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ARTICLES

Varying Confiscation Orders: Certificates of Inadequacy: Simon Whitehead: New Law Journal, 4 and 11 July 1997, pp. 997 ff and 1029 ff.

In this two part article the author examines the provisions of the UK Drug Trafficking Offences Act 1986 (DTOA) and the Drug Trafficking Act 1994 (DTA) which permit the upwards variation of confiscation benefits where the assessed benefit exceeds the realisable assets and suggests that by so allowing defendants are placed under an enduring form of double jeopardy.

The current provisions allow the prosecutor to "revisit essentially every finding of fact made in relation to a confiscation order" where a greater amount can be realised than was taken into account at the confiscation enquiry.

Where the Crown Court elects not to proceed with a confiscation enquiry under the Drug Trafficking Act 1994 the prosecutor may, within six years of the conviction, apply for a reconsideration of that decision if evidence becomes available to the prosecutor after the time of sentencing which would have led the Court to believe that the defendant had benefited from drug trafficking. The author notes that s.13 of the DTA, which allows the prosecutor to make an application cannot be used where evidence was available but simply not used.

Where the court originally determined to proceed with a confiscation enquiry but determined that the defendant had not benefited from drug trafficking the prosecution may, under s.14 the DTA, make an application within six years for a re-assessment of the finding and in such case may rely on evidence not considered by the court at the original enquiry. The author concludes in such an application that reliance may be placed on evidence of which the prosecutor was aware but which was not put before the court and it is this provision which leads to the author's conclusion that the defendant is placed "under an enduring form of double jeopardy".

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The third provision of the DTA examined by the author is s. 15 which permits application by the prosecution within six years for the revision of an assessment. The article is critical of the limitations placed on the defendant which have the effect of precluding any argument that the original figure was an over-assessment and, by setting no evidentiary standards, imply that "new evidence is not required to mount an application" thus arguably allowing the prosecution to re-apply to attack a finding of fact. The conclusion of the author is that by allowing an assessment based on the defendant's current assets the defendant "now faces a triple jeopardy".

The second part of the article contains a description of the process of assessing the benefit derived by the defendant from drug trafficking. In a thorough examination of the cases where the court calculation of realisable assets involves assumptions based on prosecution evidence that the defendant must have received payments from previous drug trafficking offences "by reason of his position in the drug ring, the size of the subject drug trafficking offence and the likelihood that he had been involved in drug trafficking for some time". In such cases the author concludes that the defendant must show that perceived payments, although never located by the prosecution, had been spent and were therefore not realisable. To so do he must admit involvement in drug trafficking for which he has not been charged. While recognising that there is nothing inherently wrong in the law proceeding on the basis of assumptions the author suggests that it should do so only where there is evidence beyond a simple assertion by the prosecution that the defendant has derived a past benefit.

Section 17 of the DTA allows the defendant to apply to reduce a confiscation order. In examining this provision the author discusses cases where the defendant must satisfy the court that assets which never existed (that is those assessed as derived from previous unproved drug trafficking offences) have reduced in value so as to render his realisable assets insufficient to meet a confiscation order already made.

The article concludes with the author's view that several principles governing other aspects of the criminal law are overridden and that confiscation orders based on assumptions as to benefits of unproved offences may breach Article 7 of the European Convention on Human Rights which prohibits the imposition of a heavier penalty than the one applicable at the time the offence was committed.

LEGISLATION

Singapore: Evidence (Amendment) Act 1996

Act No. 8 of 1996 which came into force in Singapore on 8 March 1996 amends the Evidence Act (Cap. 97, 1990 R.E.) and the Computer Misuse Act (Cap. 50A, 1994 R.E.) by introducing various provisions relevant to the trial of criminal cases. It introduces definitions of the terms "computer" and "computer output" and provides for the admission of computer output into evidence. It also deals with the manner of giving voluminous or complex evidence in cases where it appears to the court that "charts, summaries, computer output or other explanatory material" would be likely to aid the court's comprehension of other evidence which is relevant and admissible.

