RONCO v. VIAGAS

SUPREME COURT (Harwood, A.J.): October 13th, 1994

Sentencing—forfeiture of vessel—appeals—may require appellant to show cause why forfeiture inappropriate, under s.287(b) of Criminal Procedure Ordinance, as order "consequential and incidental" to quashing original forfeiture order—forfeiture part of sentence as defined by s.278(3)

Sentencing—forfeiture of vessel—drug smuggling—may order forfeiture to prevent use of vessel in further criminal activity and deter other owners

The appellant was charged in the magistrates' court with an offence of jettisoning cargo.

The appellant was seen driving a speedboat towards the Moroccan coast in the early morning and re-entered Gibraltar waters pursued by Spanish customs officers in a helicopter. The Gibraltar police joined the chase and observed packages being thrown overboard, which sank immediately, indicating that they probably contained cannabis. The appellant was arrested for unlawfully jettisoning cargo contrary to the Imports and Exports Ordinance, 1986. The cargo was never recovered. The police confiscated the speedboat and applied for an order for its forfeiture. The appellant pleaded guilty to the offence and the magistrates ordered the forfeiture of the boat.

On the appellant's appeal against the order, the Supreme Court (Kneller, C.J.) set it aside, purportedly under s.287(*c*) of the Criminal Procedure Ordinance, and held that the Crown would be required to serve a notice on the appellant to show cause why a forfeiture order should not be made at a later date. The proceedings are reported at 1993–94 Gib LR 107.

When the matter came before the court again, the appellant submitted that (a) he could not be required to show cause, since the forfeiture was "any other order" within the meaning of s.287(*c*), and the court's order to quash it was therefore conclusive of the matter; (b) the definition of "sentence" in s.278(3) of the Ordinance was restricted to that section and did not cover orders for forfeiture; (b) the concluding words of s.287, allowing a "consequential or incidental order" to be made, could only relate to costs and not the issue of a notice to show cause; and (d) in any event, the circumstances of the case did not justify an order of forfeiture. He did not give evidence but relied on the submissions of his counsel.

The Crown submitted in reply that (a) the forfeiture order formed part of the sentence of the magistrates' court as defined by s.278(3) of the Criminal Procedure Ordinance; (b) since s.287(*b*) allowed for the

substitution of any other sentence for that of the magistrates' court, the court's requirement that the appellant show cause was properly made with a view to possible forfeiture; and (c) on the facts of the case, an order of forfeiture was justified.

Held, dismissing the appeal and ordering forfeiture:

(1) Under s.287(*b*)(ii) of the Criminal Procedure Ordinance the court had the power to require the appellant to show cause why an order of forfeiture should not be made, as a "consequential and incidental order." By the definition of "sentence" contained in s.278(3), the forfeiture order comprised part of the sentence of the magistrate's court, and therefore s.287(*b*), rather than (*c*), applied so as to permit the substitution of forfeiture as another sentence. The definition was not confined to s.278 itself since s.278 governed the following sections (page 371, lines 5–30).

(2) The court would order forfeiture under s.124 of the Imports and Exports Ordinance, since the appellant had failed to show cause why such an order should not be made. The fact that his boat had been seen heading for Morocco and was of a type well known for transporting drugs from that country to Gibraltar, together with its behaviour after entering the harbour, the description of the objects jettisoned and their immediate disappearance, clearly indicated that the cargo was cannabis. The appellant's actions had enabled the boat's occupants to evade a charge of the more serious offence of drug trafficking, and it was desirable to ensure that the boat was not available for the commission of further offences. Its forfeiture would deter speedboat owners from involvement in the drugs trade. The court's order would be substituted for that of the magistrates (page 377, line 14 – page 378, line 26).

Cases cited:

(1) *Pincho (E.)* v. *R.*, 1993–94 Gib LR 357.

(2) *R.* v. *Newton* (1982), 77 Cr. App. R. 13; 4 Cr. App. R. (S.) 388.

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.278(1): The relevant terms of this sub-section are set out at page 371, lines 13–16.

s.278(3): The relevant terms of this sub-section are set out at page 371, lines 18–25.

s.287: The relevant terms of this section are set out at page 370, lines 29–40.

