[1988–90 Gib LR 260]

PRESCOTT v. VINET

SUPREME COURT (Kneller, C.J.): June 12th, 1990

Constitutional Law—fundamental rights and freedoms—protection of property rights—right to security of property in s.6 of Constitution not infringed by forfeiture of vehicle used in commission of offence—court may order forfeiture of anything relating to commission of offence—offender to be given opportunity to be heard before order made

Courts—magistrates' court—jurisdiction—expiry of jurisdiction—magistrates' court's jurisdiction to vary sentence expires after end of day on which passed—court then functus officio

Jurisprudence—natural justice—opportunity to be heard—accused to be given opportunity to be heard before forfeiture order made

Sentencing—forfeiture of goods—drugs—right to security of property in s.6 of Constitution not infringed by forfeiture order—court may order forfeiture of anything relating to commission of offence—offender to be given opportunity to be heard before order made—forfeiture order to state what to be done with property forfeited—no order to be made if undue hardship or if object not used in offence to which conviction relates

Sentencing—forfeiture of vehicle—supply of drugs—right to security of property in s.6 of Constitution not infringed by forfeiture order—court may order forfeiture of anything relating to commission of offence—offender to be given opportunity to be heard before order made—forfeiture order to state what to be done with property forfeited—no order to be made if undue hardship or if vehicle not used in offence to which conviction relates

The appellant was charged in the magistrates' court with possession of cannabis resin with intent to supply.

The appellant was stopped by the police in the street close to his parked car, and his person, his house and his car were searched. As a result, 52.2g. of cannabis resin was found, of which 16.5g. was hidden behind the dashboard of the car. He was convicted of possession of the cannabis with intent to supply and sentenced to two months' imprisonment, together with the forfeiture of the car, which the appellant had on hire-purchase

from Prescott Ltd., although he was not asked to show cause why the car should not be forfeited until a later hearing.

The appellant, appealing against the forfeiture of the car, but not against the conviction or sentence, submitted that (a) the Stipendiary Magistrate lacked jurisdiction to order the forfeiture, or that in so ordering he acted in excess of his jurisdiction; (b) the car was not related to the offence, and so ought not to have been forfeited; (c) the order of forfeiture was disproportionate to the gravity of the offence, as only 16.5g. out of the 52.2g. was found in the car; (d) the forfeiture caused undue hardship to the appellant (who still had £2,000 left to pay in hire-purchase instalments on the car) and to Prescott Ltd., the car's owner; (e) the sentence of two months' imprisonment was sufficient punishment; and (f) the Crown had not sought a forfeiture order at trial, and had led no evidence with regard to it.

The Crown submitted in reply that (a) the Stipendiary Magistrate had jurisdiction to order the forfeiture of the car under the Criminal Procedure Ordinance, s.278; (b) the cannabis resin had been concealed in the car and could not be accessed without considerable effort, and therefore the car was clearly used in the commission of the offence; and (c) the forfeiture order was not disproportionate or excessive.

Held, allowing the appeal:

(1) The Stipendiary Magistrate had exceeded his jurisdiction to make a forfeiture order as part of the sentence, as he had not given the appellant an opportunity to show cause why the order should not be made before making it. The Stipendiary Magistrate and the Justices of the Peace did not have jurisdiction to vary a sentence made after the end of the day on which it was passed. While the present court might not have imposed a forfeiture order in this case, given the appellant's lack of prior convictions and the fact that he had lost his job as a result of his conviction, the Magistrate had a discretion to exercise, which he did in a judicial manner; but for his lack of jurisdiction in ordering the forfeiture of the car, his order would not have been set aside as it had in all the other circumstances been fairly made (para. 28; paras. 31–34).