Computer output, defined as statements or representations (whether audio, visual, graphical, multi-media, printed, pictorial, written or in any other form) which are produced by a computer or are accurately translated from a statement or representation so produced) is admissible, if relevant and otherwise admissible, where the parties expressly agree or where there are no reasonable grounds for believing that the output is inaccurate because of improper use of the computer and no reason for doubt or suspect the truth or reliability of the output and there is reasonable ground to believe that the computer was operating properly, or if not so operating, that the output was not affected. Provision is made for certification by a person responsible for the operation or management of computer systems, or by a person who had control or access to the system, in relation to identification of output, the manner of its production and the storage and production devices used. Where a court is not satisfied that computer output sought to be adduced in evidence accurately

reproduces the relevant contents of the original document it may call for additional evidence, including oral evidence, and may draw inferences as to the accuracy or otherwise of the output.

Sri Lanka: Evidence (Special Provisions) Act No 14 of 1995

The 1995 Act's amendments to the evidence law provide for the admissibility of audio visual recordings and information contained in statements produced by computers in criminal and civil proceedings.

Part I of the Act makes admissible any contemporaneous recording or reproduction thereof which tends to establish a fact where direct oral evidence of that fact would be admissible. It must be shown that:

(a) the recording or reproduction was made by the use of electronic or mechanical means;
(b) it (or a transcript, translation, conversion or transformation of it) is capable of being perceived by the senses;
(c) the device making or the recording or reproduction was operating properly; and
(d) the recording or reproduction was not altered or tampered with and has been kept in safe custody.

Part II of the Act makes admissible information contained in any statement produced by a computer tending to establish a fact where direct oral evidence of the fact would be admissible. The information sought to be adduced (or a transcript, translation, conversion or transformation of it) must be capable of being perceived by the senses, the computer producing the statement must have been operating properly and the information supplied to the computer must have been accurate.

Where information contained in a statement produced by a computer is produced over a period of time it is sufficient to show that the computer was during the relevant period supplied with information of the sort contained in the statement and that the information in the statement reproduces or is derived from information regularly supplied to the computer. Information contained in a statement may be produced by a single computer or by several computers operating in succession. Human intervention is not necessary in the supply of information to, or in the production of a statement by, a computer.

Part III of the Act makes admissible affidavit evidence of a person in a responsible position in relation to the operation of the machine, device or computer used to produce evidence sought to be adduced under Parts I and II. Notice of intention to tender recordings or computer evidence must be given and any party to whom notice is given may apply to be permitted to access or inspect the machine, device or computer used to produce the evidence and any records relating to the production of that evidence. Failure to give notice or to permit ordered access or inspection has the result that the party seeking to adduce the evidence shall not be permitted to adduce it.

CASE NOTES

Drug trafficking - constitutional rights - South African Drugs and Drug Trafficking Act 140 of 1992, (the "Act") - presumption of innocence - Constitutional validity of legislation containing rebuttable presumptions.

The Accused was convicted by a magistrate of dealing in dagga in contravention of the Act. Section 21(1)(b) of the Act creates a presumption, in certain circumstances, that a person in charge of cultivated land on which dagga plants are found is rebuttably presumed to have dealt in such plants. The Natal High Court overturned the decision of the magistrate as a result of it declaring the Act inconsistent with the Constitution which, by section 35(3)(h) enshrines the presumption of innocence. The case was referred to the Constitutional Court for confirmation of the High Court's decision.

Held

Section 21(1)(b) of the Act contains a statutory instruction to infer guilt from circumstances that do not necessarily support such inference. Interference with the ordinary processes of inferential reasoning entails a risk of conviction despite a reasonable doubt as to guilt in the mind of the trier of fact.

The fundamental rights bound up with and protected by the presumption of innocence are so important, and the consequences of their infringement potentially so grave that compelling justification would be required to save presumptions from invalidation. None is apparent with s. 21(1)(b).

S v. Ntsele (CCT 25/97), Judgment of 14.10.97, (Copy available on the Internet at http://www.law.wits.ac.za/judgments/)

Corruption - suspicion of solicitor offering bribe on behalf of client - search of firm's premises - Prevention of Bribery Ordinance (Laws of Hong Kong, 1987 rev., c.201), s. 9(1)(2) - Independent Commission Against Corruption Ordinance (Laws of Hong Kong, 1996 rev., c. 204), s. 10B

The applicant who had been imprisoned following a conviction of conspiracy to defraud, instructed a partner in a firm of solicitors to act for him in relation to his appeal against conviction. A warrant was obtained under s. 10B of the Independent Commission Against Corruption Ordinance authorising a search of the firm's premises on the basis that there was on these premises evidence of the commission of an offence under s. 9 of the Prevention of Bribery Ordinance, whereby any agent who without lawful authority or reasonable excuse accepted any advantage as an inducement or reward for doing or forbearing to do, or having done or foreborn to do, any act in relation to his principal's affairs was guilty of an offence.

