Commonwealth of the Bahamas 2018/MAG APP/No.00002

In The Supreme Court

Appellate Division

In the Matter of an Appeal pursuant to section 47(1) of the Proceeds of Crime Act, Chapter 93

Between

DARRON ANTHONY DEAN

Appellant

AND

THE COMMISSIONER OF POLICE

Respondent

Before:	Her Ladyship, The Honourable Madam Justice Guillimina Archer Minns
Appearances:	Mr. Fedner Dorestal for the Applicant Mrs. Abigail Farrington for the Respondent
Hearing Date:	19 February 2022

Decision

BACKGROUND FACTS

1. On Wednesday 15 June, 2016 a team of police officers acting on intelligence and armed with a search warrant in the name of the Appellant, Darron Anthony Dean proceeded to the Appellant's establishment, the Club Washington Bar and Restaurant in the area of McKann's Long Island.

2. While searching the premises a large sum of United States and Bahamian currency was found inside a bureau said to be from selling phone cards. Also found were shotgun shells which the Appellant informed were from his shotgun which was licensed. In seeking to verify the same, officers were then directed to a second residence. At the residence, the Appellant proceeded to a gun safe to retrieve the license when attention was drawn to a navy blue draw string bag in the safe which upon examination contained United States and Bahamian currency. When questioned in regard to the same, the Appellant advised that the money was the proceeds from his business.

3. The explanation as to the source of funds did not suffice for the officers so the Appellant was arrested and cautioned in reference to the funds on suspicion of the funds being proceeds derived from criminal conduct or intended for illegal activity. The amount totaled some Sixty-Four Thousand Four Hundred and Twenty – two Dollars ($64,422.00). The Appellant was thereafter taken to the Drug Enforcement Unit along with the cash to New Providence the following day for further processing.

4. Upon a further recount, the sum of money seized totaled Sixty -Four Thousand Three Hundred and Seventy Two Dollars ($64,372.00) for which an application was made to the Magistrate Court for the detention of same pursuant to section 46 (2) of the Proceeds of Crime Act, Chapter 93. The Order was granted by the Magistrate on 17 June 2016 and thereafter additional Detention Orders were obtained in September and December 2016 in accordance with the Act.

5. By Summons filed on 16 September 2016, the Appellant sought to have a hearing for the grant of an order not to further detain the funds with a return date for hearing on Wednesday 2 November 2016. The Appellant was never afforded a hearing in respect of the Summons filed.

6. The Respondent by Summons filed on 14 June 2017 made application for a Forfeiture Order pursuant to section 47(1) of the Proceeds of Crime Act for the forfeiture of the seized funds. Following a hearing and submissions of both the Appellant and Respondent, the Acting Deputy Chief Magistrate (hereinafter referred to as "the Magistrate") delivered a decision on 26 September 2018 forfeiting the sum of $64,372.00 on the basis that it was believed most probable that the cash directly or indirectly represented the proceeds of or benefits from the Appellant's criminal conduct or which he intended for use in criminal conduct.

7. The Appellant now seeks by way of appeal that the monies forfeited be returned to him as the seized funds were monies legitimately earned from his businesses and property owned by him and his family.

GROUNDS OF APPEAL

The Appellant appealed the learned Magistrate's decision via a Notice of Appeal filed on the 24 September 2018 on the following grounds:

i the Magistrate took extraneous matters into consideration;

ii evidence was wrongly rejected and there was not sufficient evidence to sustain the decision;

iii the decision was unreasonable and could not be supported having regard to the evidence

iv the decision was erroneous on a point of law, the particular point of law being the Magistrate's consideration of the proper application of reasonable suspicion;

v the decision of the Magistrate relative to the Defendant's right of Appeal was based on a wrong principle;

vi some material illegality or irregularity, other than herein before mentioned, substantially affected the merits of the case was committed in the course of the proceedings and in the decision and;

vii the Magistrate did not adequately consider the Defendant's defence.

