IN THE MATTER OF ISRAEL'S APPLICATION

SUPREME COURT (Kneller, C.J.): June 5th, l995

Criminal Law—drugs—forfeiture of property—opportunity to be heard—procedure to be adopted when person claims to be owner of or otherwise interested in property used to commit drugs offence within Drugs (Misuse) Ordinance, s.20(2)

Criminal Law—drugs—forfeiture of property—standard of proof—issues of fact raised in application by person opposing order for forfeiture under Drugs (Misuse) Ordinance, s.20(2) to be determined according to balance of probabilities

The applicant opposed the making of a forfeiture order in respect of property which had been used to commit drugs offences.

The applicant owned a vessel and communications equipment which had apparently been used by others in the trafficking of drugs. These offenders were sentenced accordingly; there was, however, no suggestion that the applicant had been involved in the offences in any way.

He then made the present application to the court that it should not make an order under s.20(1) of the Drugs (Misuse) Ordinance for the forfeiture of the property. The court considered (a) whether on such an application the Crown was a proper party to the proceedings; (b) what procedure should be adopted, since by s.20(2), the court could not make such an order if the applicant were a person claiming to be the owner of or otherwise interested in the property in question, without first allowing him the opportunity to be heard; and (c) the standard of proof required in respect of the relevant factual issues.

Held, giving the following directions:

(1) Because the applicant was a person claiming to be the owner of or otherwise interested in the property within the meaning of s.20(2) of the Drugs (Misuse) Ordinance, who opposed the making of an order, the procedure to be adopted by the court should be as follows. First, both the applicant and the Crown (which was a proper party to such an application) should provide the court with outlines of their reasons for opposing or supporting the proposed order, including witness statements and authorities relied upon; these should also be served on the opposing party in time for the hearing. At the hearing, the applicant should be allowed to make his case, followed by the examination, cross-examination and re-examination of his witnesses; this procedure should then be repeated for the Crown. Lastly, the Crown and then the applicant should be allowed to make their final addresses to the court. This procedure would also be appropriate were the applicant to be one of the defendants or a witness (page 101, line 28 – page 102, line 5).

(2) The issues to be determined by the above procedure would include establishing whether the property in question was indeed related to the offence; its value; the interest of the applicant in it; the effect on him were an order to be made; and whether the applicant had shown cause why the order should not be made. These issues were to be determined according to the civil standard of proof, namely, proof on the balance of probabilities (page 102, lines 5–14).

Cases cited:

(1) *R.* v. *Beard*, [1974] 1 W.L.R. 1549; [1975] Crim. L.R. 92.
(2) *R.* v. *Boothe* (1987), 9 Cr. App. R. (S.) 8; [1987] Crim. L.R. 347.
(3) *R.* v. *Cuthbertson*, [1981] A.C. 470; [1980] 2 All E.R. 401.
(4) *R. v. Morgan*, [1977] Crim. L.R. 488.
(5) *R.* v. *Ribeyre* (1982), 4 Cr. App. R. (S.) 165.

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.
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> (2) 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."

C. Finch for the applicant;
A. Trinidad, Crown Counsel, for the Crown.

KNELLER, C.J.: Robert Israel claims to be the owner of or otherwise interested in an inflatable craft G 329, a Yaesu transceiver and a portable telephone, which were exhibits in the trial of Juan Javier Mejias Reina and Juan Jose Crespo Peralta ("the defendants") in Supreme Court Criminal Case No. 4 of 1995. They were unanimously found guilty of unlawfully importing a prohibited import, namely, 3 kg. of cannabis resin, and being in unlawful possession of it with intent to supply it to another or other persons, all contrary to ss. 6(1) and 7(3) of the Drugs (Misuse) Ordinance. They were each sentenced by this court to 16 months' and 18 months' imprisonment on those counts, to run concurrently.

At the end of the trial, the court was satisfied that the defendants used the craft, the transceiver and portable telephone in relation to the offences. The court may therefore order one or more of those exhibits to be forfeited and either destroyed or dealt with in such other manner as the court may order. But the court may not make such an order where a person claiming to be the owner of or otherwise interested in it or them applies to be heard by the court, unless an opportunity has been given to him to show cause that that order should not be made. All that is set out in the Drugs (Misuse) Ordinance, s.20, which repeats the terms of the Misuse of Drugs Act 1971, s.27.

Reported decisions on s.27 of the Misuse of Drugs Act 1971 underline the fact that the forfeiture provision is limited to the specific offences under the Act and to any property related to the offences, including money within the jurisdiction but not intangibles: see *R.* v. *Beard* (1), *R.* v. *Cuthbertson* (3), *R.* v. *Morgan* (4), *R.* v. *Ribeyre* (5) and *R.* v. *Boothe* (2).

What is the procedure to be followed where a person claiming to be the owner or otherwise interested in the property related to the offence applies to be heard in opposition to the making of a forfeiture order? No authority from any jurisdiction has been cited and I have not found one. So it seems right to suggest that counsel for the applicant should begin by outlining briefly the basis of the application, together with passages from relevant authorities if any, and should then call the applicant and/or any supporting witnesses, who may be examined in-chief, cross-examined and re-examined. Counsel for the Crown should then follow the same procedure in attempting to show that the forfeiture order should be made. The order of addresses after that should be counsel for the Crown and then counsel for the applicant. I would also make that the procedure if the applicant took part in the trial as the defendant or one of the defendants or as a witness, because he is the person showing cause why the order should not be made and he or his counsel should begin and have the last word before the decision is made known.

An outline of the reasons for making or not making the order of forfeiture, statements of the applicant, the witnesses for or against making

the order and a list of authorities should be filed in the Registry in duplicate and served on the opposite party in a reasonable time for the court and each party to read them before the hearing of the claimant's application. The Crown is in my view a proper party to the claimant's application. The issues will include (a) whether the property is related to the offence; (b) its value; (c) whether the applicant is the owner of it or otherwise interested in it; (d) the effect its forfeiture will have on the applicant; and (e) whether the applicant has shown cause why the order of forfeiture should not be made.

The application is a civil proceeding, so the standard of proof is the usual civil one, namely, the balance of probabilities. Issues of fact and law may therefore be agreed by the parties. The good sense of the parties and the determination of counsel to help the court answer the issues will supply any deficiencies these directions may have.

Directions accordingly.