

MICALAND

... Appellant

AND

COMMISSIONER OF POLICE  
ROYAL BRUNEI POLICE FORCE

... Respondent

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(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 15 of 2014)

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Before: Mortimer P, Leonard and Burrell JJ A.  
28<sup>th</sup> May 2015

Mr. Pg Mohd Khairul Nizam Pg Hj Md Yasin and Mr. Eugene Loh Jit Kuan (M/S Yusof Halim & Partners) for Appellant  
DPP Hjh Suhana Hj Sudin and DPP Hjh Fauziah Hj Sulaiman for Respondent

**Leonard, JA.:**

This is an appeal from a decision of the Chief Justice made on the 2<sup>nd</sup> of December 2014 dismissing an application made by the appellant, a Malaysian Corporation, under Section 47 of the Criminal Assets Recovery Order, 2012 ('CARO') for the return of cash which is in the possession of the Royal Brunei Police Force.

On the 12<sup>th</sup> October, 2013 a car driven by Yung Chow Wang ('Yung') and containing a passenger named Louis Lu Zen Kun ('Lu') entered Brunei from Malaysia at the immigration checkpoint at Labu, Temburong. In the car was a substantial amount of cash in various currencies, their total value being about half a million Brunei dollars. The cash was in two bags. It is the appellant's case that Lu was taking the cash on behalf of the appellant, allegedly a registered money changer in Malaysia, through Brunei to the appellant's branch in Limbang. Before reaching the customs checkpoint Yung and Lu were approached by Brunei Customs and Narcotics officers, who asked whether they had anything to declare. Yung, who was in the driving seat, replied "Nothing". Lu, sitting in the front passenger seat, did not reply, according to him because he was asleep. The officers then found the cash in the boot of the car and seized it as 'uncustomed goods.' They suspected that Lu and Yung had brought in the cash without complying with the statutory requirements in Malaysia concerning the movement of currency out of the country, thereby committing offences in Malaysia. As a result of their subsequent investigation with sources in Malaysia, which inevitably took some time, they made a report to the police on 9 November 2013 and the police, suspecting a possible offence of money laundering, seized the cash, informing the appellant's solicitors that they had done so under section 100(3) of the Criminal Assets Recovery Order ('CARO'), which was made by His Majesty the Sultan and Yang Di-Pertuan under Article 83(3) of the Constitution which reads:

*"When a proclamation of Emergency has been made and so long as such Proclamation is in force, His Majesty the Sultan and Yang Di-Pertuan may make any*

*Orders whatsoever which he considers desirable in the public interest; and may prescribe penalties which may be imposed for any offence against any such Order, and may provide for the trial by any court of any person charged with such offence.”*

A Proclamation of Emergency is now in force, Brunei having been in a continuous state of emergency since 1962. Article 83(3) exists side by side in the Constitution with the articles added in 2004 prohibiting judicial review.

On 16/12/2013 the Applicant filed an Originating Summons against the Respondent applying for the following –

- (i) A DECLARATION that the Applicant is the beneficial/legal owner of all that cash seized by the Royal Customs & Excise Department on the 12<sup>th</sup> October 2013 from Louis Lu Zen Kun which was transferred to the Royal Brunei Police Force on or about the 14<sup>th</sup> November 2013;
- (ii) A DECLARATION that the said cash as described in (i) above had been unlawfully seized and/or unlawfully detained by The Royal Customs & Excise Department and/or The Royal Brunei Police Force;
- (iii) AN ORDER that the Respondent be compelled to forthwith surrender the said cash as described in (i) above to Sankaran Halim, Advocates & Solicitor as solicitors for the Applicant upon service of this Order; and
- (iv) such other Orders or reliefs as the Honourable Court deems fit.

On 19 March 2014, the Respondent filed a Summons in Chambers No.30/2014 for an order that the Originating summons be struck out pursuant to Order 18 rule 18 of the Rules of the Supreme Court. The Chief Justice declined to strike out the Originating Summons and the case proceeded as an application under section of the 47 of CARO. There has been no appeal against that decision and it does not fall for consideration by us.