(2) Forfeiture of property as a consequence of a breach of law did not infringe the appellant's constitutional rights to security of property; the court had jurisdiction to order the forfeiture of anything relating to the commission of an offence, provided that the offender was given an opportunity to show cause why a forfeiture order should not be made. Forfeiture of property situated abroad could not, however, be ordered by Gibraltar courts, for jurisdictional reasons. Forfeiture orders should state what was to be done with the property forfeited, indicating whether it should be destroyed or in what other manner it should be dealt with. A forfeiture order should not be made if it would cause undue hardship to the offender, nor could the forfeiture of something that might be used to commit future offences be ordered if it had not been used in the offence to which the conviction related (*e.g.* a drug dealer's working capital, which

he might use to purchase drugs in future, could not be the subject of a forfeiture order) (paras. 18–19; paras. 21–24).

Cases cited:
(1) *R.* v. *Boothe* (1987), 9 Cr. App. R. (S.) 8; [1987] Crim. L.R. 347, applied.
(2) *R.* v. *Bucholz*, Divisional Ct., May 10th, 1974, unreported, applied.
(3) *R.* v. *Churcher* (1986), 8 Cr. App. R. (S.) 94, applied.
(4) *R.* v. *Cuthbertson*, [1981] A.C. 470; [1980] 3 W.L.R. 89; [1980] 2 All E.R. 401; (1980), 71 Cr. App. R. 148, applied.
(5) *R.* v. *Llewellyn* (1985), 7 Cr. App. R. (S.) 225; [1985] Crim. L.R. 750, observations of Stuart-Smith, J. applied.
(6) *R.* v. *Menocal*, [1980] A.C. 598; [1979] 2 W.L.R. 876; [1979] 2 All E.R. 510; (1979), 69 Cr. App. R. 148; [1979] Crim. L.R. 651, observations of Orr, L.J. applied.
(7) *R.* v. *Morgan*, [1977] Crim. L.R. 488, applied.
(8) *R.* v. *Simms* (1987), 9 Cr. App. R. (S.) 417; [1988] Crim. L.R. 186, applied.
(9) *R.* v. *Tavernor*, [1976] RTR 242, applied.

Legislation construed:
Drugs (Misuse) Ordinance (1984 Edition), s.20(1):
> "Subject to subsection (2) the court, by or before which a person is convicted of an offence against this Ordinance, may order anything shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order."

s.20(2): The relevant terms of this sub-section are set out at para. 19.

M. Isola for the appellant;
J.M.P. Nuñez, *Crown Counsel*, for the respondent.

1 **KNELLER, C.J.:** Stephen Paul Prescott, the appellant, asks this court to set aside the order of forfeiture of his motor vehicle, Registration No. G51871, made on May 24th, 1989 by the learned Stipendiary Magistrate.

2 The appellant was convicted and sentenced to two months' imprisonment on March 9th, 1989 for being in unlawful possession of 52.2g. of cannabis resin with intent to supply, contrary to the Drugs (Misuse) Ordinance, ss. 6(1) and 7(3). His final grounds of appeal are, in brief, that: (a) the Stipendiary Magistrate lacked jurisdiction to order the forfeiture of the vehicle, or that he exceeded his jurisdiction in doing so; (b) the motor vehicle was not related to the offence; and (c) the order of forfeiture was disproportionate to the offence. Detective Const. 145 Louis Vinet, the respondent, supports the order.

3 The appellant was charged with three counts: (a) unlawful possession of 52.2g. of cannabis resin with intent to supply; (b) unlawful possession

of 52.2g. of cannabis resin; and (c) unlawful possession of 4.03g. of cannabis resin. He pleaded guilty to the two counts of unlawful possession for which on conviction no penalty was imposed. The appellant did not appeal against the conviction or the sentence.

4 The evidence for the respondent was that he was waiting behind a parked car in Sir Herbert Miles Road at 6.30 a.m. He saw Det. Insp. Rodriguez call the appellant over to his car where he identified himself and said that he suspected that the appellant was in possession of drugs with intent to supply, and the appellant did not reply.