Imports and Exports Ordinance, 1986, s.112(1): The relevant terms of this sub-section are set out at page 376, lines 2–14.

s.124, as amended by Ordinance No. 1 of 1990: The relevant terms of this section are set out at page 376, lines 16–26.

C. Finch for the appellant;

A. Mitchell for the respondent.

HARWOOD, A.J.: This is the continuation of an appeal heard in part by the Chief Justice on June 28th and 29th, 1993 against an order of forfeiture of a speedboat imposed by the magistrate's court on May 15th, 1992. The speedboat is a Phantom 21, powered by a 150 horsepower outboard motor. It is said to be worth £20,000. In the magistrate's court the appellant, Mr. George Ronco, pleaded guilty to a charge that on April 24th, 1992 he, together with two other persons, did throw overboard within the territorial waters of Gibraltar, approximately three packages, after having been properly summoned to bring to by a police motor boat and whilst chase was being given. His grounds of appeal were twofold:

"1. That in all the circumstances of the case I was not given any or any proper opportunity to be heard on the question of whether an order of forfeiture should be made or not.

2. That the order of forfeiture was unduly harsh in all the circumstances of the case."

In his judgment the Chief Justice made an order that the appeal be allowed in part, that the forfeiture order be quashed, and that the appellant and/or the owner of the speedboat should show cause in this court at a date and time to be fixed by the Registrar. A notice to show cause was issued by the Registrar and the matter comes before me as a response to that notice.

As a preliminary point, Mr. Finch sought to argue that the quashing of the order by the Chief Justice was final and conclusive of the matter. He submitted that the order whereby the forfeiture had been quashed was made pursuant to s.287(*c*) of the Criminal Procedure Ordinance, that the Chief Justice was *functus officio* and that he had no power to require the appellant to show cause. Section 287 of the Criminal Procedure Code reads as follows:

"The Supreme Court shall have the following powers in relation to an appeal…

…

(*b*) on an appeal against sentence only, the power—

…

(ii) to substitute any other sentence, whether more or less severe and whether of the same nature or not, which the magistrate's court would have had power to pass;

(*c*) on an appeal against any other order, the power to affirm, quash or vary the order,

and in any such case the Chief Justice may make any consequential or incidental order which may appear just and proper."

Thus, said Mr. Finch, the order of forfeiture made by the magistrates was "any other order" within the meaning of para. (*c*) which the Chief Justice chose to quash and, having done so, his decision must, as a matter of construction, be regarded as final. The concluding words of the section, he submitted, must be taken to relate to a matter such as costs, and could

not justify the issue of a requirement to show cause against forfeiture because the forfeiture order had been quashed once and for all.

Mr. Mitchell submitted that the Chief Justice's requirement to show cause was properly made with a view to possible forfeiture under s.287(*b*). Clearly, the appeal was not an appeal against conviction. I was satisfied that s.287(*b*)(ii) is applicable, and *not* s.287(*c*) because in my view the forfeiture order appealed against comprised part of the sentence of the magistrates' court. There is a definition of the word "sentence" in s.278(3) which makes this quite clear. Although the definition is limited to the purposes of s.278, that section itself governs the text of following sections including s.287. This is plain from the opening words of s.278(1). The relevant sub-sections read as follows:

> "(1) A person convicted by the magistrate's court may appeal to the Supreme Court—
>
> (*a*) if he pleaded guilty, against his sentence;
>
> (*b*) if he did not, against the conviction or sentence.
>
> …
>
> (3) In this section the expression 'sentence' includes any order made on conviction by the magistrate's court, not being—
>
> (*a*) a probation order or an order for conditional discharge;
>
> (*b*) an order for the payment of costs;
>
> (*c*) an order under the Animals and Birds Ordinance for the destruction of an animal or bird; or
>
> (*d*) an order made in pursuance of any law under which the court has no discretion as to the making of the order or its terms."

Thus, I held that the Chief Justice had the power, under s.287(*b*)(ii), to consider substituting an order of forfeiture on the appeal and that the requirement to show cause was within his power as a "consequential or incidental order" which appeared to him to be just and proper. I upheld the submission of Mr. Mitchell and rejected that of Mr. Finch.

