. 707 Endall Haywood ('Cpl Haywood') at the Grenadines Wharf at Gate No. 5 on 16 November 2015. Cpl Haywood was conducting searches on persons and their belongings and requested a search of the Second defendant and his belongings and he consented.
- [4] The Second defendant handed over a brown book bag to Cpl Haywood who searched the bag in his presence revealing an orange Pringles can. Cpl Haywood took notice that the Pringles can was heavier than the average one and this aroused her suspicion.
- [5] Cpl Haywood questioned the Second defendant as to the contents of the Pringles can and the Second defendant indicated that he purchased the Pringles to take to his daughter in Union Island and that he was planning to surprise her with it.
- [6] Cpl Haywood proceeded to open the Pringles can in the Second defendant's presence and that of Police Constable 905 Pierre ('PC Pierre'). Upon opening the can, Cpl Haywood discovered a large quantity of Eastern Caribbean One Hundred Dollar notes inside.
- [7] Cpl Haywood asked the Second defendant where he got the monies from and he responded that he did not know how the money got inside the Pringles can. Cpl Haywood continued with her search and examined the Second defendant's person and a search of his front left pants pocket revealed another large sum of Eastern Caribbean currency. Cpl Haywood showed the monies to the Second defendant and he responded by stating "*Officer the truth is the money is for me to buy a car*".
- [8] Corporal Matthews, the Non Commissioned Officer (NCO) on duty at the Port Authority, Kingstown was then contacted and Cpl Haywood placed the Pringles can containing the monies and the monies retrieved from the Second defendant's pocket into a brown envelope.
- [9] While waiting for the NCO to arrive, Cpl Haywood again questioned the Second defendant about the cash and he responded "*Officer is my smaller boss give me to take for my bigger boss in Union*".
- [10] The Second defendant and the Third defendant were subsequently interviewed by Financial Investigators at the Financial Intelligence Unit (FIU) and consented to render Statements in writing which they both signed, agreeing to be true and correct on 16 November, 2015.

- [11] The Second defendant in his Statement indicated, among other things, that “Allan” told him that he would have to go to Union Island to meet his boss to “carry some stuff” for him. He stated that Allan told him that he would be taking some money to the boss but did not tell him how much money.
- [12] The Third defendant in his Statement indicated, among other things, that he is the Manager of the ‘Everest Trading’ stores which are owned by his uncle who lives in China. He indicated that his uncle left St. Vincent approximately three (3) weeks prior.
- [13] The Third defendant indicated that he gave some money to the Second defendant on 16 November, 2015. He stated that he gave the Second defendant EC \$100,000.00 to take to Union Island in a small shoe box.
- [14] The Third defendant indicated that he was sending the money to Union Island because his uncle told him to send the money to someone there. He stated that he did not know the persons but his uncle knew them. The Third defendant further indicated that the money was to do business in Union Island and the he thought that his uncle wanted to open a store there, but he did not know.
- [15] At the hearing at the Serious Offences Court on 20 June, 2018 the Third defendant then for the first time since the cash was seized then informed the Court that the cash was intended for the purchase of lobsters in Union Island.
- [16] After the said hearing on 22 June 2018, the Learned Chief Magistrate ordered that the sum of EC \$41,390.00 be released on the basis that there was insufficient evidence to find that the sum was derived from or intended for use in unlawful conduct.
- [17] As a result of the finding of the Learned Chief Magistrate this matter proceeded to trial before this court on 16 and 24 July 2019.
- [18] After trial it was clear to this court (in agreement with counsel for the appellant) that the sole issue that had to be determined was whether on a balance of probabilities the sum of \$41,390.00XCD represented recoverable cash that is that it was derived from or intended for use in unlawful conduct¹.

The Appellant's Submissions

- [19] The submissions of the appellant, although conceding that there was no direct evidence of unlawful activity on the part of the Second and Third defendants, argued that there however were copious amounts of circumstantial evidence that supported the theory that the cash seized by the police was in fact recoverable cash.
- [20] The appellant argued that the evidence elicited at trial and on the affidavit evidence that was admitted before this court, it was clear that both the Second and Third defendant had something to hide, and it is this highly suspicious behavior which the appellant states must raise in this court’s

¹ Closing submissions of the appellant filed the 5/8/19

mind that there really was no good reason for the movement of the cash and that the same should be forfeited.

- [21] The appellant has relied on the lies given by the Second defendant when the money was first found on his person to the change in the explanations given as he was further questioned, to the actions of the Third defendant in his not disclosing to the Second defendant the presence of the cash and his changing story with regards to the intended purpose to all bolster their argument that this court on a balance of probabilities should find that this cash was recoverable property.

