

LAW REPORTS

*Note: These Reports are cited thus —
(1979) Gib. L.R.*

ATTORNEY GENERAL v. VINALES

Supreme Court (in chambers)
Spry, C. J.,
30 October 1979

*Crime — proceeds of — whether court should allow dissipation
pending criminal proceedings*

*Crime — forfeiture order — Misuse of Drugs Ordinance, 1973,
s.20*

*Public policy — whether justified injunction freezing bank
account believed to contain proceeds of offences against Misuse
of Drugs Ordinance, 1973.*

Several *ex parte* injunctions were issued inter alia freezing the moneys in certain bank accounts (see *Barclays Bank International Ltd. v. Attorney General* (1979) Gib. L.R. 53, to which reference was made in the argument).

An application was made for the injunctions to be set aside so far as they froze those moneys.

HELD: (i) A person who receives money in return for unlawfully supplying controlled drugs has the property in that money.

(ii) Section 20 of the Misuse of Drugs Ordinance, 1973, (Ord. 6 of 1973) permits a court to order the forfeiture of moneys but does not affect the ownership of such moneys until an order is made.

(iii) An order under s.20 may be made in respect of money which is not and has not been in the possession of the person convicted.

(iv) The court is entitled on the ground of public policy, pending the bringing of criminal charges, to impound property

which there is strong reason to believe to be the proceeds of crime and liable to forfeiture, provided that charges are brought without undue delay.

(v) In deciding whether to invoke public policy, the public need must be weighed against the deprivation the individual will suffer and the greater the crime, the more the scales will tilt in favour of the public interest.

Cases referred to in the order

Malone v. Commissioner of Police of the Metropolis [1979]

1 All E.R. 256

Gordon v. Chief Commissioner of Metropolitan Police [1910]

2 K.B. 1080

Richardson v. Mellish (1824) 2 Bing. 229

Holman v. Johnson (1775) 1 Cowp. 341

Ambicable Society etc. v. Bolland (Fauntleroy's case) (1830)

5 E.R. 70

Beresford v. Royal Insurance Co. Ltd. [1938] 2 All E.R. 602

Cleaver v. Mutual Reserve Fund Life Association [1892]

1 Q.B. 147

In the Estate of Crippen [1911] P.108

Summons

This was an application by summons for the partial discharge of several interim ex parte injunctions.

Sir Joshua Hassan, Q.C., and H. J. M. Levy for the applicants
C. Finch for the Attorney General

5 November 1979: The following order was read—

This is an application for the discharge of five injunctions, which operated to freeze certain accounts at Galliano's Bank, Barclays Bank International Ltd., the Algemene Bank and the Banque de l'Indo-Chine et de Suez and to preserve the records of those accounts. The basis of the injunctions was that there was strong prima facie evidence that the funds in the accounts were the proceeds of offences against the Misuse of Drugs Ordinance, 1973. Six customers of the banks are affected.

At the beginning of the hearing, Sir Joshua Hassan, Q.C., who appeared for the applicants, indicated that he did not wish to

pursue the application at this stage so far as it was made on behalf of one of the applicants, Ambrosio Vifiales. Later, by consent, I lifted the injunctions so far as they operated to freeze eight accounts. In the event, I am only required to consider two accounts, both at Galliano's Bank, one in the name of Edward Mario Victory (commonly known as Edward Victory) and the other in the names of Edward L. Victory and/or Dorothy A. Aleman. Moreover, Sir Joshua conceded that the injunctions should remain in force so far as they operate to preserve the records of the banks concerned, and he only sought their discharge so far as they freeze the funds in the accounts.

Counsel were in agreement that there is no reported case on all fours with the present proceedings. Sir Joshua relied very largely on the judgments in *Malone v. Commissioner of Police of the Metropolis* (1). That was a case where the police searched the house of a man suspected of handling stolen goods and seized property, including a large sum in banknotes. He was charged with handling but no charge was laid relating to the banknotes. On the contrary, it was admitted that they were the property of the accused. The police claimed to be entitled to retain them, either for production as evidence or because they might be the subject of a compensation, restitution or forfeiture order. It was held that there was no power to hold property in anticipation of the possibility of such an order. The retention of the money as evidence was held to be justified.

Sir Joshua stressed that his clients had not acted precipitately but had allowed time for investigation. At the end of a month, none of them had been charged with any offence. It was not necessary to freeze the bank accounts for evidence of payments in and out, and there was no power in the court or the police to retain money, not alleged to be stolen, and so deprive the owners of the use of it. He claimed that the injunctions were an infringement of the rights of his clients, made without authority or justification. He also put on record certain procedural irregularities with which it is unnecessary to deal now.

Mr Finch, who appeared for the Attorney General, opposed the application. He relied on an affidavit by a police officer as showing very strong grounds for suspecting that large sums of money, being the proceeds of sales of controlled drugs, had passed through the two accounts with which I am concerned.