Submissions

Appellant's Submissions

8. The Appellant relied on written Submissions and Affidavits filed on 26 November 2020 and 28 September 2021(inclusive of a Forensic Analysis Report dated 25 November 2020) respectively. The Appellant advanced inter alia:

(i) the Learned Magistrate should not have used sections 123(1) and (2) of the Evidence Act as her reasoning to forfeit the Appellant's funds as his previous conviction was not a subsisting one. The Appellant was convicted of simple possession nearly a decade earlier so it was not relevant or related to this matter.

(ii) the Appellant's evidence was that a small quantity of drugs was found in his yard to which he was advised to plead guilty by his attorney and for which he received an absolute discharge. The conviction was not relevant under the Evidence Act nor the Proceeds of Crime Act. Moreover it was not relevant with respect to the seizure for which he found himself before the court. The Magistrate in her oral decision referred to him as a "criminal" and pointed out that because of it he was likely to have committed the offence for which he was before the court.

(iii) this is a criminal matter but the Appellant was tried on the civil standard of proof and in accordance with Section 59 of the Proceeds of Crime Act, the standard of proof that should have been applied by the Learned Magistrate was that of the Criminal Standard of Proof. The Magistrate considered both the evidence of the Prosecution and Defence on the civil standard of proof. Reliance was placed on R v. Martin (2000) 2 LR19.

(iv) the Learned Magistrate wrongly rejected crucial evidence that was in the Appellant's favor particularly, that the funds seized from his premises was money legitimately earned from his business, property and income that belonged to his family. He also provided evidence that he had previously held bank accounts, but accounts were closed by banking institutions because of challenges the banks were experiencing in Long Island at the material time. He resorted to operating on a cash basis and saved his money in a gun safe which is entirely legal.

(v) the Magistrate's rejection of the Appellant's evidence was not reasonable having regard to the fact that the Police evidence was not supported by any direct evidence. The suspicion under which the Police conducted the raid was unfounded. There were no drugs, stolen property or illegal weapons found on the Appellant or his property nor was the Appellant charged in relation to any offence the subject of the search warrant.

(vi) the bank cards produced by him at trial are cards that were in fact issued by Scotia Bank and that he had in fact deposited funds in the said bank prior to the branch closure in Long Island and only resorted to keeping funds in the safe after the bank's closure. The amount found in the Appellant's safe and his business is entirely reasonable in the circumstances. The Appellant provided evidence as to his businesses ie the restaurant and bar for which he has a business licence, rental from apartment units, Bahamas Power and Light and Paradise Games relative to retail space and rental of rooms, revenue from the sale of phone cards

and his mother's bakery. Moreover, the Appellant's mother confirmed she operates a bakery out of the Appellant's premises, that she receives a pension from National Insurance Board and was aware that the Appellant kept savings inclusive of hers in the gun safe after the bank's closure. No evidence has been presented that supports the police contention that the funds in his possession were derived from criminal conduct and or the funds were intended to be used for any criminal activity. He was never charged with possession of the cash as in the requirement under section 46(2) of the Proceeds of Crime Act.

(vii) the Appellant further contends that his funds were illegally seized as the seizure was done without legal authority. All entries on and searches of premises under a warrant issued are unlawful unless they comply with section 70 of the Criminal Procedure Code and so the failure of the police to produce a Search Warrant signed by a Magistrate to the Appellant meant the police were obliged to return said funds to him. Also assuming the warrant was valid, the effect of any seizure made under the same would have to have fallen under the Acts permitted by the warrant itself. The warrant was for firearms, stolen goods and dangerous drugs. It was not a warrant for monies suspected to be used for crime or proceeds of crime. Moreover, the warrant is in total violation of sections 70, 71 and 72 of the Criminal Procedure Code. Reliance was placed on Chief Constable of Lancashire, Ex Parte Parker (1993) QB.

(viii) the Appellant also provided that no evidence was ever presented by Officers Goodman or Rodgers that supports the reasonable cause to suspect that the Appellant was in possession of stolen goods, firearms or dangerous drugs. In this case the reasonable cause to suspect the Appellant was nonexistent. The Officers also failed to charge the Appellant as is required by section 46 (2) of Proceeds of Crime Act and as such could not have confiscated the funds under section 47.