The Defendant's Submissions

- [22] The submissions of the defendants concentrated on two aspects of the appellant's case. Firstly, that the appellants were unable to prove any illegal activity of any kind on the part of the defendants. That there had been no evidence, as far as the defendants were concerned, that showed that either the money seized was from illegal activity (the financials of the company of the Third defendant showed that the company was operating with large cash turnovers) nor that the money was intended to be used illegally (the production of the contract for the purchase of the lobsters between the uncle of the Third defendant and some unknown person in Union Island).
- [23] The second aspect of the appellants case against which the defendants attacked, was integrally part and parcel of the first limb of attack, as the defendants submitted that the failure of the appellants to adequately investigate the allegations and the reasons for the Third defendant having in his possession the vast quantities of cash and the rationale for sending the same, not out of the jurisdiction, but to another island within the state, resulted in an injustice being perpetrated against the Third defendant and the Second defendant in particular who has always been nothing more than the employee of the Third defendant.
- [24] This failure by the appellants as submitted by the defendants undermined the obligation on the appellants to ensure that the provisions of the Act had in fact been contravened by the Third defendant and the Second defendant to warrant the seizure of the sums. Counsel submitted that upon the evidence, the answers to questions by the Third and Second defendant gave entirely plausible reasons for the money and the purpose of the same.

Court's Analysis and Considerations

- [25] In this court's mind this is a matter that must turn on the factual circumstances of this case and the question must be asked how and where did this money come from?
- [26] So, in order to do so, I must examine the evidence that was led with regard to how this matter manifested itself.
- [27] At trial the appellants relied on two witnesses, Sargeant Ivo Ash who is now the Financial Intelligence Unit's chief investigator (hereafter referred to as FIU) and Cpl Endall Haywood.

- [28] It was clear from the affidavit that was admitted into evidence on behalf of Sgt Ash and upon his cross examination that at the time of the investigation he was not the one in charge and could only effectively really speak to the details of the investigation gleaned from persons who had been actively involved. In fact, he categorically stated under cross examination that his main role was in taking the statement from the Second defendant. His ancillary role was to do an analysis of the banking transactions of the Third defendant and the company with whom, the Second defendant worked. However by and large the investigative work conducted by this witness personally was limited.
- [29] Despite this admission on the part of this witness, it was still telling to this court that this witness told this court that he could not determine the origin of the cash that was discovered nor could he say what exactly the money was to be used for but that *“based on [his] experience it was meant for some unlawful conduct”*².
- [30] Also of note, in answer to questions from this court, this witness made it clear that on his own knowledge of the business of the Third defendant’s company, that it was never involved in the sale either retail or wholesale of lobsters or any other type of seafood nor were they involved in any kind of restaurant business.
- [31] The only other witness for the appellants was the officer who searched the Second defendant at the ferry dock where the Second defendant had presented himself to board a ferry for Union Island.
- [32] This was Cpl Haywood. The nub of her evidence which was in relation to the search she conducted of the person of the Second defendant spoke to the discovery of the Pringles tin that piqued her interest due to its extraordinary weight within which she found bundles of cash under some pieces of the chips at the top of the can.
- [33] This evidence, in this court’s mind, remained by and large unshakeable despite the rigorous and sometimes irrelevant cross examination by counsel for the defendants. The court is therefore satisfied that when this witness approached the Second defendant to search him as was the procedure before the embarkation of any ferry leaving the Kingstown Port, she properly discovered the bundles of cash. There was no reason in this court’s mind for Cpl Haywood at that juncture to have held reasonable grounds to conduct the search as the same was part of the usual protocol observed at the port of embarkation, but upon happening on the Pringles can with its anomalies, this court considers that she was entitled and did so form the requisite reasonable grounds that the same may have contained some item including recoverable cash³.

² Cross examination of the witness Ivo Ash on 16/7/19

³ Section 108 (2) Proceeds of Crime Act states as follows:

“(2) If a law enforcement officer has reasonable grounds for suspecting that a person (the suspect) is in possession of recoverable cash, he may:

(a) so far as he thinks it necessary or expedient, require the person:

(i) to permit a search of any article he has with him; and

(ii) to permit a search of his person; and

(b) for the purposes of exercising his power under subparagraph (a)(ii), detain the person for so long as is necessary for the exercise of that power.”