(1) [1979] 1 All E.R. 256.

The accounts contain relatively small credits (£10,597.01 and £2,103.35 respectively) but the principles involved are of the greatest public importance and may apply to other accounts, with much larger credits, said to amount to about £750,000, arising out of or related to the same alleged offences.

Mr Finch submitted that *Malone's* case could be distinguished. He referred to a passage in the judgment of Stephenson, L.J., which reads

"The common law can develop in many ways, but I would accept it as clear law that, generally speaking, the right or power to deprive a defendant of his property even for a time, whether in criminal or in civil proceedings, for the purpose of punishing him by forfeiture or compensating the victim of his wrongdoing by any form of restitution can only be conferred by express and unambiguous statutory provisions."

Mr Finch claimed that the Attorney General was seeking neither punishment nor compensation. There was no question of compensation and Mr Finch argued that if it could be shown that property was the proceeds of crime, its forfeiture was not punishment.

In the course of his argument, Mr Finch referred to the fact that stolen property can be seized and he submitted that no person in possession of the proceeds of crime has an absolute title to it. I know of no authority to support the latter proposition. There is some authority to the contrary in *Gordon v Chief Commissioner of Metropolitan Police* (1). Dealing with money obtained unlawfully in the course of street betting and seized by the police, Fletcher Moulton, L.J., after saying that there was no forfeiture under the relevant Act, observed obiter,

"the property in the coins having passed out of the payer by his own voluntary act of payment, that property must be in the receiver, and whatever punishments and liabilities he may incur through his wrongful action in frequenting the streets for the purpose of betting, there is nothing that affects the property in the money received by him."

(1) [1910] 2 K.B. 1080, at p.1095.

I think it is essential to appreciate the difference between stolen property, of which the thief never acquires ownership, and money acquired in other illegal enterprises, which is the property of the offender, unless and until it is ordered to be forfeited or returned. In the present case, the moneys may have been obtained unlawfully by the supply of controlled drugs, but I do not think that affects the property in them: s. 20 of the Misuse of Drugs Ordinance, 1973, permits a court to order forfeiture, but there is no automatic forfeiture. If I am right in this, the forfeiture of the money might contain at least an element of punishment, if the person from whom it is taken is the offender.

In *Malone's* case, both Stephenson, L.J., and Roskill, L.J., were emphatic that it was for the legislature, not the courts, to create any new power to deprive a person, even temporarily, of his property but they were dealing, as their judgments make clear, with money which was not the proceeds of crime and not the subject of any charge. That is, I think, a valid reason for distinguishing the case.

There is, of course, another difference, in that *Malone's* case was concerned with police powers while I am concerned with the powers of the Supreme Court, but I think that is a superficial difference and does not affect the underlying philosophy.

It is not, I think, irrelevant to note at this point that what was contemplated in *Malone's* case was the possibility of a forfeiture order under s.43 of the Powers of Criminal Courts Act 1973, which in certain circumstances allows the forfeiture of property which was in the possession of the offender at the time of his apprehension. The possible order of forfeiture with which this court is concerned is that under s.20 of the Misuse of Drugs Ordinance, 1973, which, when a person is convicted of an offence under the Ordinance, allows the court to make a forfeiture order in respect of "anything shown to the satisfaction of the court to relate to the offence", after giving any person who claims to be the owner an opportunity to show cause to the contrary. Under this section, it is clear that the property need not be or have been in the possession of the offender, and in such a case the order is more of the nature of an order in rem. What is in issue at this stage, therefore, is not whether there are reasonable grounds for believing the applicants, or any of them, to have been guilty of an offence but whether there are reasonable grounds for believing that an offence has

been committed and for believing that the bank credits represent the proceeds of that offence.

Mr Finch also submitted that *Malone's* case could be distinguished in that there was no suggestion in that case that the money seized was proceeds of crime, whereas here it is specifically alleged. In the final analysis, Mr Finch's argument was based on the simple proposition that no-one should be allowed to enjoy the proceeds of crime and that no court should permit the proceeds of crime to be dissipated, as would very probably happen if the accounts were unfrozen. It is this argument that has given me the greatest difficulty. Although Mr Finch did not use the words, what is implicit in his argument is public policy.

I approach this subject bearing in mind what Burrough, J., said (1), in a different context, of public policy. that

“it is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail.”

There is a wealth of authority for saying that the courts will not help a man to recover the proceeds of crime. The principle was put simply in *Holman v. Johnson* (2) by Lord Mansfield

“No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.”

The two main lines of cases descend from a common ancestor, generally known as *Fauntleroy's* case (3). *Fauntleroy* was convicted of forgery, sentenced to death and executed. He had earlier taken out a policy of life assurance, but persons claiming through him were unable to recover, because it was held that he had brought his death on himself by his act of felony. In argument, it was said to be

“against the general policy of the law, as well as established principles, that either the insured, or those claiming in his right, should recover for a loss caused solely by the criminal act of the insured himself.”

