

[1991–92 Gib LR 290]

IN THE MATTER OF E. BOLANOS and A. BOLANOS

SUPREME COURT (Alcantara, A.J.): May 4th, 1992

Criminal Procedure—proceeds of criminal conduct—restraint order—court has civil jurisdiction under Drug Trafficking Offences Ordinance, 1988 to make restraint order pending adjudication on confiscation of accused's assets

Criminal Procedure—proceeds of criminal conduct—discovery—inherent civil jurisdiction to order discovery in aid of restraint order made under Drug Trafficking Offences Ordinance, 1988—discretion to be exercised only if real prospect of obtaining evidence for use in criminal proceedings

The defendants were charged with unlawful possession of cannabis with intent to supply.

The defendants were convicted of the unlawful possession of 60 kg. of cannabis with intent to supply. Sentencing was adjourned for the court to consider confiscation under the Drug Trafficking Offences Ordinance, 1988, and the court, under its civil jurisdiction, made restraint and discovery orders against the defendants.

The defendants applied for the discharge of the orders. They submitted that (a) the restraint order was invalid, since once a conviction had been entered in the Supreme Court, the jurisdiction to grant such an order became vested in the trial judge alone, under his criminal jurisdiction; and (b) there was no power under the Ordinance to order discovery against them, since that would offend against the common law rule against self-incrimination.

The Crown submitted that (a) the jurisdiction to make a restraint order was civil, although it was in aid of criminal proceedings, and it was not necessary for the defendants first to have been convicted of the offences charged; and (b) the court also had inherent jurisdiction to make a discovery order in conjunction with a restraint order.

Held, discharging the discovery order:

(1) The restraint order had been validly made by the court, since the relevant part of the Drug Trafficking Offences Ordinance conferred civil jurisdiction to restrain assets whether or not the defendant against whom criminal proceedings had been instituted had yet been convicted of an offence. The order would remain in place pending the court's determination of the issue of confiscation (para. 5).

(2) Although there was no power under the Ordinance to order discovery, the court had inherent power to do so in aid of a restraint order made under the Ordinance. The court should exercise its discretion to make such an order only if there was a real possibility that evidence would be obtained on which the Crown might wish to rely for the purpose of criminal proceedings. In this case, the police had obtained considerable material from the defendants under their powers of search and seizure on arrest, and under production orders obtained against various banks and institutions relating to the defendants and their families. The trial judge had later ordered the return of all unused material. No attempt had been made to obtain a discovery order until after the defendants' conviction, and the affidavit evidence in support did not reveal the prospect of further useful evidence. The order for discovery would be discharged (paras. 6–11).

Cases cited:

- (1) *Defendant, Re a, The Times*, April 7th, 1987, unreported, *dicta* of Webster, J. applied.
- (2) *V, In re*, Supreme Ct., Misc. No. 838 of 1990, September 27th, 1990, unreported, applied.

Legislation construed:

Drug Trafficking Offences Ordinance, 1988, s.4(8): The relevant terms of this sub-section are set out at para. 5.

P. Dean, Senior Crown Counsel, for the Crown;
C. Finch for the defendants.

1 **ALCANTARA, A.J.:** This is an *inter partes* hearing for the continuation or discharge of a restraint and discovery order granted against Errol Bolanos and Anthony Bolanos by the Chief Justice on April 15th, 1992, under the Drug Trafficking Offences Ordinance.

2 Errol and Anthony Bolanos were convicted, on March 20th, 1992, after a trial in the Supreme Court, of being in unlawful possession, on January 31st, 1992, of approximately 60 kg. of cannabis resin with intent to supply. Sentencing was adjourned for one month to consider the question of confiscation under the Drug Trafficking Offences Ordinance. The order was granted but limited until Tuesday, April 21st, 1992, when the defendants were due to be sentenced. The sentencing process was adjourned for two reasons. First, the prosecution was not ready to deal with the question of confiscation and, secondly, the defence required time to consider the statements which had been handed over by the prosecution that morning and to deal with the question of the restraint and discovery order.

3 I, as the trial judge, adjourned sentencing for one more month, and adjourned consideration of the restraint and discovery order into

Chambers until April 24th, 1992, and extended the restraint and discovery order until that date.

4 At the hearing Mr. Finch, for the defendants, has made a number of submissions in support of his contention that the restraint and discovery order should be discharged. Dealing first with the restraint order proper, counsel argues that once there is a conviction the jurisdiction to grant a restraint order becomes vested in the trial judge, and the proceedings are criminal and no longer civil.

5 I do not agree. The provisions of the Drug Trafficking Offences Ordinance are of a civil nature, although they are in aid of the criminal courts. In 1 *The Supreme Court Practice 1991*, Third Cumulative Supplement, para. 115/4/2, at 149–150, this is made clear in the following passage dealing with the Drug Trafficking Offences Act 1986 and Criminal Justice International Co-operation Act 1990:

“The provisions of the Acts which confer jurisdiction on the High Court to make restraint and charging orders are civil in character, and any appeal from a judge’s order made thereunder lies properly to the Civil Division of the Court of Appeal . . .”