- [34] It is also this officer who in having found the can, searched the tin and questioned the Second defendant who also relayed the reasons given by the Second defendant for the same.
- [35] Upon the discovery of the Pringles can the Second defendant stated firstly that he had just bought the Pringles to take for his daughter in Union⁴.
- [36] Upon Cpl Haywood inquiring whether she could look in the can, he then reportedly said "officer if you open the Pringles pan you will spoil the surprise for my daughter that would not be a surprise again"⁵.
- [37] Once the can was opened and the bundles of cash were discovered the Second defendant then reportedly said "*Officer I do not know how the money got in there*"⁶.
- [38] By the time Cpl Haywood then requested her fellow officer to search the person of the Second defendant, he then indicated that he had more money in his pockets which he took out and gave to officers.
- [39] Upon Cpl Haywood having cautioned the Second defendant as to the offence of carrying in excess of \$10,000.00, the Second defendant then said "officer the truth is the money is to buy a car"⁷.
- [40] Then finally before the Second defendant was transported to the Central Police station upon a final question being put to him by Cpl Haywood he told her, the money was from his smaller boss to take to his bigger boss in Union Island and to Cpl Matthews who then presented himself to take the Second defendant into custody, that a speed boat was suppose to come and collect it from him⁸.
- [41] None of these statements allegedly issued by the Second defendant were at all challenged in any meaningful way or at all in this court's mind. In fact what is clear is that these contradictory statements uttered by the Second defendant remain wholly intact in this court's mind and established the circumstances as to how this money was discovered and the reasons advanced for the same at the time of first discovery.
- [42] In light of this information, in this court's mind not only did the Second defendant need to give an explanation, but it was imperative that he did. Not only explain the money but explain the answers he had given when questioned.
- [43] What was that explanation? In relation to the Second defendant by his witness statement filed on the 21/11/18, the long and short of his evidence was that he was tasked to take this money to the Third defendant's uncle, the "bigger boss" not having done anything like it previously. He maintained that he had no idea how much money it was that he had on his person/bag and was only aware of the \$1,500.00 given to him as his "expense" monies. On cross examination the story of the Second defendant even morphed some more.

⁴ Paragraph 4 of the Affidavit of Cpl Haywood filed on the 17/1/19

⁵ Paragraph 5 of the Affidavit of Cpl Haywood filed on the 17/1/19

⁶ Paragraph 6 of the Affidavit of Cpl Haywood filed on the 17/1/19

⁷ Paragraph 9 of the Affidavit of Cpl Haywood filed on the 17/1/19

⁸ Paragraphs 10 and 12 of the Affidavit of Cpl Haywood filed on the 17/1/19

- [44] The Second defendant told this court that he was in fact given a number to call his “bigger boss” Mr. Huang when he got to Union Island. Yet still he had no idea whether this bigger boss was in Union island or not.
- [45] In answer to this court as to why he came up with all these versions of events, he told this court that when he was shown the Pringles can, it was the first time he had seen it and that the story had just rushed to his head. He was so nervous when he saw the money and that further he had no idea how much money it was as he had never counted it even what was in his wallet. He just did what he was asked.
- [46] Then came the Third defendant. His story was that the business Everest is managed by him but owned by his uncle. His uncle having requested him to send \$100,000.00 he felt that he had no need to question the Uncle or ask why. He therefore decided to send the Second defendant to carry out this undertaking but he did not tell him how much money he was carrying. So while the Second defendant was in the bathroom, the Third defendant placed \$100,000.00 in a Pringles can (with the pieces of Pringles on top), a shoe box and the wallet of the Second defendant.
- [47] The Third defendant told this court that this money came from sales in the business which he kept in a vault at home and even if he banked proceeds of the business transactions, he always had adopted a practice of retaining large sums in the safe at his residence.
- [48] He maintained his story that he had not divulge to the Second defendant the sum of money that he placed in his care and he categorically told this court that this was the first time that he had engaged in this conduct.
- [49] What was of some concern to the court as well was that in questioning he in fact admitted that his uncle was in fact not in Union Island on the day that the Second defendant was sent there, he having left to travel to Grenada the week before.
- [50] Finally he told this court that he did not tell the police when questioned that the money was to buy lobsters in Union Island but that he had supposed at the time, that his uncle had needed it to open a new business in Union Island. It was not until after the money was confiscated that his uncle informed him that the money was in fact to purchase lobsters and he was then presented with the contract which made its way before this court. The Third defendant did also admit that up to that period as far as he was concerned the business, he ran for his uncle had never been engaged in the business of lobsters nor was any indication of involvement in seafood at all.
- [51] Having therefore assessed this evidence, it became apparent to the court that upon the discovery having been made of the cash in the custody of the Second defendant, there was a need for an explanation, and indeed the defendant needed to show that the funds were in fact legitimate⁹.
- [52] Let me quickly state that having said this, does not mean that the law requires or places a burden of proof on the defendants to prove anything. In fact in stating this, this court relies on the dicta of