(ix) the fact that the Magistrate only gave the right of appeal to the Appellant's mother, is an indication of her pre determination of guilt towards the Appellant. Further the bias of the Magistrate exhibited is an attitude of mind which prevented her from making an objective determination of the issues that she had to resolve. The fact that she referred to the Appellant as a criminal, did not afford him a right of appeal, ignored the fact that the Prosecution did not provide any evidence of their reasonable cause for suspicion, never turned over the documentary evidence they seized from the Appellant, seized his funds under section 46(2) without charging him and did not allow the Appellant's direct examination through his Affidavit to be put into evidence is an indication of apparent bias. The funds were in fact seized under section 46(2) of The Act.

(x) section 46(2) makes it pellucid in that one of the requirements when a seizure is done under such circumstances by the police is that the person(s) concerned, "shall be charged with being in possession of said cash,". The Appellant was never charged with possession of same. The Appellant as the Defendant made an application by Summons was filed on 16 September 2016 citing no justifiable reason for the detention under section 46(5) (a) and (b) but was never ruled upon. Thus, not only was the Appellant's cash detained illegally but he was also prevented from taking a course of action to recover the same.

(xi) the Magistrate did not adequately consider the Appellant's defense indicating that the Appellant did not give an explanation as to the source of funds and that it was unusual for monies to be found in a bag in a gun safe when Royal Bank was still in operation at the time and the previous drug conviction. The Magistrate concluded that it was not unreasonable for the court to come to a negative inference when you include monies hidden in a bag in a gun safe to infer that that Respondent (now Appellant) has a propensity of criminal conduct.

(xii) the Appellant denies that the funds are from illegal source and filed affidavits to support his position inclusive of a forensic report by M. E. Lockhart, Chartered Accountant dated 25 November 2020.

(xiii) the Appellant withdraws his arguments on Bias.

Respondent Submissions:

9. The Respondent opposing the Appellant's appeal relied on written and oral submissions asserting inter alia:

(i) the sum of sixty-four Thousand, Three Hundred and Seventy-Two ($64,372.00) dollars was lawfully forfeited to the Public Treasury by Acting Deputy Chief Magistrate, Subusola Swain on 26 September 2018 pursuant to section 47(1) of the Proceeds of Crime Act.

(ii) the Learned Magistrate, after considering both the evidence of the Appellant and Respondent, ordered that the detained cash be forfeited to the Crown.

(iii) the Respondent relies on the facts averred to by D/Inspector Renaldo Burrows in his Affidavit in Support of the Applicant's application for forfeiture, in proceedings in the Magistrate Court.

(iv) in considering the totality of the evidence, the Learned Deputy Chief Magistrate was lawfully entitled to take into consideration a previous conviction for dangerous drugs in coming to her decision to forfeit the said cash. The previous conviction of Possession of Dangerous Drugs which on the date of seizure of funds was not expunged as seven years had not expired. It therefore was not unreasonable for the magistrate to come to a negative inference when you include monies hidden in a gun safe to infer that the Appellant has a propensity of criminal conduct.

(v) Appellant's conviction in 2013 for Possession of Dangerous Drugs which at the date of seizure in 2016 was just over three (3) years and was not expunged (Rehabilitation of Offenders Act Section 4(2)(b) as amended). Reliance was also placed on the authority of Winston Pusey and Asset Recovery Agency 2012.

(vi) the Learned Deputy Chief Magistrate did not refer to the Appellant as a "criminal" but indicated that because of the circumstances in which the money was found, it was reasonable to infer a propensity of criminal conduct.

(vii) in accordance with section 59 of the Proceeds of Crime Act the Learned Deputy Chief Magistrate was correct in applying the civil standard of proof in the application for forfeiture, as the application is not a proceeding for an offence under the Act.

(viii) the Learned Deputy Chief Magistrate was entitled to find on a balance of probabilities, after considering the evidence for the Appellant and Respondent, that the cash seized and detained represented proceeds of criminal conduct, and or was intended to be used in criminal conduct. In considering the evidence the Learned Deputy Chief Magistrate was entitled to reject evidence by either party that she found on the balance of probability to be untrue.