An information sworn in support of the application for the warrant made the allegation that with money from the applicant, (who had hoped to secure his acquittal on the appeal), the solicitor had bribed R to make a false affidavit to discredit L, the main prosecution witness at the applicant's trial, and that the solicitor and R had attempted to bribe L not to co-operate with the Commission or give evidence contradicting the affidavit.

The High Court of Hong Kong granted the applicant judicial review and quashed the warrant, holding that there had been no jurisdiction to issue it. A majority in the Court of Appeal of Hong Kong dismissed the Commissioner's appeal.

Held, dismissing the appeal:

1. Section 9(1)(a) of the Prevention of Bribery Ordinance applied to corrupt transactions with agents and not dishonest acts by agents and, to constitute an offence under the section, the agent's act or forbearance had to be intended, by the person offering the bribe, to influence or affect the principal's affairs and not merely to involve the agent acting on his own.

2. Although the solicitor was also the agent of the partners in the firm, the Commission's case in the information was that he had offered the bribes, not that he had received a hidden benefit from the applicant for rendering services in relation to the firm's affairs; and that accordingly, since the information had failed to disclose facts sufficient to satisfy the magistrate that there was reason to believe that the solicitor as agent of the partners in the firm had committed an offence under s. 9(1)(a), the magistrate had had no jurisdiction to issue the search warrant under s. 10B of the Independent Commission Against Corruption Ordinance.

3. Section 9 would apply if the person offering the bribe intended the act or forbearance of the agent to influence or affect the principal's affairs. In this case if the applicant had bribed the solicitor to secure him a benefit at the expense of the firm of solicitors, for example to arrange a

reduction in professional fees. If the agent acts on his own without involving his principal (the firm) then whatever other offence may have been committed, it was not a corrupt transaction with an agent for the purposes of s.9 of the Ordinance.

Commissioner of the Independent Commission Against Corruption v Ch'ng Poh, [1997] 1 WLR 1175 (Privy Council)

Drug trafficking - money laundering - Drug Trafficking Act 1994 (the "Act") (UK)

An appeal was made by F against a sentence of nine years imprisonment and a confiscation order of £10,000 on a plea of guilty to conspiracy to possess the proceeds of drug trafficking. The judge had assessed the proceeds of drug trafficking as being equivalent to the aggregate value of the drug deals and not the aggregate value of the rewards paid to the money launderers for their money laundering in accordance with the line of cases culminating in *R v Banks* [1997] 2 Cr App R (S) 110.

Section 2(3) of the Act provides that:

> ".......a person has benefitted from drug trafficking if he has at any time (whether before or after the commencement of this Act) received any payment or other reward in connection with drug trafficking carried on by him or another person."

Section 4(1)(a) contains the following provision:

> " any payments or other rewards received by a person at any time (whether before or after the commencement of this Act) in connection with drug trafficking carried on by him or another person are his proceeds of drug trafficking;"

Held:

1. In assessing the proceeds of drug trafficking, there was no reason to treat drug money launderers as a special case, even though by s. 4(5) of the Act, the statutory assumptions required to be made by the court pursuant to s. 4(2) did not apply to such a defendant.

2. It was true that the statutory assumptions did not apply to offences of drug money laundering but the fact that, to that limited extent, drug money launderers were treated less harshly than those guilty of other drug trafficking offences did not justify the conclusion that the words of ss. 2(3) and 4(1)(a) of the Act did not mean what they said.

R v Fadden, The Times, January 26, 1998 (Court of Appeal - UK)

Drug Trafficking - absconding before hearing of appeal - criminal procedure - Drug Trafficking Offences Act 1986 (the "Act")

The appellant had been granted leave to appeal against a conviction of being knowingly concerned in the importation of a controlled class B drug, 1,200 kg of cannabis valued at £2,646,000, and a sentence of 11 years imprisonment including a confiscation order in the sum of £650,000.

