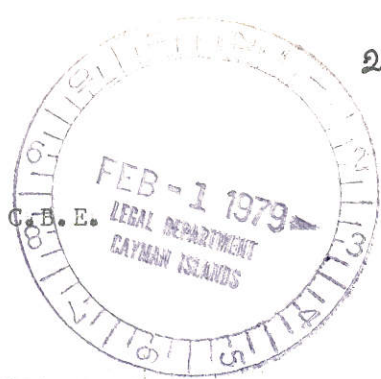


IN THE GRAND COURT OF THE CAYMAN ISLANDS

Holden at George Town

Before His Lordship, Sir John Summerfield, Q.C., C.B.E.
on 14th December, 1978.

Cause No. 293/78



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IN THE MATTER OF AN APPLICATION BY CAYMARINE HOLDINGS LTD.
FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

and

IN THE MATTER OF AN ORDER DATED 16TH FEBRUARY, 1978
MADE BY HIS HONOUR W. M. HERCULES,

Mr. MacDonald for applicant

Mr. Donaldson for respondent

RULING

This is an application for a writ of certiorari to bring up and quash an order by the learned magistrate for the forfeiture of a vessel under section 14 (2) (a) of the Misuse of Drugs Law 1973 following a conviction for unlawful possession of ganja contrary to section 3 (1) (i) (k) of that Law.

When the notice of motion was filed the only records of the proceedings were copies of the endorsements of the learned magistrate on the case files - Exhibits B and C annexed to the supporting affidavit. This was no fault of the applicant or his counsel. Application had been duly made for copies of the record and, due to administrative error or oversight, these were the only records copied and supplied to the applicant's counsel.

Affidavits were filed to amplify these incomplete records of the proceedings and the hearing proceeded with only these records and the affidavits before the court. By agreement the affidavits relating to the proceedings before the court of summary jurisdiction were admitted to explain what had occurred before that court. Two affidavits by Supt. Cruickshank relating to later events were excluded.

After the conclusion of the hearing investigation revealed that there had in fact been a much fuller record of the proceedings taken by the learned magistrate in his note book. This was copied and sent to counsel for both parties with the invitation to re-open the hearing if either wished to take that course. It was further intimated that I would take account of the actual record in writing this judgment in the event that neither party wished the

hearing re-opened. In my view, I am obliged to take note of the official record of the proceedings in any event, once it comes to light.

Counsel for both parties stated that no further hearing was required.

The affidavit in support of the application states that at the relevant time, the vessel, a motor sailer called "Good Karma", was in the ownership of the applicant although actual possession of it had not been taken. The record reveals that, at the relevant time, it was on charter. This was stated by counsel for the two defendants at the hearing and the only implication from this is that it was on charter to the two defendants or one of them.

Each of the defendants pleaded guilty to a charge of unlawful possession of gaja. It would appear to have been their first offence of this nature. In relation to another charge against each, namely, unlawfully importing ganja, no evidence was offered and the charge was dismissed. Both defendants were sentenced to a nominal one day's imprisonment and to a fine. The vessel was ordered to be forfeited.

Before sentence was passed the facts were outlined by the prosecution. Those facts were supplemented by defence counsel in a plea in mitigation.

From the facts outlined it was open to the learned magistrate to conclude that the vessel had been used as a container for the ganja which was the subject matter of the charges to which the defendants pleaded guilty - and no doubt for a much larger quantity than that discovered when the defendants were apprehended. The actual quantities found were small, but indicative of the fact that the vessel had been carrying ganja.

The applicant was not present or represented at the proceedings before the learned magistrate. The applicant had been given no notice of those proceedings and knew not of them until sometime later. The applicant's affidavit in support is as significant for what it does not say as for what it does. It obliquely confirms that the vessel was on charter, but gives no indication of when information was first received about the entry of the vessel into territorial waters or why it was here or why the ship's agent had not immediately contacted the applicant about the plight of the vessel and its crew. Singularly little effort appears to have been made to discover how the defendants came to be on

board - a matter one would have thought would have been of considerable concern to the owner of the vessel. It seems extraordinary that a vessel could be in this plight in these waters without the owner, who is in the Islands, being aware of the situation - particularly when one can take judicial notice of the publicity such cases have in the news media.

The grounds of the application were:

- "(i) that the said order was contrary to the intent of the provisions of section 14(2) of the Misuse of Drugs Law, 1973;
- (ii) that there was no evidence that the said Caymarine Holdings Ltd. was in anywise connected with the offences of Capt. Michael Cook or David H. Hathaway or could have been ^{or} aware thereof or aware that its vessel MV Good Karma was used in the commission of any offence (sic) of which they were or either of them was convicted;
- (iii) the said order was wrong in law;
- (iv) the said order was wrong in offending the rules of natural justice.

Section 14 (2) provided, at the relevant time, as follows:

"(2) On the conviction of any person for an offence against this Law, the court of conviction -

(a) may, upon the application of the prosecution, in the case of a first conviction for any such offence... order the forfeiture of any vessel used in the commission of the offence and seized pursuant to this section:

Provided that the owner of any vessel so seized may, with the consent of the court of conviction, recover such vessel upon payment into court of a redemption fee of \$6000."

It is a proper inference from the information before the learned magistrate that the vessel had been seized and detained pursuant to section (14) (1). Mr. Ritch's affidavit discloses that application was made by the prosecution for the forfeiture of the vessel. It was open to the learned magistrate to take the view that the vessel had been used in the commission of the offence, as the container of the drugs.

In my view, section 14 (2) contemplates the making of the order for forfeiture at the time of conviction - not at some later date. It provides "on the conviction of any person... the court of conviction... may etc." This precludes notification of any owner who is not one of the defendants. The true owner might not be known. He may be in some far flung corner of the world. It

would be impossible to comply with the requirement for immediate forfeiture following conviction if the owner had to be traced or notified. According to Mr. McField's affidavit the defendants instructed him that they had no knowledge of who the owners were or how they could be contacted.

The subsection provides that on the conviction of any person (not the owner or apparent owner) the vessel used in the commission of the offence may be forfeited. This is in contrast to the use of the words "the owner" in the proviso. These strong powers were no doubt considered ^{necessary} by the Legislature having regard to the mischief aimed at. It is immaterial whether the true owner was in any way a party to the offence. It must, of course, be apparent that the vessel used in the commission of the offence was in the control and possession of the convicted defendant/s. One could not forfeit an ocean liner because one of its passengers used it to transport a few sticks of ganja. Here one of the defendants was the captain of the vessel and had it in his control.

The true owner hires or lends his vessel to another at his peril. His remedy is against the convicted defendant/s for damages. He has a further limited remedy under the proviso on payment of a redemption fee. Presumably the convicting court would only exercise its discretion under the proviso if the owner, on application, showed that he had clean hands.

Quite apart from the foregoing, however, in the instant case the vessel was on charter to the defendants or one of them. The charterer stands in exactly the same position in relation to these provisions as the true owner. The charterer is to all intents and purposes the owner for the time being. The owner chartered at his peril. Forfeiture is just one of the risks a vessel faces. If the vessel were to founder on rocks the owner would look to the charterer for redress. Likewise where the vessel is forfeited because it was used by the charterer in the commission of an offence, he must look to the charterer for redress.

In my view, there is no merit in any of the grounds for this application. Accordingly, the application is dismissed with costs.

SIR JOHN SUMMERFIELD

Date 22nd January 1979.