(ix) in the circumstances of this case, it is more probable than not that: (a) the cash directly or indirectly represents any person's proceeds of, or benefit from criminal conduct or (b) was intended by any person for use in criminal conduct.

(x) in the case of Pusey, as in the present case, the court found at paragraph 35 of the Ruling, that the Appellant did not give a satisfactory explanation for the funds seized also taking into consideration his past criminal conduct.

(xi) during his Record of Interview, the Appellant refused to answer any questions with regard to the origin nor gave any explanation for the funds.

(xii) the Appellant's evidence that he kept the cash in his safe and bureau at home because there was no bank on Long Island (which was clearly false), was cause for suspicion, he being a person with so many alleged business interest. In these circumstances, the Learned Deputy Chief Magistrate properly took this into consideration in coming to her decision.

(xiii) the Appellant claimed that the confiscated sums were proceeds of his various businesses; further enquiries were made at the Business Licensing Section at the Department of Inland Revenue and revealed that Club Washington had an annual turnover of $18,500.00 for the years 2015 and 2016. This recorded figure is well below the figure which was seized from the Appellant midway through the year.

(xiv) in response to the Forensic Accounting Report of the Appellant, the Respondent also produced a Report of Forensic Analysis from Craig Underwood of Five Stone Intelligence which contradicts the report of the Appellant. Reliance placed on the case of ***Bujar Muneka wherein*** the court rejected the report of the accountant as not justifying an explanation for the cash seized.

(xv) the application for forfeiture is a civil matter and the Learned Deputy Chief Magistrate after hearing the totality of the evidence, properly came to the conclusion on the balance of probability, that the money seized was proceeds of criminal conduct, or was intended to be used in criminal conduct and thereby ordered forfeiture of the sums.

(xvi) the Prosecution need not prove that the seized funds were from any particular identifiable criminal conduct, and that it is permissible for a court to find from the facts and circumstances of the case, that the money had been obtained by unlawful conduct of some unspecified kind. Steven

Fletcher and Chief Constable of Leicestershire Constabulary relied upon. The court having found therein that the facts and circumstances of the finding of the money were sufficient to conclude that it was criminal property

(xvii) in accordance with section 47(2) an Order may be made under sub section (1), whether or not proceedings are brought against any person for an offence with which the case in question is connected.

(xviii) the police having lawfully entered the premises was legally mandated to seize anything that was either relevant to the matter for which they entered, or which implicated the Appellant in a crime.The crime in this case being that of possession of proceeds of crime/money laundering. Sections 41 and 42 (***Ghani v. Jones 1970 1 QB***)

(xix) the officers being lawfully on the premises, was thereafter entitled to seize and detain any cash, if the officers had reasonable grounds for suspecting that it directly or indirectly represented any person's proceeds of criminal conduct or was intended by any person for use in any criminal conduct.

(xx) the Learned Deputy Chief Magistrate nor officer Goodman ever stated that their reasonable suspicion was as a result of the Appellant having been convicted of a previous offence

(xxi) the Appellant provided information to give an explanation for the funds found in his possession. The Learned Deputy Chief Magistrate, after having heard all of the evidence, accepted the evidence produced by the Prosecution to support its contention that, on the balance of probabilities, the monies seized were proceeds of crime or were intended to be used in criminal conduct. She rejected the evidence provided by the Appellant as being inconsistent and unsupported by documentation to show the legitimacy of the sums seized.

(xxii) in a final effort to explain the cash seized, the Appellant has now produced for the purpose of this appeal, a"Forensic Accounting Report". This report purports to submit additional documentation that were not before the Learned Deputy Chief Magistrate.

(xxiii) The expert opinion of Mr. Craig Underwood, producer of the Respondent's Forensic Analysis report, found that the report of the Appellant was fundamentally flawed due to errors in methodology and an incredible lack of documentation to support findings

(xxiv) in the circumstances of this case, and the relevant authorities the Learned Deputy Chief Magistrate properly came to her decision to forfeit the seized funds and invite the court to affirm the decision and dismiss the appeal.