In addition, I considered it was quite clear from his judgment what the Chief Justice intended by his order. He was intending to give to the appellant the very opportunity he was seeking in Ground 1 of his notice of appeal. In his judgment, the Chief Justice summarized Mr. Finch's submission on this aspect of the appeal (1993–94 Gib LR at 112):

> "The appellant … was not asked to show cause why [the speedboat] should not be forfeited. The value of the speedboat, its importance to the appellant as a means of earning his livelihood, and the hardship which forfeiture would cause him could have been put forward and investigated had he been given the opportunity to be heard on the issue of whether or not to order forfeiture. This was a breach of natural justice of which the appellant complained in his notice of appeal."

Later on, the Chief Justice posed the question "Do the merits justify forfeiture?" to which he gave the following as his answer (*ibid.*, at 115):

"The merits may justify forfeiture but the magistrates never gave the appellant an opportunity to show cause why that order should not be made. I shall quash the order for forfeiture but order that the Crown serve the appellant and/or the owner with a notice to show cause before this court why the vessel should not be forfeited to the Crown. The date and time will be fixed by the Registrar."

Thereupon the Chief Justice made the order which, Mr. Finch now says, was beyond his power to do. So, as a matter of interpretation of the judgment, the appellant was being granted precisely the relief he was asking for. Accordingly, I ruled that the hearing before me should continue on the basis of a part-heard appeal against sentence.

It is necessary now to set out the facts, in full, as contained in the summary of facts prepared by the prosecution.

"The facts of this case are as follows:

1. In the early hours of the morning of April 24th, 1992, Drug Squad officers were on observations when they saw a number of locally-based speedboats leave Gibraltar and head towards the Moroccan coast. Amongst these speedboats was *The Big Bull*, PFB No. 425, a grey Phantom 18 with a 150 h.p. Yamaha outboard engine.

2. At about 7.15 a.m., the same date, *The Big Bull*, with three persons on board, namely the defendants George Ronco and Mohamed Marzok Hassan and an unidentified third person, was seen heading towards Gibraltar from the Moroccan coast and being chased by the Spanish helicopter. The speedboat headed inside Admiralty waters through the southern entrance of the harbour and at this stage the Spanish helicopter ceased its chase. The speedboat stopped in the area of HM Dockyard Tower.

3. At this stage, the police fast boat *Sir Peter Terry* was at sea involved in another matter with its crew and Det. Sgt. Alcantara from the Drug Squad was notified of this. The *Sir Peter Terry* then headed towards the location of *The Big Bull* with the blue beacon flashing and sounding its siren. When the occupants of the speedboat saw the police launch approaching them they left at a fast speed. The officers in the police launch then shouted and waved at the defendants to stop but this was to no avail. The defendant Ronco was steering the launch.

4. A chase then took place between *The Big Bull* and the police launch inside the area of the harbour. This chase lasted for approximately five minutes. All this time the police launch had its beacon and siren on.

5. The speedboat then headed out of the harbour through the south entrance and left towards Rosia Bay followed by the police launch. On reaching the end of the South Mole the officers in the police launch saw the defendant Hassan and the unidentified person

throw three large bales overboard. This was also witnessed by officers in various observation posts. The three bales sunk immediately.

6. *The Big Bull* then turned round and headed north followed by the police launch. When the speedboat reached the area of Sheppards Marina the defendant Hassan and the unidentified person jumped off the speedboat on to the pier and disappeared between the boats on land. The defendant Ronco remained on the speedboat.

7. Drug Squad officers who were approaching the area of Sheppards Marina via land saw the defendant Hassan running out of Sheppards Marina, towards Waterport roadway. Hassan was stopped by Det. Const. Borrell who cautioned him and informed him that he had been seen on board a launch which had been chased by the police launch, that the launch had not stopped and that he had been seen throwing bales overboard. Hassan remained silent. Detective Const. Borrell then arrested him for the offence of jettisoning cargo, cautioned him and he remained silent. Hassan was then taken to the Central Police Station.

