

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

KEVIN DONNELLY

Appellant;

AND

POLICE SERVICE OF NORTHERN IRELAND

AND

NORTHERN IRELAND COURT SERVICE

Respondents.

Before: MORGAN LCJ, COGHLIN LJ and SIR ANTHONY CAMPBELL

MORGAN LCJ

[1] This is an appeal against a decision of Treacy J on 28 March 2011 whereby he dismissed the appellant's application for judicial review in respect of the seizure of cash by the first-named respondent on 3 September 2007 pursuant to Section 294 of the Proceeds of Crime Act 2002 (the 2002 Act) and the subsequent order for its detention by the Magistrates' Court under Section 295 of the 2002 Act on 5 September 2007. The appellant contends that the learned trial Judge erred in determining that the cash seizure powers of the 2002 Act could be exercised in relation to the cash the subject of this appeal in the circumstances set out below. Mr Ronan Lavery QC appeared for the appellant, Mr Sharpe appeared for the first named respondent and Mr Wolfe for the second named respondent. We are grateful to all counsel for their helpful written and oral submissions.

Statutory scheme

[2] The cash seizure powers at the relevant time were contained in Sections 294 and 295 of the 2002 Act.

“294. - (1) A customs official or a constable may seize any cash if he has reasonable grounds for suspecting that it is-

- (a) recoverable property, or
- (b) intended by any person for use in unlawful conduct....

295. - (1) While the customs officer or constable continues to have reasonable grounds for his suspicion, cash seized under section 294 may be detained initially for a period of 48 hours.

(1A) The period of 48 hours mentioned in subsection (1) is to be calculated in accordance with subsection (1B).

(1B) In calculating a period of 48 hours in accordance with this subsection, no account shall be taken of-

- (a) any Saturday or Sunday,
- (b) Christmas Day,
- (c) Good Friday,
- (d) any day that is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom within which the cash is seized, or
- (e) any day prescribed under section 8(2) of the Criminal Procedure (Scotland) Act 1995 as a court holiday in a sheriff court in the sheriff court district within which the cash is seized.

(2) The period for which the cash or any part of it may be detained may be extended by an order made

by a magistrates' court; but the order may not authorise the detention of any of the cash-

- (a) beyond the end of the period of six months beginning with the date of the order,
- (b) in the case of any further order under this section, beyond the end of the period of two years beginning with the date of the first order."

Provision for forfeiture during the period of detention was provided for in Section 298.

"298. - (1) While cash is detained under section 295, an application for the forfeiture of the whole or any part of it may be made-

- (a) to a magistrates' court by the Commissioners of Customs and Excise, or a constable.
- (2) The court may order the forfeiture of the cash or any part of it if satisfied that the cash or part-
 - (a) is recoverable property, or
 - (b) is intended by any person for use in unlawful conduct."

Background

[3] On 21 August 2007, as a result of a planned police operation, searches were conducted at premises belonging to the appellant at 204, 236 and 240 Dublin Road, Newry. Cash was seized from addresses at 204 and 240 Dublin Road on the basis that it was reasonably suspected to be recoverable property. There has never been any issue about the reasonableness of that suspicion.

[4] On 22 August 2007 police attended the appellant's home at 204 Dublin Road. He was not present. Two notices of application for continued detention of seized cash pursuant to Section 295(2) of the 2002 Act were left for his attention. One of these related to the cash seizure at 204 Dublin Road and the other to the seizure at 240 Dublin Road. Applications for orders for continued detention of cash were

brought before the Deputy District Judge at Newry Magistrates' Court on 23 August 2007.

[5] At the hearing it was established that two sums of cash, namely €5,515.26 and £674.43 which had been seized at 204 Dublin Road, had in error been included in the application relating to the seizure at 240 Dublin Road. It does not appear that there was any application to amend the applications at the hearing. The Deputy District Judge made an order in respect of the seizures at each set of premises but reduced the amounts claimed in relation to 240 Dublin Road by the said amounts set out above and stated that this cash would have to be formally returned to the appellant.