In May 1995 the appeal against conviction was dismissed but the question of appeal against sentence was adjourned and was to be considered at a later date. The appellant then absconded from prison and remained unlawfully at large. The case was stayed pending his recapture.

A determination was sought by the Crown one way or other, of the outstanding appeal against sentence because by s. 11 of the Act, they were unable to enforce the restraint orders and other orders that they held in respect of the part of the appellant's property which represented the sum of £650,000 which was to be confiscated, while it remained subject to appeal.

Held:

1. Where a person had been given leave to appeal against conviction or sentence but had absconded before the hearing of the appeal, the normal practice of the Court of Appeal was either to adjourn the appeal or to dismiss it, according to the justice of the case. Exceptionally, however, an appeal could be listed for hearing in the absence of the appellant where instructions to lawyers had not been withdrawn and no further instructions were required to enable the appeal to be pursued.

2. This was an exceptional case and the normal course was to adjourn the appeal of a person who was absent and that would have been done if the prosecution had not urged against that course. This was not a case where dismissal would meet the justice of the case so the appeal would be listed for hearing.

3. Their Lordships emphasised the unusual circumstances in which they had taken that step. Other persons who absconded from prison should not assume that they would be dealt with in such a way.

R v Gooch, The Times, January 29, 1998 (Court of Appeal - UK)

Criminal procedure - fair trial - equality before the law - disclosure by prosecution - police dockets - witness statements - Constitution of the Republic of Namibia 1990 (the "Constitution")

During his trial in the High Court, the respondent applied for an order for the disclosure by the Prosecutor General of statements of prosecution witnesses. This application was opposed by the state. The court granted an order restricted to disclosure of statements of state witnesses who had not yet testified. Following completion of the trial the appellant was granted leave to appeal on the sole ground that the trial judge had erred in law by ordering that certain witness statements were not privileged and should be made available to the defence.

Article 12(1)(a) of the Constitution provides:

> "In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law"

Held:

It is of no consequence that the Criminal Procedure Act does not have a provision for a general right of disclosure. The right resides in the Constitution.

The appellant submits that the notion of a fair trial is not a new one created by Article 12 of the Constitution. That is so but what has happened is that the pre-independence law of Namibia has undergone some metamorphosis and some of the principles in the Criminal Procedure Act are now rights entrenched in a Bill of Rights. The Courts must now ask whether the retention of privileges of witness statements accords with the exercise of the rights of the Constitution. To achieve equality between the prosecution and the defence is what the Constitution demands and hence Article 12 cannot be given an interpretation that supports the proposition that a witness statement was a privileged document and that there was no entitlement to its disclosure to an accused (*R. v. Steyn* 1954 (1) SA 324)

The principles of procedure that protected witness statements against disclosure where such statements were procured for the purpose of evidence to be given in a contemplated lawsuit were incompatible with Art. 12(1)(a) of the Constitution, since the purpose for which that article was enacted was to enable courts to determine the civil rights of citizens and criminal cases fairly and under conditions of equality for all, an objective also confirmed in Art. 10 of the Constitution which stated that "[a]ll persons shall be equal before the law."

Constitutional rights should not have implicit restrictions read into them in order to bring them into line with the common law.

A trial could not be considered just and balanced when the prosecution hid from the defence relevant material of evidential importance which might be used to cause surprise to the defence during cross-examination. Refusal to disclose witness statements to the defence could not be justified on the ground that the material would be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. Full disclosure was in accordance with Arts. 7 and 12 of the Constitution.

In order to be effective, disclosure has to be done at the earliest possible time to enable the accused to make a thorough preparation for his reply to the charge.

If in advance of a trial the prosecution has in its possession documents or other evidential material helpful to the defence case but wants to claim public interest immunity the defence should be informed of that fact and the court should be asked to give directions or a ruling on the prosecution's claim to public interest immunity.

To guide future prosecution, the Court declares:

"In prosecutions before the High Court, an accused person or his legal representative should ordinarily be entitled to the information contained in the police docket relating to the case prepared by the prosecution...including copies of the statements of witnesses whom the police have interviewed in the matter whether or not the prosecution intended to call any such witnesses at the trial.