5 The police and the police dog went with the appellant to his house. The police had a search warrant. They discovered in his house some more cannabis resin. Then they searched his car, and the dog sniffed out two pieces of cannabis resin wrapped in cellophane behind the console. These two pieces together weighed 16.5g. The appellant said that all this cannabis resin was for his own use. It was a large amount, but he purchased it for £50 from a Moroccan to enjoy over the Christmas holidays. He smoked 4–5g. per day.

6 The respondent alleged that cannabis resin cost £2 or £3 per gram in Gibraltar, so the 52.2g. would be worth £104.40, and the 16.5g. in the appellant's car £33 or so.

7 The record gives the following timetable for the progress of this matter:

December 13th, 1988	Offence occurred.
March 9th, 1989	Appellant convicted. Forfeiture order made against appellant.
March 16th, 1989	First notice of appeal filed.
April 4th, 1989	"Owner" required to show cause before Stipendiary Magistrate. The record does not show what happened.
April 20th, 1989	The appeal came on for hearing before Alcantara, A.J., who adjourned it because the court record indicated that the forfeiture order had not been made, and the appellant had not been given an opportunity to show cause why it should not be made.
May 15th, 1989	The appellant and owner showed cause. They did not take the point that the Magistrate had no jurisdiction to make the order. The Attorney-General did not ask for such an order, and said that it would be inappropriate to make one.

May 24th, 1989	The Magistrate delivered his ruling and refused to vary the order which he had made against the appellant on March 9th, which was that the vehicle should be forfeited.
May 31st, 1989	Second notice of appeal filed. Appellant applied for legal aid.
September 1989	Certificate for legal aid granted.

8 At the conclusion of the trial, according to the record, the Magistrate said:

> "It is a serious offence[, calling for] two months' imprisonment. I take it [that] the supplying is from the car. [The defendant] . . . ought to forfeit the car. I have to give time to the owner to show cause why the car should not be forfeited.
>
> For the two counts of possession [there will be] no further penalty. You have the right to appeal."

9 The appellant's counsel saw the learned Magistrate in chambers on April 20th, 1990 and was told by the Magistrate that he had made the forfeiture order on March 9th, 1989. This would seem to be confirmed by the first line of his ruling which includes the sentence "I am not disposed to alter the order [that] I made at the time of conviction, namely to forfeit the car." I find, therefore, that the order to forfeit the car was made at the time of conviction, namely, on March 9th, 1989.

10 The appellant was called upon to show cause why the car should not be forfeited on May 15th, 1989, as I have said. His counsel, who had not represented him at the trial, submitted that the learned Magistrate should not make such an order of forfeiture because—

(a) the Crown led no evidence to justify a forfeiture, and so his counsel at the trial had not cross-examined on that point;

(b) only 16.5g. out of the 52.2g. was found in the car;

(c) the car was not related to the offence; and

(d) the sentence of two months' imprisonment was sufficient punishment.

11 Expanding on each, he pointed out that the Crown had not asked for the forfeiture order; that the 16.5g. indicated that the cannabis in the car was for the appellant's own consumption; that there was no connection between the car and the offence because the car was not used to supply the cannabis; and that to add forfeiture of the car to the term of imprisonment was to impose a manifestly excessive sentence in all the circumstances.

12 The appellant's counsel informed the learned Stipendiary Magistrate that the vehicle was a fairly new Fiat Regata 100, valued at the time of

purchase at £6,500, which was bought on hire-purchase terms, with the appellant's previous car (worth £2,000) being taken in part-exchange. The appellant still had £2,000 to pay in instalments at the beginning of April 1989.

13 Mr. Francis Felices, an accountant employed by Prescott Ltd., testified that on September 24th, 1986, the appellant hired the Regata from it for instalments of £129.32 per month, and that at the end of 4 years, once the instalments had been paid, the vehicle would be sold to the appellant for £2. He confirmed that 25 of the 48 instalments had been paid.