[6] On 24 August 2007 police attended at the appellant's home address but no one was present. Detective Constable McAllen left a letter for the appellant in the following terms:-

“Regarding the aforementioned subject. On the said date a cash seizure was made at your property of £674.43 sterling and €5,515.26 cent. The said cash was not ordered to be retained by police due to a discrepancy with the order furnished to the court.

As a direct result of this the money is to be returned to you. We have attempted to contact you at your home address to no avail. Will you please make contact with this office at your earliest convenience to have the same returned to yourself.”

[7] On 26 August 2007 DC McAllen received a telephone call from Mr Thomas Tiernan who explained that he was the solicitor acting on behalf of the appellant. He informed DC McAllen that all contact with the appellant should be made through Tiernans solicitors. DC McAllen subsequently made an arrangement with Mr Tiernan for the monies to be collected at Banbridge PSNI Station on the afternoon of 3 September 2007.

[8] On the afternoon of 3 September 2007 a solicitor from Tiernans attended at Banbridge PSNI Station and informed the police that she was there to collect the money on behalf of the appellant. There is some dispute as to what occurred in the police station. It is agreed, however, that the solicitor counted the cash, signed a written statement confirming the amount of cash and the fact that she had received it from the police on behalf of the appellant. The solicitor agrees that she had the cash in her hands. She says that she had it only momentarily. Detective Constable

McAllen says that she had the cash for some little time. It is agreed that Detective Constable McAllen's evidence was not challenged before the Deputy District Judge. The appellant said in affidavit that he was told that the cash never passed into the solicitor's hands but the solicitor has agreed that the appellant is in error on this point.

[9] As the solicitor went to leave the interview room holding the cash Detective Constable McAllen informed her that he would be immediately seizing it in accordance with the 2002 Act. The solicitor handed the cash back to him, made no further representations and then left the police station. Subsequent to this seizure an application was made to Newry Magistrates' Court on 5 September 2007 for the continued detention of the seized cash pursuant to Section 295(2) of the 2002 Act. Following a contested hearing the Deputy District Judge concluded that the police had reasonable suspicion that the cash was recoverable property, the seizure was therefore lawful and further detention was justified.

The arguments of the parties

[10] The appellant submitted that the statutory scheme in Sections 294 and 295 of the 2002 Act provided a time limit for the interference with property rights which ought to be strictly construed. This was supported by a line of case law in relation to the relevant provisions in earlier statutes. To allow the police to exercise their seizure powers by re-seizing the same property as soon as the 48 hour time limit had passed would be to defeat the statutory intent to protect the property rights of the person holding the cash. Secondly it was submitted that the letter of 24 August 2007 created a legitimate expectation that the money would be returned to the appellant and the charade of placing the money into the hands of the solicitor and then re-seizing it constituted a breach of that expectation.

[11] The respondents contended that Section 12 of the Interpretation Act 1978 applied to the power to seize cash and it was, therefore, open to the first named respondent to re-exercise the power in this case. There had been a technical or administrative error in the applications because money that should have been included within the application for 204 Dublin Road was in fact included in the application for 240 Dublin Road. There was no manipulation of the process by the police. The statutory object of this legislation is to ensure that cash in respect of which there is a reasonable suspicion that it is recoverable property should be secured pending investigation. In a case such as this the use of the power to re-seize the money in light of the indication from the Deputy District Judge was lawful and in accordance with the object of the statute.

[12] The learned trial judge concluded that no bad faith had been established. He considered that the error was merely technical or administrative. The police retained their reasonable suspicion that the cash was recoverable property and they were entitled to re-seize it as they were acting in good faith. The letter of 24 August 2007 may have caused the applicant to believe that the money was to be permanently returned to him. The learned trial judge was satisfied that the police were not acting in bad faith but were intending to promote the objects of the legislation by curing a technical error and bringing the matter back before the court where the applicant could exercise his rights to challenge the legality of the seizure and the application for continued detention. He could not have any legitimate expectation in law that the cash would not be re-seized.