8. Detective Insp. Rodriguez then saw the defendant Ronco by his launch and after cautioning him told him that he had been steering the launch which had failed to stop when told to do so by the police launch and had thrown three bales overboard. Ronco stated that he had not stopped because he thought it was the Spanish launch and what they had thrown were boxes. The Detective Inspector then arrested Ronco for jettisoning cargo and cautioned him, and he remained silent. The speedboat was then searched and nothing incriminating was found. Ronco was then taken to Central Police Station. A search for the third occupant of the launch proved fruitless.

9. Both defendants were subsequently bailed out to appear at Central Police Station at 4 p.m., May 14th, 1992.

Points to assist:

Both police and navy divers searched the area where the bales were thrown but nothing was found. The reason for this was the great depth in the area (43m.).

The police confiscated the launch under s.112 of the Imports and Exports Ordinance.

Could forfeiture of the launch be asked for by prosecutor?"

Through Mr. Finch, the appellant elected not to show cause by way of giving evidence himself. He preferred to rely upon Mr. Finch to make appropriate submissions. As the latter pointed out, the appellant was not a compellable witness. Mr. Finch then made submissions which can be summarized as follows:

"1. It was permissible to draw to the court's attention the inadequacies of the summary of facts (which was read to the magistrates and formed the basis of the charge).

2. The summary of facts contained several references to 'bales' when describing the objects thrown overboard, whereas in the particulars of offence on the charge sheet they were described as 'packages,' and whereas the appellant after caution had stated they were 'boxes.' These were material discrepancies.

3. There was no forensic or other evidence to show that the objects jettisoned were 'bales' or, indeed, drugs of any kind.

4. There was insufficient material to justify the making of an order of forfeiture, there being no evidence that cannabis was involved in the commission of the offence, merely suspicion at best, which was not enough. No cannabis had been recovered, and there was no charge of any offence involving drugs nor any certainty that the boat was involved in any 'nefarious trade,' for even innocent boats are chased by the Spanish customs. There is no evidence at all as to what the jettisoned goods were to justify a finding by the court that they comprised cannabis."

His second submission, in particular, raised issues of fact upon the facts outlined in the summary sufficient, in my opinion, to require the reception of evidence, which was available and which was given by the following witnesses:

1. Police Const. 123 J. Gonzales (aboard the Gibraltar police boat);
2. Police Const. 186 D. Canepa (aboard the Gibraltar police boat);
3. Police Const. 161 J. Victory (aboard the Gibraltar police boat);
4. Police Const. 115 R. Kassam (a police diver); and
5. Police Sgt. 19 J. Zarb (who prepared the summary of facts).

Their evidence, which I found to be truthful and accurate, can be summarized from my notes as follows in the above order:

1. One of the occupants threw some stuff overboard which made a splash and looked like bales. This was about 500m. offshore near another vessel. "It was heavy stuff going in. I assumed they were bales."

2. As the speedboat went round a tanker moored about 450–500m. out, one occupant jettisoned brown rectangular packages, about $2\frac{1}{2}$ ft. in length, which made a splash and sank immediately. They were packages, not boxes. They were brown, more like a parcel in plastic. They looked like bales but I stick to the word "packages." It happened around 7.15 a.m.

3. One of the occupants threw out brownish items which appeared to be bales (about $2\frac{1}{2}$ ft. x $2\frac{1}{2}$ ft. demonstrated), which made a big splash and sank immediately.

4. Dived at 10 a.m. about 500m. out from centre of South Mole, near a tanker, at a spot pointed out by other officers. Went to depth of 42m., spent about seven minutes searching seabed. Saw nothing out of the ordinary. Unable to stay longer searching at that depth.

5. Prepared summary of facts from information given. Not told spot was about 500m. out near a tanker—thought spot was nearer the South Mole.

Witnesses 1 and 2 also stated from their experience that boxes of cigarettes float, whereas bales of cannabis sink. Witnesses 2 and 3 said that they had observed what occurred from a distance of some 20–30m. only.