Section 47 of CARO provides that:

- ‘47. (1) *A person who claims that any cash or any part of it, seized under this Part belongs to him may apply to the High Court for the cash or part to be released to him.*
- (2) *Where the application is made by a person under subsection (1) and if it appears the High Court that –*
- (a) the applicant was deprived of the cash to which the application relates, or of cash which it represents, by unlawful activity;*
  - (b) the cash he was deprived of was not, immediately before he was deprived of it, tainted property; and*
  - (c) the cash belongs to him,*

*The High Court may order the cash to which the application relates to be released to the applicant.*

The words “this Part” in subsection (1) refer to part III of CARO which is entitled

*“CROSS BORDER MOVEMENTS OF PHYSICAL CURRENCY AND BEARER NEGOTIABLE INSTRUMENTS”.*

The appellant claims that customs officers who first seized the cash did so under section 42 of CARO, which section is in Part III and that they failed to obtain from the High Court an extension of time as required by section 43 and were thereafter holding the cash unlawfully.

Section 42 reads:

- 42. An authorised officer may seize any cash, if he has reasonable grounds for suspecting*  
*That -*
- (a) the cash may afford evidence to the commission of an offence under section 37;*
  - (b) the cash is tainted property; or*
  - (c) the cash is intended by any person for the use in unlawful activity.*

The appellant, as we understand his case, contends that when the police took over the cash, they could be in no better a position than the customs officers had been so that they too were holding the cash unlawfully, no extension of time having been sought as provided in section 43. The appellant made it clear, finally, that it was applying under section 47 and the allegation of unlawful seizure and detention of the cash indicated that the appellant was applying under section 47(2). It was for the appellant to satisfy the Chief Justice on the balance of probabilities that

1. the cash was seized under Part III of CARO
2. the appellant was deprived of the cash by unlawful activity and
3. at the material time the cash was not tainted property and
4. the cash belonged to the appellant.

As to 1 above though it appears from a notice that they issued that the customs officers mistakenly purported to seize the cash under the Customs Order 2006 as uncustomed goods, they did have a power of seizure under section 42, which is in Part III of CARO, if they had reason to believe that there had been an offence against section 37(1) of moving or attempting to move into or out of Brunei Darussalam cash the total value of which exceeded the prescribed amount, which this cash did. The section 42 power is included in that Part of CARO dealing with undeclared cash. The Chief Justice found that as authorised officers they also had power to make the seizure under section 100(3). But the Commissioner of The Royal Customs and Excise is not the respondent to this application. That is because he is not in possession of the cash, which has been seized by the police and is now in their possession. It is the Commissioner of Police alone who is the respondent to these proceedings. Having received a report from the Customs and, suspecting that the cash was the subject of money laundering, the police seized the cash from the Customs and proceeded to investigate. It is the Respondent’s case that the officers, being authorised officers under CARO had power, as the Chief Justice found, under section 100(3) to make the seizure. It is to their present possession of the cash that this case relates.

The appellant's argument is that because section 42 of CARO refers explicitly to cash, whereas section 100(3) refers generally to property, the respondent was only empowered to seize the cash by section 42. That argument did not find favour with the Chief Justice.

It has always been the respondent's case that the police at the time of seizure by them were concerned not only with a failure to declare cash but more importantly with suspected money laundering, which offence, created in section 3 in Part II, is far more serious and carries a far greater penalty. A seizure under section 100(3) on suspicion of money laundering is not a seizure under Part III and section 47 is not applicable. Section 100(3) is in the following terms.

*“(3) An authorised officer may seize, take possession of, and detain for such duration as he thinks necessary, any property, record, report or document produced before him in the course of his investigation or found on the person who is being searched by him.”*

“Property” is widely defined in section 2 of the Order. It includes among other things assets of every kind, whether tangible or intangible, movable or immovable, however acquired. Cash meets that definition. If an authorised officer is investigating money laundering he will need power to seize anything, including cash, which is needed for the investigation and possible prosecution of such an offence. That is why section 100 is broad in scope. If he is concerned only with a possible offence of failing to declare how much cash has been brought in to Brunei he may choose to seize it under section 42. If he needs to investigate possible money laundering he may choose to rely on section 100. The two sections are not in conflict: they are complementary.