Discussion

[13] It is common case that the cash seizure provisions of the 2002 Act are subject to strict time limits. This was established in relation to the preceding legislation by R v. Uxbridge Magistrates' Court ex party Henry [1994] Criminal Law Review 581 and has been followed in subsequent cases under the 2002 Act. It is, however, also clear that the time limits run from the seizure with which the court is concerned (see Chief Constable of Merseyside Police v. Hickman and another [2006] EWHC 451 (Admin) at paragraph 24).

[14] Section 12 of the Interpretation Act 1978 deals with the continuity of powers and duties.

“12. - (1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.”

The appellant accepts that this section applies in relation to the power to seize cash. He further accepts that the same cash may be subject to a second subsequent seizure outside the initial 48 hour period but submits that this power can only be exercised where new evidence comes to light. The paradigm example is where documentation at an extension hearing provides an explanation for the holding of the cash but subsequent investigation after the 48 hour period establishes that the documentation was or may be false.

[15] The statutory purpose of the cash seizure provisions is to ensure that where there is a reasonable suspicion that that cash is recoverable property it should be detained pending an investigation and forfeiture proceedings if appropriate. It is clear,

however, that this is a draconian power and judicial supervision is, therefore, necessary if the detention is to extend beyond 48 hours. We accept that a literal application of section 12 of the Interpretation Act 1978 might enable police to nullify the protections of the legislation as submitted by Mr Lavery and it follows, therefore, that the court must be alert to protect the interests of the holder of the cash.

[16] In discharging that obligation the court must take into account what Lord Diplock described in Hunter v Chief Constable of the West Midlands [1982] AC 529 as

“the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied.”

We consider, therefore, that the test which should be used in judging the lawfulness of the re-exercise of the cash seizure powers in an application for extension is whether the police were misusing or abusing the process of the court. That requires the court to examine the matter broadly taking into account all of the public and private interests involved and all the facts of the case (see Johnson v Gore Wood [2002] 2 AC 1).

[17] In this case there is no dispute that there was an administrative error as a result of which the application to detain this cash wrongly identified the house in which it was located. The police action thereafter was designed to ensure compliance with the guidance of the Deputy District Judge by formally returning the cash to the appellant. The re-seizure of the cash was in good faith. We accept that good faith alone cannot be the determinant of whether the conduct of police constituted an abuse of process. A broader view is required.

[18] There is no suggestion that the passage of time in this case was of any advantage to police in presenting evidence of either reasonable suspicion or the need for further detention. Similarly there was no evidence that the passage of time had disadvantaged the appellant in adducing material or submissions to oppose the police application. The appellant continued to have the benefit of judicial scrutiny of the application in order to protect his interests.

[19] In the circumstances set out we do not consider that the seizure of the cash on 3 September 2007 was an abuse of the power contained in section 294 of the 2002 Act. There was clearly a substantial public interest in securing this money in respect of which there was a reasonable suspicion that it was recoverable property and little if any disadvantage to the interests of the appellant caused by the fact that the power had to be re-exercised outside the initial 48 hour period as a result of an administrative error. The police acted in good faith and in accordance with the course suggested by the Deputy District Judge.

[20] In order to succeed on legitimate expectation the appellant must show that the letter of 24 August 2007 contained a promise as to how the police were going to act in relation to the cash, that the promise was clear and unambiguous and that it was devoid of any relevant qualification (see Paponette v AG of Trinidad and Tobago [2010] UKPC 32). In particular the appellant has to show that a promise of the type described was made that the police would not exercise the powers of re-seizure which we have found were open to them. The appellant accepts that no such promise can be derived from the express language of the letter. We do not consider that there is any basis upon which to infer any such promise. At most this was a representation that the money would be returned to the appellant but the police did not give any indication as to how they might act thereafter. The necessary conditions for the establishment of a legitimate expectation have not, therefore, been fulfilled.

[21] For the reasons given we dismiss this appeal.