The state shall be entitled to withhold...any information contained in such docket if it satisfied the court, on a balance of probabilities that it had reasonable grounds for believing that the disclosure ... might reasonably impede the ends of justice or otherwise be against the public interest. (Examples of such claims are where the information sought to be withheld would disclose the identity of an informer which it is necessary to protect, or where it would disclose police techniques ...or where disclosure might imperil the safety of a witness ...).

The duty of the state to afford ... the right (of access) to the prosecution information ..shall ordinarily be discharged upon service of the indictment and before the accused was required to plead provided that the Court should be entitled to allow the state to defer the discharge of that duty ...if the prosecution established on a balance of probabilities that the interests of justice required such deferment..."

State v Scholtz, [1997] 1 LRC 67 (Law Reports of the Commonwealth)(Supreme Court of Namibia)

[Note: the judgment of the Court in the case contains a thorough examination of the development of the law on disclosure in Namibia and other common law jurisdictions)

Drug trafficking - tort of maliciously procuring search warrant - elements which need to be established to prove the tort

The respondent (R), was the managing director of a bank in the Cayman Islands which was part of a group headquartered in Amsterdam. While in Amsterdam he had resigned in circumstances that amounted to a constructive dismissal. Upon his return to the Cayman Islands, he found out that the police had executed search warrants at his home and at the bank. No incriminating evidence had been found at either location. R commenced proceedings alleging wrongful, false and malicious invoking of the process of the court to procure the grant of the search warrants.

The search warrants had been applied for by the officer in charge of the Drug Profit Confiscation Unit of the Royal Cayman Islands Police Force, under s. 16M of the Misuse of Drugs Law.

The issues before the court were:

(a) whether there existed a tort of maliciously procuring and executing a search warrant; and

(b) whether there was sufficient evidence to support a finding that the elements of the tort were established.

Held

1. A warrant could be issued if the court was satisfied that there were reasonable grounds for suspecting a specific person had carried on or had benefited from drug trafficking; that there were reasonable grounds for suspecting material of likely value would be found and that the investigation might be prejudiced unless immediate entry could be secured.

2. It was an actionable wrong to procure the issue of a search warrant without reasonable cause and with malice. The action was akin to that for malicious prosecution and to the tort of maliciously procuring an arrest with the foundation of each being intentional abuse of the processes of the court.

3. Malice covered spite, ill-will and improper motive which can be proved if intent to use the process of the court for granting a warrant for a purpose other than search in permitted circumstances. Reasonable and proper cause for making application for a warrant depends on the statutory conditions for the grant of a warrant. To establish a case it must be shown that in making a successful application, the applicant for the warrant lacked bona fide belief that the material placed before the judge issuing the warrant was sufficient to meet the conditions for the issue of such a warrant, that the applicant for the warrant acted with malice and that damage resulted from the issue or execution of the warrant. Failure to establish reasonable cause for the seeking of the warrant could be evidence of malice.

4. In this case, the burden on R was to prove on the balance of probabilities that the detective inspector did not believe in good faith that there were grounds for suspicion that R had carried on or benefited from drug trafficking. The state of a person's mind could be proved by evidence of what he or she had said or done and also by circumstantial evidence.

5. R gave evidence that he could not conceive of any grounds on which a suspicion that he had benefited from drug trafficking could be formed. His evidence was left unchallenged. There was no evidence that R's lifestyle suggested affluence out of proportion with his income. There was no police file in existence and R had not been interviewed by police. Requests for police disclosure had been resisted without explanation.

6. A person alleging malicious procuring of a warrant was entitled to expect to be informed of the grounds for its issue unless there were good reasons for withholding such information. The courts would have ensured that protection of information which would have prejudiced drug investigations was the subject of public interest immunity exemption had such application been made by the police but no claim for immunity had been made.

7. Procuring the issue of a warrant when a person knows that there are no sufficient grounds constitutes employing the court process for an improper purposes. When all of the factors mentioned were considered together they formed a circumstantial case of the absence of any grounds upon which a person could reasonably suspect him of trafficking in drugs or benefiting therefrom.

Gibbs and Others v Rea, (Privy Council), The Times, February 4, 1998