THE LAW

This Appeal is brought pursuant to section 47 (1) of **the Proceeds of Crime Act 2000, Chapter 93 (hereinafter "POCA 2000")**. It should be noted that this Act has since been repealed by the 2018 Act nevertheless given the provisions of section 20(e) of the **Interpretation and General Clauses Act** as detailed below, the 2000 Act will be followed:

> *"Where a written law repeals in whole or in part other written law, the repeal shall not —affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."*

Sections 46(1), (3), (5) and (6)of POCA 2000 state:

> *(1) A police officer may seize and detain, in accordance with this Part, any cash if the officer has reasonable grounds for suspecting that it directly or indirectly represents any person's proceeds of criminal conduct or is intended by any person for use in any criminal conduct and any such person shall be charged with being in possession of such cash.*
>
> *(3) Any order under subsection (2) shall 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 Stipendiary and Circuit Magistrate 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 but so that —*
>
> > *(a) no period of detention specified in such an order shall exceed three months beginning with the date of the order; and*

(b) the total period of detention shall not exceed two years from the date of the order under subsection (2).

(5) At any time while cash is detained by virtue of this section a Stipendiary and Circuit Magistrate may direct its release if satisfied -

(a) on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported that there are no, or are no longer, any such grounds for its detention as are mentioned in subsection (2); or

(b) on an application made by any other person, that detention of the cash is not for that or any other reason justified: Provided however that a police officer may release the cash before ninety-six hours if he is satisfied that its detention is no longer justified.

(6)If at a time when any cash is being detained by virtue of this section —

(a) an application for its forfeiture is made under section 47; or

(b)proceedings are instituted (whether in The Bahamas, or elsewhere) against any person for an offence with which the cash is connected,

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

Sections 47(1),(2), (3) and (4) of POCA 2000 provide that,

(1)A Stipendiary and Circuit Magistrate may make an order (a "forfeiture order") ordering the forfeiture of any cash which has been seized under section 46 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 criminal conduct.

(2) An order may be made under subsection (1) whether or not proceedings are brought against any person for an offense 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 thirty days beginning with the date on which it is made, appeal to the Supreme Court.

(4) An appeal under this section shall be by way of rehearing, and the Supreme Court may make such order as it considers appropriate and, in particular, may order the release of the cash (or any remaining cash) together with any accrued interest.

Section 59 of POCA 2000:

Any question of fact to be decided by the Supreme Court or the magistrate court in proceedings under this Act, except any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act, shall be decided on a balance of probabilities

Pursuant to section 46 The test laid out in the Act in relation to such matters indicates that the Applicant of funds seized must show that they, "*directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in criminal conduct.*" Further, in accordance with section 59 Lord Nicholls in **(Re H (Minors) [1996] AC 563 at 586)** explained that "*[t]he balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not*".

10. Section 47(1) of the Act makes it patently clear that any funds seized and detained pursuant to section 46, may be ordered forfeited if the court is satisfied on an application for forfeiture that the funds on a balance of probability in accordance with section 59 directly or indirectly represents any person's proceeds of or benefit from, or is intended by any person for use in criminal conduct. As such, the onus is on the **Respondent to show that the monies found in the Appellant's possession directly or indirectly represent proceeds of, benefit from, or was intended for use in criminal conduct**.

11. In the circumstances of the Appeal, this Court must now consider whether the sums seized, detained and ordered forfeited by the Deputy Chief Magistrate based on the evidence presented ought to remain forfeited or released to the Appellant.

12. The law does not require that the owner prove where the funds came from (although an explanation for same would be reasonably expected). It requires that the

Respondent on a balance of probability show a direct or indirect link between the funds and some criminal conduct although as stated by the Court of Appeal in Anwoir and others 2001 it is not necessary to show the precise type of crime for which the property was acquired if the circumstances are such as to give rise to an irresistible inference that it could only be derived from crime. It is necessary to evaluate the evidence as to the direct or indirect source of a person's proceeds or benefit from the money which they would have been found in possession of. Isabelle Moxey v C.O.P and Bapinder Sandler vs Chief Constable of West Midland Police 2019 EWHC considered.