(1) In *Richardson v. Mellish* (1824) 2 Bing. 229, at p. 252.

(2) (1775) 1 Cowp. 341.

(3) *Amicable Society etc., v. Bolland* (1830) 5 E.R. 70.

What may be termed the direct line of descent is the series of cases in which it was held that persons claiming through a suicide could not recover under policies of insurance. Of many cases, it will suffice to cite *Beresford v. Royal Insurance Co. Ltd.* (1), in which Lord Atkin said:

"I think that the principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime, whether under a contract or under a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime, or remove a restraint to crime, and that its effect is to act as a deterrent to crime, but apart from these considerations, the absolute rule is that the courts will not recognise a benefit accruing to a criminal from his crime."

The other line of cases concerns the estates of people who have been killed unlawfully. The two classic cases are *Cleaver v. Mutual Reserve Fund Life Association* (2) and *In the Estate of Crippen* (3). *Cleaver's* case seems to have been the first in which it was clearly laid down on the basis of public policy that neither a murderer nor anyone claiming through him could recover any benefit from the estate of the deceased. Lord Esher, M.R., in the course of his judgment said

"That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy."

Later, he said that if the criminal made a claim on the executors of the murdered person

"they may then vouch the doctrine of public policy, and may say that by reason of it such person has forfeited his or her right to the money."

In *Crippen's* case, Sir Samuel Evans, P., said

"It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime....."

(1) [1938] 2 All E.R. 602, at p. 607.

(2) [1892] 1 Q.B. 147.

(3) [1911] P. 108.

The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."

These cases are of no direct help in the present proceedings, because they are all cases where the offender, or persons claiming through him, instituted the proceedings, while here it is not the applicants but the Attorney General who is seeking the aid of the court. The court will, of course, always aid a person to recover property of which he has been deprived by a criminal act, such as fraud; here the alleged criminal acts deprived no one of any property but, if the allegations are true, the persons who engaged in the illicit traffic in drugs have become unjustly enriched. It is this situation that does not seem to have been considered in any reported decision.

It will, however, be noted that both Lord Esher, in *Cleaver's* case, and Lord Atkin, in *Beresford's* case, go beyond the basic rule that the courts will not aid the criminal and propound, no doubt obiter, a wider doctrine, which is, in effect, that public policy demands that the criminal shall not benefit by his crime. If that is correct, and I do not doubt it, then this court would, in my opinion, be failing in its duty if it did not impound property which it has strong reason to believe to be the proceeds of crime and liable to forfeiture, until such time as criminal charges can be tried, provided, of course, that they are brought without undue delay. This would not prevent anyone claiming the property, at any time and without waiting for the criminal proceedings, from showing good cause why the order should be set aside, in other words, from showing a good title to the property. If necessary, I would be prepared to invoke the inherent jurisdiction of the court to prevent the dispersal of property which appears to be the proceeds of crime, pending substantive proceedings, because it is obvious that very large sums of money illegally obtained will disappear unless the court acts.

Sir Joshua asked me not to be "dazzled" by the very large sums of money that have been mentioned. The cannabis seized in England was said to be worth £30m; £3m is said to have been transferred to Gibraltar and it is said that there is £750,000 in frozen accounts. I think I must have regard to these figures. In deciding whether or not to invoke public policy, it is necessary to balance the public need against the deprivation which the applicants will suffer. The greater the seriousness and the

scale of the alleged crime, the more the scales must tilt in favour of the public interest, and here the alleged crime was a very grave one and the operation would seem to have been on a vast scale.

Roskill, L.J., said, in *Malone's* case

"It is the duty of the courts to protect the freedom and property of the individual against arbitrary action by the executive, whatever the form which the particular action may take. But the courts, when performing that duty, must always have in mind that the administration of justice must not be hampered and that from time to time the rights of individuals have to yield to a wider public interest which requires the abridgment of individual rights."

I think this is such a case.

My conclusions are

- (i) that there is no justification for freezing a person's bank account merely because it is believed that he has been guilty of an offence under the Misuse of Drugs Ordinance, 1973; but
- (ii) that there is justification, in an appropriate case, on grounds of public policy, for freezing an account the funds in which are reasonably suspected of being the proceeds of transactions in controlled drugs in breach of the Ordinance.

I think, therefore, that Sir Joshua's application must fail. It is unnecessary to consider the evidence, on which I heard no argument. I would only remark that in my opinion the evidence to justify depriving a person of his right to deal with his property as he pleases must be very clear and very particular.

I said earlier that property should only be impounded pending criminal proceedings provided they are brought without undue delay. I think the injunctions should have been limited in time, with liberty to apply, and should now be so limited. I will hear counsel on the appropriate period. Subject to this, the application is dismissed.