At this stage the appellant again elected not to give evidence himself and Mr. Finch thereupon submitted that the allegations as to cannabis, and the point of jettison and search, were still not supported. His remaining submissions can be summarized as follows:

> "The speedboat is worth £20,000, is not a boat that is by its nature illegal (such as a fast launch), and was properly licensed. It was not the appellant who jettisoned anything, and it would be unfair to order the forfeiture of his boat in addition, when his co-accused, and he also, had been fined £200. The appellant had not been charged with using the boat for an unlawful purpose. The offence was not pre-meditated by the appellant: he was merely steering the boat. It would be hugely unfair to him if the court were to conclude that cannabis was jettisoned when there was no evidence to suggest what material had been jettisoned. In any event, if he were to be deprived of his boat as well, the disparity of sentence would be unjustified. He had already been deprived of his boat for nearly $2\frac{1}{2}$ years, and the circumstances of the offence had not been proved to be so serious as to warrant forfeiture. It was quite reasonable to throw things overboard from a boat being pursued by the Spanish helicopter."

Mr. Mitchell's submissions were concisely stated. The boat was seen leaving Gibraltar and heading towards the Moroccan coast in the early hours of that morning. At about 7.15 a.m., it was seen returning from the same direction with the Spanish helicopter in pursuit. It entered the harbour and stopped. When the police launch approached, with blue beacon flashing and siren sounding, the speedboat made off at speed, ignoring those and all other signals to stop. After some minutes of chase it left the harbour to a point where jettisoning occurred, in deep water. All this took place with the appellant at the helm and in control of the speedboat. The objects jettisoned, about three in number, splashed into the sea and immediately sank without trace. When the speedboat eventually berthed at Sheppards Marina, two of its occupants ran away. When the offence was pointed out to the appellant, he stated that he had not stopped because he thought it was a Spanish launch giving chase and said that the articles jettisoned were boxes. On those facts, said Mr. Mitchell, there was nothing to suggest that the whole enterprise was anything but nefarious and that, as a matter of plain inference, some illegal cargo—even if not cannabis—was thrown overboard. A serious offence was disclosed, contrary to s.112 of the Imports and Exports Ordinance, and its purpose was to prevent the occupants of any vessel from denying the authorities the opportunity to establish what cargo was being carried on board.

The section reads as follows:

"(1) If any part of the cargo or stores of a ship or any other dutiable goods are thrown overboard—

(a) while the ship is within the territorial waters of Gibraltar (as defined by section 2 of the Interpretation and General Clauses Ordinance); or

(b) where the ship, having been properly summoned to bring to by any vessel in the service of Her Majesty (whether in right of the Government of the United Kingdom or the Government of Gibraltar), fails to do so and chase is given, at any time during the chase,

any person present on the ship and who is either in control of the ship or who engages in any of the acts listed in this subsection, is guilty of an offence and the ship shall be liable to forfeiture."

The provision authorizing forfeiture by a court (s.124) reads:

"The court may order that any ship, aircraft or vehicle be forfeited to the Crown if—

(a) it was employed in the commission of an offence contrary to section … 112.

(b) it was, at the time of the offence in the ownership or under the control of the offender, or one of the offenders where there are more than one; or

(c) it is shown to the satisfaction of the court that the owner of the ship, aircraft or vehicle … knew or suspected or had reason to suspect that the ship, aircraft or vehicle was being employed in the commission of an offence against this Ordinance."

Lastly, on the subject of evidence, s.100 contains various provisions concerning the burden of proof of facts—but this section does not appear to me to be directly applicable in this case, having regard to the nature of the charge, and none of its provisions was referred to in argument.

Forfeiture is a matter for the exercise of the court's discretion in the various circumstances of each case. In this case, the circumstances were slightly unusual. There has been an appeal against the forfeiture order of the magistrates. It was based on grounds which the Chief Justice rejected, except to the extent that he afforded the appellant the opportunity he was seeking to show cause. That opportunity has been taken, not by the giving of evidence himself, but by reliance upon his counsel to make appropriate submissions based upon instructions. Those submissions raised relevant issues of fact which I considered must be determined to enable me to dispose of the appeal in a manner fair to both sides and which is just and proper.