13. The Appellant advanced that notwithstanding the execution of the search warrant, no stolen goods, dangerous drugs or firearms were found nor was he charged with being in possession of the said funds in accordance with section 46 of the Act.There must be a nexus between the funds and an offense and in this case, there was none.

14. The Respondent contended that on the basis of a previous drug conviction and the finding of the funds in the manner in which they were found together with the inconsistencies in the Appellant's explanation as to why the funds were in the safe, the lack of documentation to substantiate the source of the funds were sufficient for the Magistrate to find on a balance of probabilities that the funds directly or indirectly were the proceeds of, or benefit from or derived from criminal activity.

15. The Learned Deputy Magistrate in her Ruling noted that the Appellant's Affidavit in Response was rejected coupled with the inconsistencies in the amount he declared as income to Inland Revenue, unbelievable and undated information in relation to the sale of phone cards, the food store and funds paid to the Appellant by Constantakis together with his previous conviction of Possession of Dangerous Drugs which was not expunged at date of seizure of the funds, it was not unreasonable in the circumstances for the court to come to a negative inference together with the monies hidden in a bag in a gun safe that the Appellant has a propensity of criminal conduct.

16. The Learned Deputy Magistrate ultimately determined that having considered in its entirety the evidence and submissions of the Applicant and Respondent and the

relevant law bearing in mind that he who asserts must prove and must do so on a balance of probability, the court found judgment for the Applicant.

17. In the circumstances of this Appeal, this Court must now determine whether the sum seized, detained and ordered forfeited by the Magistrate based on the evidence presented ought to remain forfeited to the Crown or be released to the Appellant.

18. Contrary to what was advanced by the Appellant in relation to civil recovery of seized property pursuant to the Act, the court may exercise its powers in relation to any property including cash whether or not proceedings have been brought for an offense in connection with the property seized. Section 47(2) of The Act make this patently clear.

19. Whilst, the onus is on the Respondent to satisfy the court to the standard of proof referenced in section 46 of the Act in respect to the source or intended use of the funds, Moses J in Bujar Muneka v Commissioner of Customs & Excise 2005 stated: " in so far as it is suggested that it is incumbent upon the prosecution to identify the criminal activity, the source of the money or the criminal offense for which it is intended to use the money that, in my judgment is incorrect. All that has to be shown is that the source of the money was a criminal offense in the United Kingdom and that it was intended for a criminal use either in the United Kingdom or elsewhere." Winston Pusey vs Assets Recovery Agency 2012 3JMCA and Carol Angin vs United Kingdom Border Agency 2011 EWHC considered.

20. The pivotal question for the court to determine is whether the Appellant came into possession of a significant sum of money well in excess of his legitimate business operations and his capacity to save. And, the circumstances in which the funds were found, a reasonable inference could be made that it was sourced from criminal activity or intended for criminal activity - the money was being concealed in such a manner because it was illegitimate money obtained from some criminal origin unknown.

21. The Appellant has contended that the money seized and ultimately forfeited by the Magistrate was accumulated commingled funds, money derived from his and his family's legitimate business operations including but not limited to his Bar and Restaurant, fishing enterprise, bakery, phone cards and rental space. The businesses were primarily cash based businesses thus the reason for the existence of the large sum of money and the declining to almost non-existent banking system on the island.

Further that he had ceased banking with Scotia Bank since 2013 and had no other bank accounts at the material time.

22. The Court notes that this aspect of the Appellant's evidence is inconsistent with that of the Respondent as per the Affidavit of Renaldo Burrows filed on 19 November 2021.The Respondent's Exhibit RB1 clearly indicate that the Appellant held a Royal Bank account in Long Island. The statement covers the period 30 April 2016 - 29 July 2016. There was no reference nor acknowledgment of same by the Appellant whatsoever. The Appellant's evidence was that he had no bank account since 2013 when he ceased banking with Scotia Bank. Evidently, there were deposits as well as withdrawals on the Royal Bank Account in the name of the Appellant (which went unchallenged). Moreover, Royal Bank as per Exhibit RB2, (an article from The Tribune daily newspaper) the bank did not cease full service operations in Long Island until on or about April 2018 well after the time period which is material to the matter at hand.