The fact that a defendant has been convicted does not alter the situation. Section 4(8) of the Drug Trafficking Offences Ordinance makes this clear by providing that the “‘defendant’ means a person against whom proceedings have been instituted for a drug-trafficking offence (whether or not he has been convicted).”

6 On the question of discovery, counsel’s contention is that there is no power in the Drug Trafficking Offences Ordinance to order discovery. That is so. Once again, *The Supreme Court Practice 1991* becomes useful. There is the following passage (*ibid.*, at 149):

“Although neither the 1986 Act nor Part VI of the Criminal Justice Act 1988 contain any express provision empowering the court to order a defendant to make full disclosure of all his assets, there is inherent in the statutes power to make any order necessary to make a restraint order effective, including a power to order a defendant to make such disclosure. The power, however, is discretionary and is exercisable subject to certain conditions and exceptions. The Acts do not abrogate the common law rule against self-incrimination, and hence it will be appropriate to make any such disclosure order subject to the condition that any disclosure made thereunder may not be used in criminal proceedings against the defendant or his spouse (*Re O’C* (1990) New L.J. 1755, C.A.).”

The same opinion is to be found in Feldman, *Criminal Confiscation Orders*, para. 6.02, at 83 (1988). The case referred to there is *Re a*

Defendant (1). This case was brought to my attention by Mr. Finch, who asked me to say that it had been wrongly decided or in any case that it should not be followed in this jurisdiction.

7 Mr. Dean brought to my attention that a similar argument for the defendants had been before the Chief Justice and rejected by him in *In re V* (2) in 1990. I extract the following from his ruling:

“The restraint orders were too wide in Mr. Finch’s view . . .

The discovery ordered in paras. 2 and 3 of the order offended against the defendants’ right to silence and should never have been ordered. There was no general power of discovery. There were provisions for a police or customs officer to apply to a judge for an order that a person produce particular material or that a Government Department produce material in its possession to the court. Sections 23 and 26 (*ibid.*).

Mr. Neish adopted all the points that Mr. Finch had made.

So far as the order for discovery was concerned, Mr. Dean submitted the court had inherent powers to make it. Taylor, J. had done so *ex parte* in *Re a Defendant*, *The Times*, April 7th, 1987, and Webster, J. had not set it aside when the matter was heard *inter partes*.”

The Chief Justice concluded as follows: “The prosecutor applied for discovery and if discovery should lead to any defendant incriminating himself, his protection lies in the prosecutor’s undertaking not to use that information.”

8 It is clear that, in the opinion of the Chief Justice, an ancillary order of discovery can be made in aid and in conjunction with a restraint order. I find that this court, in its civil jurisdiction, has the inherent power to grant a discovery order in support of a restraint or charging order made under the Drug Trafficking Offences Ordinance. I intend to follow Webster, J. in England and Kneller, C.J. in Gibraltar, not just because they have so decided, but because I think that such is the right decision.

9 The grant of a discovery order is, however, a matter of discretion which the court is called upon to exercise in an appropriate case. Whether such discretionary power should be exercised depends on the circumstances of the particular case. I find a passage in the judgment of Webster, J. in *Re a Defendant* (1) of assistance. It reads:

“Thus, in the present case, the drug trafficking offences were serious, and his Lordship would assume that there was a real possibility that discovery, for instance, of a considerable sum of money in a bank account could constitute evidence on which a

prosecutor might want to rely for the purpose of instituting proceedings.”

10 On the facts of this case, am I entitled to assume that there is a real possibility that discovery would disclose very much more? A real possibility to my mind is something more than mere possibility, but very much less than probability. On arrest or after arrest the police detained considerable property belonging to the defendants, without any court order. On September 27th, 1991, the police secured production orders directed to the Commissioner of Income Tax, National Westminster Bank (Gib.) Ltd., Gibraltar Building Society, Barclays Bank PLC, Banque Indosuez, Allgemeine Bank (Gib.) Ltd., H. Sheppard & Co. Ltd., and Grecian Investments (Gib.) Ltd., in respect of the defendants and some members of their families. A month later, when the defendants appeared before the court in its criminal jurisdiction on the indictment, the presiding judge ordered that the goods detained other than exhibits in the case should be returned to the defendants. The prosecution was invited to secure a restraint order if they so wished.

11 No such order was applied for until after conviction on March 20th, 1992. There was never any attempt to secure a discovery order until April 15th, 1992. I have read the affidavit in support of that application and there is little which leads me to the conclusion of a real possibility of finding very much more. In the circumstances, I feel that the proper course is to discharge the discovery order. However, the restraint order should remain, so that there is money to pay whatever sum is decided should be confiscated.

Order accordingly.