Whatever might have been the case if the appellant had made its application while the money was still in the hands of The Royal Customs and Excise, different circumstances now exist. Once the police officers seized the cash in exercise of their powers under section 100(3), the question of the legal status of the previous possession of the cash by the customs officers became irrelevant.

As to 2 above, the Chief Justice noted that the term ‘unlawful activity’ is defined in section 2 of CARO as:

*“(a) an act or omission that constitutes an offence against a law in force in Brunei Darussalam or in a foreign country;*

*(b) an attempt to commit an offence against a law in force in Brunei Darussalam or a foreign country.”*

There was no evidence of any such act or omission or attempt committed by any authorised officer involved. The applicant did not allege that he was deprived of the cash by unlawful activity as defined, seeking instead a declaration that it “had been unlawfully seized and/or unlawfully detained by the Royal Customs and Excise Department and/or the Royal Brunei Police Force”. Assuming (without deciding the point because it is unnecessary to do so for the purposes of this appeal), that it was open to the appellant to apply for a declaration, it was futile to seek a declaration in terms of the Originating Summons because it would not have satisfied the requirement of section 47(2)(a). By no stretch of imagination could the bona fide seizure by the customs officers or by police of cash for the purpose of the investigation

of suspected offences be regarded as an offence or attempt as defined. The application was therefore doomed to failure and the Chief Justice rightly dismissed it.

As to 3 above, the Chief Justice was not satisfied on the affidavit evidence before him that the appellant had established on the balance of probabilities that the cash was not tainted property as defined in section 2 of CARO. That was a good ground for dismissal of the application. We are unable to find fault with his decision. The affidavit evidence afforded reasonable grounds for suspicion

As to 4 above, the Chief Justice found that the police were still investigating the ownership of the seized cash and on the basis of the evidence before him he was not satisfied that the appellant owned that cash. That was a finding that he was entitled to make on the evidence. Thus the appellant failed completely to satisfy the requirements of section 47.

The Grounds of Appeal set out in the Petition of Appeal dated 2 April 2015 are concerned solely with the question whether the seizure and/or detention of the cash had been illegal, (the declaration sought was to be that the seizure and/or detention had been unlawful). For the reasons given above the question was irrelevant because what the appellant needed to prove was not simply that the detention and retention were unlawful but rather that they had constituted 'unlawful activity' as defined, which they clearly had not. In the circumstances the stated grounds of appeal do not merit further consideration.

A civil court should be extremely reluctant to make findings on issues which are intended to be canvassed later in a criminal court. Since we began to hear this appeal, warrants have been issued by the High Court against Lu, Micaland and another person, namely Lu Ngoung Lew, said to be the uncle of Lu. Lu is to be charged with moving the cash into Brunei, its total value exceeding the prescribed amount (\$15,000.00), without giving a report in accordance with section 37(4) of CARO and thereby committing an offence punishable under section 37(4) of CARO. He is also to be charged with money laundering in that he brought into Brunei money that is the proceeds of crime, an offence under section 3(1)(b) of CARO. The appellant and Lu Ngoung New are to be charged with abetting the alleged money laundering committed by Lu.

Notwithstanding the fact that the investigations have led to the issue of warrants with a view to criminal charges being preferred, the appellant maintains its application, saying that the production of the cash as an exhibit at any criminal trial is not essential because its existence can be proved by secondary evidence. But that is not the only consideration. In the event of a conviction, the question of confiscation of the cash would normally arise in a case such as this. See section 367 of the Criminal Procedure Code and section 60 of CARO.

There will be an order that the appeal is dismissed and an order nisi that the costs of this appeal be taxed if not agreed and paid by the appellant. A party wishing to be heard on costs should inform the Registry with notice to the other side by close of business on Thursday 28 May 2015 and appear on Saturday 30 May 2015 at 9 am. Otherwise the order nisi will become absolute at midday Saturday 30 May 2015.

**Mortimer, P.**

**Leonard, J.A.**

**Burrell, J.A.**