23. Seemingly, the initial deterioration of the banking system based on the evidence adduced both by the Appellant and Respondent did not take effect until sometime in mid 2016 around the time the funds were seized from the Appellant. As such, contrary to what the Appellant has advanced either personally or through his attorney, banking systems were available on the island to permit the Appellant to deposit and withdraw money upward to April 2018. Notwithstanding, there may not have existed banking facilities to accommodate credit /debit card payments were sufficient to allow for the deposit of large sums of cash.

24. Whilst the Court fully appreciates that the Appellant was a licensed entrepreneur operating a restaurant and bar, fishing enterprises, a bakery co-owned with his mother these in and of themselves do not explain why the Appellant was in possession of such a large sum of money or its source. The mere existence of legitimate businesses do not equate to proof of funds said to be derived therefrom without more.

25. The Court has taken note of the content of the Forensic Audit Report of Mr. M.E Lockhart, Chartered Accountant in which he concluded that the funds seized from the Appellant on 15 June 2016 were from legal or legitimate services and do not represent proceeds or benefits of criminal conduct. Quite frankly the Court has no appreciation of the numbers reflected in the report nor how the figures were derived particularly, in the absence of credible and cogent information to substantiate same. In the Court's view, the data provided was insufficient to support the figures referenced in the report.

26. Reference was made to the purchase of a fishing vessel by the Appellant in 2015 which does not reflect the serial numbers of any of the two vessels said to be owned by the Appellant in the report i.e "Lil Blue" and "Big Blue"registered in 2017 and 2018 respectively. No other documentation was provided in connection therewith. The Appellant also produced in that report a letter from Paradise Games in respect of rental premises at a monthly rate of one thousand dollars ($1,000.00) indicating a business arrangement with the Appellant from April 2013 to December 2015. There was no indication as to the form of payment nor any indication otherwise to substantiate same. Suffice it to say, the business arrangement came to an end as of December 2015 and there is no indication as to a renewal of same.

27. The Forensic Report of Craig Underwood, Certified Anti- Money Laundering Specialist and Certified Fraud Examiner, a report that was produced for and on behalf of the Respondent, also questioned the methodology utilized by Mr. M.E.Lockhart in the production of the Appellant's report. The calculations it was advanced were presented in large part on assumptions, estimates or unsubstantiated data. There was no single unified explanation provided by the Appellant and those acting on his behalf regarding the source of sixty four thousand three hundred and twenty two dollars in seized currency.

28. Fully appreciating that the Appellant has nothing to prove as it is the Respondent who must do so on a balance of probability in keeping with the provisions of the Act, the circumstances in which the Appellant was found in possession of the quantity of seized cash, required an explanation as to how he came into possession of same. When initially questioned as to the source, the Appellant indicated it was from his business, a position he has pretty much maintained throughout. However, during his formal interview when more detailed questions were put to him, he declined to give any response, which certainly was his right so to do but one would have expected that if the funds were legitimate, the Appellant would have had no reservation in providing an explanation as to its source (at least an explanation of some kind would be reasonably expected). The general reference to licensed businesses without supporting information in respect to those business interests is not sufficient in the Court's view. A mere assertion of the existence of legitimate business operations without more will not suffice in the Court's view in circumstances where a large sum of money is found in a person's possession, an explanation is reasonably expected. There ought to be a paper trail or an alternative means to substantiate the legitimate source of the same.

29. The Court is also aware that the best business practices are not always employed by persons operating small to medium businesses within The Bahamas and even more

so on the family islands. Proper record keeping is known to be at a minimal to nil. Businesses are more often than not operated in the manner of a "tuck shop" concept - some what a cultural way of doing business. The island way of doing business is informal in many respects with legitimately operated businesses. The Court appreciates this but also is mindful, this lack of formality and proper record keeping can be an avenue for illegal businesses to so operate and crime to fester particularly when there is no alternative means to justify large sums of money found in the possession of an individual and there exist banking systems in which monies could be stored for safe keeping and which can be an alternative source of record keeping for monies derived from legitimate business operations.