⁹ **Winston Pussey v Assets Recovery Agency** [2012] JMCA Civ 48 at paragraph 27 per Harris JA

Moses J in the case of **Bujar Muneka v Commissioners of Customs and Excise**¹⁰. At paragraph 13: “... *it is plain that there was no reverse burden of proof properly so-called; all that happened on the facts was that the facts were so startling that they called for an explanation. No truthful explanation was given. That does not amount to a shift in any burden of proof.*” Therefore, the burden is and always remains on the appellants to prove to this court on a balance of probabilities that this cash as seized was recoverable cash within the meaning of the Act. What the court does recognize however is that there is an obligation in the best interest of the defendants to explain circumstances in which questions arise as to the reason for the possession of monies discovered.

[53] Therefore, in order for the defendants to know what they must explain, an understanding must be had as to what is recoverable cash. How does the Act define recoverable cash? At Section 107 as it is amended by Act 18/2017, recoverable cash is defined as (a) cash which is recoverable property or (b) cash which is intended by a person for use in unlawful conduct.

[54] On the basis of that definition, this court has to be satisfied on a balance of probabilities that either the source of the funds was from criminal or unlawful activity or the intended destination was for use in criminal or unlawful activity and that it can therefore be forfeited as recoverable cash.

[55] In order to do so, there is a need to assess the evidence that was led. As stated above the factual matrix of the discovery of the cash required a response from the defendants. It is from that evidence that I find that the following has been established:

i. The Second defendant was given large quantities of cash from a safe that was under the control of the Third defendant but was not told how much money it was nor its purpose.

ii. The Second defendant when he was questioned as to the cash found and as to “*why he was carrying that amount of money and the source of the money, this [defendant] was well aware of the context in which he was being asked those questions*”¹¹ and he chose to lie as to the container that was drawn to his attention and once caught, then to give an explanation that changed at least twice over the course of the questioning. Indeed, this court considers that these “*untruthful explanation[s] or a failure to offer an explanation [added] to the arguability of the case*”¹² for the enforcing agency.

iii. That despite the evidence of the sales of the company managed by the Third defendant substantiated the sums that were said to have been sent to Union Island, that “*just as the law abiding citizen normally has no need to keep large amounts of banknotes in his possession, so the criminal will find property in that particular form convenient as an untraceable means of funding crime.*”¹³

iv. That the provision of the contract by the Third defendant as to the purchase of lobsters for \$100,000.00 was insufficient to explain how the money was packaged or couriered (the small pieces of Pringles laying on top of the bundles of cash in the can; given to the

¹⁰ [2005] EWHC 495 Admin

¹¹ **Muneka** case Op Cit at paragraph 2

¹² **The Director of the Assets Recovery Agency v Szepietowski and Ors** [2007] EWCA Civ 766

¹³ **The Director of Assets Recovery Agency and ors v Jeffrey Green and ors** [2005] EWHC 3168 Admin

Second defendant without even notifying him of how much he was carrying or for what purpose) and finally;

v. The fact that the Second defendant was ordered to take this money to Union Island within this state with porous borders and to the island that is closest to Grenada established that this transaction was unusual in the “cashless”¹⁴ society in which we now live and there must have been a reason that these parties decided to do so rather than make use of normal banking facilities¹⁵.

[56] When one considers all of these factors and the additional admission by the Third defendant that in fact this ghost like Uncle, Mr. Huang was not in Union Island at the time that this movement of the cash was to take place, (although the Second defendant was to deliver the same to him) but rather was in Grenada, makes it abundantly clear that on a balance of probabilities that even though the source of the cash may not be questionable, in that the business activities of the company operated by the Third defendant supported access to large sums of money, that on the other hand the intention or destination of these sums were meant for some unlawful conduct or transaction.

[57] When this court considers the evidence, I am satisfied that the inferences that could be drawn lead to the conclusion that this transaction fell within the parameters of the definition of recoverable cash under the Act.

[58] I therefore am satisfied that the cash is recoverable cash and allow the appeal as filed.

The order of the court is therefore as follows:

1. There is to be forfeiture of the sum of \$41,390.00 to the claimant with costs on the said sum pursuant to Part 65.5 CPR 2000 in the sum of \$6,208.50 to be paid by the Third defendant solely. The basis for that determination is that the court accepts that the Second defendant was the employee of the Third defendant and was placed before the court he having acted pursuant to instructions issued to him by his employers.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar

¹⁴ Paragraph 32 in **Green** case OP cit

¹⁵ **Mohammed Butt v HM Customs and Excise** [2001] EWHC Admin 1066 at paragraph 2 per Mrs. Justice Hallett