14 Prescott Ltd., which was the car's owner and was to remain so until the appellant had paid off all the instalments and £2 as the sale price, was represented in court by counsel who submitted that an order of forfeiture should not be made because that would cause hardship to the appellant and to the company. Prescott Ltd. would have to file suit for £2,000 against the appellant, and that action might not be heard until some time in 1992.

15 The Senior Crown Counsel submitted that the 16.5g. was not only in the car but was also concealed in it, and that the car was therefore used in the commission of the offence, namely, being in unlawful possession of cannabis with intent to supply. He went on to say that the prosecution did not, however, ask for the car to be forfeited and never thought it proper that it should be.

16 When the learned Stipendiary Magistrate gave his ruling on May 24th, 1989, he found that the 16.5g. of cannabis was hidden in the car and that the car was related to the offence. He interpreted Senior Crown Counsel's submissions to amount to the suggestion that the cannabis was not to be distributed from the car and that the car was analogous to a pocket in which an offender might conceal drugs for his own use. The learned Stipendiary Magistrate was sure that the cannabis was hidden in the car and that the car was used as transport to facilitate its distribution. He agreed that this was a minor case, but that forfeiture was one way in which drug traffickers might be made to disgorge their gains and the wherewithal by which they had made them. The fact that the appellant had no relevant previous convictions for drugs did not in the circumstances impress him.

17 I am indebted to counsel in this appeal for their helpful submissions on what the law is and, without going into them in great detail, I will now set out what in my view the law should be in cases relating to forfeitures under the Drugs (Misuse) Ordinance and other laws in Gibraltar. It is as follows.

18 The forfeiture of the vehicle in consequence of a breach of law does not contravene the fundamental right of the offender's protection from being deprived of his property: s.6(4) of the Constitution of Gibraltar.

19 The court by or before which a person is convicted of an offence

against the Drugs (Misuse) Ordinance may order anything shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order. The Drugs (Misuse) Ordinance, s.20(2) provides that—

> "the court shall not order anything to be forfeited under this section, where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made."

This is in the same terms as s.27 of the Misuse of Drugs Act 1971, so English decisions on that section will be persuasive when dealing with s.20 under the Ordinance. The words of that section are clear and must be strictly interpreted: *R.* v. *Llewellyn* (5) (7 Cr. App. R. (S.) at 227, *per* Stuart-Smith, J.); *R.* v. *Simms* (8).

20 An order for forfeiture by the magistrates' court is included in the term "sentence" and an appeal from it is made without leave to the Supreme Court: Criminal Procedure Ordinance, s.278.

21 It is a penalty and such an order must not be made in the absence of a finding or an admission that it is a thing related to the offence and in all the circumstances such an order of forfeiture should be made: *R.* v. *Cuthbertson* (4).

22 Power to order forfeiture in drug offences is valuable and should be used in appropriate cases. Proper investigations must be made to ensure the provisions of the statute are fulfilled. These include giving the person claiming to be the owner or otherwise interested in the thing likely to be forfeited a proper opportunity to establish that the court should not be satisfied that the thing related to the offence: *R.* v. *Churcher* (3).

23 The tangible thing must be within the jurisdiction of the Gibraltar court: *Cuthbertson*. Gibraltar courts have no jurisdiction either in a criminal or a civil matter to make orders purporting *ipso jure* to transfer movable property situated abroad.

24 An order depriving an offender of his rights in the property should not be made where it will subject the offender to undue hardship, *e.g.* if the appellant is deprived of his rights in a car in which the drugs are found but in which he has invested part of his compensation for his physical disability consequent upon an accident, and the car is a means of getting around because he is handicapped by his injuries: *R.* v. *Tavernor* (9); *R.* v. *Bucholz* (2); *Current Sentencing Practice*, para. J4–4B. A forfeiture under the Drugs (Misuse) Ordinance, s.20 can never have been intended by the legislature to serve as a means of stripping the offender of the total profit of his unlawful enterprise: *R.* v. *Cuthbertson* (4).