It seemed clear to me that it would be neither fair nor just and proper to reach a determination without first hearing evidence from both sides by way of a "*Newton* hearing" (see *R.* v. *Newton* (2)). It would not have appeared to be fair, nor I think would it have been just or proper, to reject

Mr. Finch's initial submissions out of hand. Equally, the appellant—having mounted an attack on the accuracy of the summary of facts after pleading guilty to the offence—can hardly complain of unfairness if the court permits the reception of "live" evidence from both sides once his counsel has raised relevant issues of fact. A "*Newton* hearing" before the magistrates would have been perfectly proper, especially as the summary of facts was put before them after plea, and it seemed no less proper on this appeal once those issues had been raised for the first time. I say "for the first time" without implying any criticism at all, because the appellant was of course given no chance to raise them before the lower court. I do, however, find it surprising that the appellant did not choose to give any sworn evidence for any purpose on his appeal to support any of the submissions of his counsel, even though not obliged to do so.

As was said recently in the Court of Appeal by Fieldsend, P. on the appeal of Eduardo Pincho in *Pincho* v. *R.* (1) (1993–94 Gib LR at 366): "It is common knowledge and well known to the court from the cases that come before it, that there is a considerable drug trade from North Africa to Gibraltar…" The appellant's boat was seen to head towards the Moroccan coast in the early hours of the morning and to be returning therefrom, heading towards Gibraltar, at about 7.15 a.m. It is one of a type well known to this court and to the magistrates' court to be used for the conveyance of drugs from that area to Gibraltar. Its behaviour after entering the harbour was, as I find, inconsistent with its use for any lawful purpose. The lack of any evidence that the Spanish customs launch was in the vicinity, coupled with his plea of guilty to the offence contrary to s.112(1)(b) of the Imports and Exports Ordinance, makes it quite clear that the appellant could not possibly have mistaken (as he claimed at the time of his arrest) the Gibraltar police launch for that of the Spanish customs, whether within the harbour or not.

The evidence describing the objects jettisoned and their immediate disappearance leaves no doubt in my mind that they were bales of cannabis, and that the appellant's assertion that they were "boxes" (implying, no doubt, tobacco cartons) was untrue. Having regard to the foregoing matters, I do not doubt that the appellant was fully aware of the nature of his speedboat's "cargo."

In that knowledge, the appellant, as helmsman of the speedboat, fully intended to thwart the instructions of the police to bring to. By his actions, which enabled the other occupants successfully to jettison the cannabis, certain detection of far more serious offences was avoided and the police were effectively precluded from arresting all three occupants and the preferment against them of drugs charges. These are matters which I consider relevant to the question of forfeiture of the appellant's speedboat; also the following.

The appellant was evidently willing to make his speedboat available for the night's work and to involve himself knowingly in its use for the

conveyance of cannabis. He was primarily responsible for the defiance of the instructions to bring to emanating from the Gibraltar police launch, and for the perpetuation of the attempt to evade arrest. It is desirable that this court should consider neutralizing the availability of this speedboat and its potential future use by the appellant or anyone else for any similar purpose. Its forfeiture by order of the court should act as a deterrent to other owners and users of similar speedboats against involvement in the drugs trade, or at least against defiance of instructions to bring to when lawfully given by proper authority.

In my judgment, these are all factors that, when cumulatively considered, strongly suggest an order of forfeiture would be appropriate, as s.112 implies, unless of course there are special features to the contrary pertaining to the appellant or his circumstances. But no submissions were made by Mr. Finch in this regard and in the absence of any evidence I conclude that no such features exist. The ingredients of s.124 afford guidance to a court when considering the making of an order of forfeiture.

For the above reasons, the appellant has failed to show cause why an order of forfeiture should not be made. On the facts of the offence to which he pleaded guilty, and paying due regard to the considerations which I have mentioned, I am entirely satisfied that an order of forfeiture is appropriate and merited. The appeal therefore fails and it is ordered that there be substituted for the order of forfeiture imposed by the magistrates an order of forfeiture by this court. The speedboat is forfeited to the Crown accordingly under s.124 of the Imports and Exports Ordinance.

Order accordingly.