30. Conversely, the storage or concealing of large sums of money in the manner utilized by the Appellant is neither good sense nor good business practice and such conduct could be regarded as an attempt to conceal proceeds of ill gotten gain as opposed to behavior consistent with the handling of legal and legitimate income particularly, in the absence of supporting documentation.

31. In Winston Pusey and Asset Recovery Agency (2012) JMCA at paragraph 28 the court stated:

(28) Commenting on the cases cited by counsel for the Director of Assets Recovery in Green (namely, Bassick, Nevin, Butt and Muneka Sullivan J stated at paragraphs 32 and 33:

"32 The decisions are no more than a reflection of the fact that in today's cashless society, the ordinary law abiding citizen does not normally have any need to keep large numbers of bank notes in his possession. It will almost always be safer (bearing in mind the risk of loss through accident or crime), more profitable (bearing in mind the opportunity to earn interest) and more convenient (bearing in mind the many other ways of paying for lawful goods and services) not to be in possession of a large sum of money in the form of bank notes.....

33 Just as the law abiding citizen normally has no need to keep large amounts of bank notes in his possession, so the criminal will find property in that particular from convenient as an untraceable means of funding crime.....the four decisions do no more than recognize that conduct consisting in the mere fact of having a very large sum of cash in the form of bank notes in one's possession in certain circumstances (eg at airports) may well provide reasonable grounds for suspicion and demand an answer."

At paragraph 34 Sullivan J went on to expound that the circumstances in which the cash was found may well be sufficient to require an explanation because for example without an explanation, "the large amount of cash is being unnecessarily exposed to the risks necessarily inherent in transit and or in being transported to a particular destination and or is being transported in a particular manner." He accepted the argument that although the burden of proof on a balance of probabilities rested throughout on the Director of the Assets Recovery Agency, facts may be proved by inference and the absence of (or an untrue) explanation where one is called for, may be sufficient to discharge that burden."

32. The Appellant's assertion that the money found in his possession was derived from legitimate(primarily) cash operated businesses and was co mingled funds saved by him and other family members due to a declining almost non-existent banking system was not sufficiently verified by the documentation submitted or otherwise. Further, there was evidence to the contrary as to the existence of both Scotia and Royal Bank of Canada doing business on the island. And, that the Appellant operated a Royal Bank of Canada account in which funds were deposited and withdrawn and which was in existence during the material time (which was not addressed at all by the Appellant). The question is why wasn't this facility being utilized by the Appellant for the securing of the seized funds.

33. The issue for the Deputy Chief Magistrate was whether the Respondent had proved that the seized funds were obtained through unlawful conduct or intended for same. In this regard, this Court is of the view, that the Magistrate was well within her right to infer from the circumstances of the finding, the Appellant's unwillingness to provide detailed or significant information as to the source of the funds when interviewed, the vague documentation presented to support the source, his refusal to utilize available banking facilities for the purpose of depositing such a large sum for safe keeping when he had an active R.B.C account and the Appellant's drug conviction which had not been expunged at the time of the proceedings for forfeiture that the funds seized were derived either from criminal conduct or intended for same on a balance of probability. These were all valid factors taken into consideration by the Magistrate. Matter of factly, the Appellant's evasiveness or refusal to answer pertinent questions during the initial stage of the investigation in an attempt to determine if he had a legitimate basis for the funds could very well be viewed as strengthening the Respondent's suspicion as to its source or intended use. The explanation he did proffer was clearly rejected by the Magistrate and the Respondent's assertions that the seized funds were the source of criminal activity or intended for same, accepted. Bassick and Osborne vs.Commissioner of Customs and Excise 1993 and Nevin vs Customs and Excise1995 considered.

34. In the circumstances of this case, the Court having given careful consideration to the Affidavits of the Appellant and Respondent, the submissions, the relevant law and the referenced authorities, this Appeal is dismissed and the Court affirms the learned Deputy Chief Magistrate's Order made on 26 September 2018 that the cash in the amount of $62,342.00, be forfeited to the Crown.

Dated the 30th Day of November 2022

JUSTICE