25 Forfeiture of a BMW saloon owned by the appellant convicted of

possessing a controlled drug with intent to supply was upheld by the Court of Appeal in *R.* v. *Boothe* (1), where 106g. of a substance containing 88% cocaine and 4.853g. of a substance containing 94% was taped to the underside of one of the seats of the car. This was under the Criminal Courts Act 1973, s.43.

26 It is not sufficient to show that the thing forfeited will be used to commit offences in the future, *e.g.* £393 working capital for future trade in drugs. It would be possible to make an order for forfeiture of cash ready to be or having just been handed over for drugs involved in the offence. In *R.* v. *Morgan* (7), the defendant was convicted of being in unlawful possession of drugs with intent to supply. He was going to sell them, but would not need the £369 cash to do so. It was thus not related to the offence.

27 Forfeiture is part of the sentence of a Crown Court. The Courts Act 1971, s.11 applies to it, so it cannot be varied and it cannot be added to a sentence outside the 28 days allowed by s.11(2) of that act: *R.* v. *Menocal* (6) (69 Cr. App. R. at 156, *per* Orr, L.J.).

28 This does not affect the law here, which is that the Stipendiary Magistrate and/or the Justices of the Peace may not vary or add to a sentence after the end of the day. They become *functi officio*. It is different for the Supreme Court, which can vary or add to a sentence before the end of the Sessions.

29 The learned Stipendiary Magistrate found at the end of the trial that the appellant was in unlawful possession of a controlled drug, namely, cannabis resin. Two pieces of this cannabis resin were wrapped in cellophane and were behind the cassette player in the dashboard of this Fiat Regata. The car was registered in his name and under his control.

30 At the end of all the evidence for and against the appellant, the learned Stipendiary Magistrate found that the appellant was in unlawful possession of that cannabis in his house and his car with intent to supply it. There is no appeal against that conviction.

31 He went on to make an order for the forfeiture of the car on the same day, March 9th, 1989. The order should have indicated if it were to be destroyed or in what other manner it should be dealt with. He did not on that date give the appellant an opportunity to show cause why he should not make such an order. At the end of the proceedings in his court for the day he became *functus officio*, and could not vary or add to the sentence of two months' imprisonment and the forfeiture order which he had passed. The order of forfeiture was made without jurisdiction. The consequence is that the appeal must be allowed and the order for forfeiture set aside, and the Fiat Regata must be returned to the defendant.

32 Should this court be wrong in making that order and the learned Stipendiary Magistrate was not *functus officio* and, in fact, was capable of

dealing with the matter of forfeiture again on May 15th and 24th, and of refusing to vary his order, then the view of this court is that in all the circumstances he was right to find that the vehicle was related to the offence. The learned Magistrate is very experienced and he knows the people and the area of Gibraltar well. The cannabis resin was wrapped in cellophane and behind the console which had to be dismantled to get at it. The area where it was found would be taken into account by the Magistrate. He saw the witnesses and the appellant, which was an advantage denied to this court. It would not be right, in the absence of any finding that he took into account something that he ought not to have taken into account or forgot to consider something that he ought to have considered, for this court to replace his finding with that of its own.

33 When it comes to the matter of sentence, although this court might not have imposed a forfeiture order in the circumstances since the amount in the vehicle was a small proportion of the total, the appellant had no relevant previous convictions, and had lost his job as a consequence of the conviction, the learned Magistrate had a discretion to exercise and he did so judicially. There were no persuasive submissions which would have compelled this court to quash this order for forfeiture.

34 The upshot is, however, that the order for forfeiture made on March 9th, 1989 was made without jurisdiction. This is something which cannot be cured by the proviso to the Court of Appeal Ordinance. The appeal will therefore be allowed and the orders of forfeiture of March 9th and May 24th, 1989 quashed, and the vehicle is to be returned to the appellant.

Orders accordingly.