Date: 20011120
Case Number: 1059359

IN THE PROVINCIAL COURT OF NOVA SCOTIA

IN THE MATTER OF an Application by the Attorney General of Canada for an Order pursuant to section 490(9) of the *Criminal Code* Ordering that certain property seized by the police be forfeited to Her Majesty the Queen in the Right of Canada

Cite as: Canada (Attorney General) v. Luther, 2001 NSPC 31

Decision Respecting Admissibility of Evidence

Heard Before: **The Honourable Judge D. William MacDonald**

Place Heard: **Dartmouth, Nova Scotia**

Dates Heard: **October 3, 2001 and November 20, 2001**

Decision: **November 20, 2001**

Counsel: **David W. Schermbrucker**
Solicitor for the Applicant
The Attorney General of Canada

Joel E. Pink, Q.C.
Solicitor for Justin Luther

Background

The Respondent in this application is a shoe box containing $21,500 in Canadian currency. The shoe box is represented by counsel, who also appeared for Mr. Justin Luther.

Under section 489.1 of the *Criminal Code*, where there is a dispute as to who is lawfully entitled to something that has been seized but is no longer required for investigation or court purposes, the peace officer must bring the thing before a justice to be dealt with as the justice directs. The resulting application is, in effect, an *in rem* application. In this case, there is an application made under section 490(9) of the *Criminal Code*, by the Attorney General of Canada, who seeks forfeiture of the contents of the shoe box which were seized by the police executing a search warrant. The Applicant asserts the contents of the shoe box were unlawfully in the possession of Mr. Justin Luther, being proceeds of crime, and therefore should be forfeited.

Mr. Luther left the package with an employee at the Dartmouth office of Purolator Courier for shipment. The employee was suspicious, and contacted police. A police dog was brought to the courier office and the dog reacted to the package. Using that, and the information provided by the Purolator employee, the police obtained a search warrant under the *Controlled Drugs and Substances Act*. The validity of the search, seizure, and return is admitted. No controlled substance, only money, was found in the package.

It is common ground that the box contained money wrapped in plastic. The box itself was wrapped in newspaper and clear plastic. The package was marked to show the name of the sender, using Mr. Justin Luther's real name and address, and the real name and address of the intended recipient in British Columbia. Neither Mr. Luther nor the intended recipient have criminal records for drug offences and, before this investigation began, neither was known to police who investigate drug offences.

No charges have been laid and none are contemplated as a result of this investigation. Courts have dealt with applications for forfeiture under section 490 where there is no antecedent criminal conviction. See *Re Mac and The Queen* (1995), 97 C.C.C. (3d) 115 (Ont. C.A.); *R. v. Zamora*, [2000] B.C.J. No. 1480 (Prov. Ct); and *R. v. Marriott, [2001] N.S.J. No. 363 (Prov. Ct).* Whether or not charges have been laid, forfeiture has been ordered where the court is satisfied beyond a reasonable doubt that the items in question were unlawfully in someone's possession. As to the burden of proof, see *Attorney General for British Columbia v. Forseth* (1995), 99 C.C.C. (3d) 296 (B.C.C.A.); and *R. v. Daley*, [2001] A.J. No. 815 (Alta. C.A.), which deals primarily with the application of the *Canadian Charter of Rights and Freedoms* to proceedings under section 490.

Issue

No affidavits were relied upon at the hearing. The Applicant called two police officers, one involved in the seizure and the other who was in charge of the investigation. Through these witnesses, the applicant sought to produce (1) information provided by the Purolator employee who dealt with Mr. Luther, (2) information provided by the landlord of Mr. Luther's apartment, and (3) a statement obtained from the intended recipient by a police officer in British Columbia. Counsel for Mr. Luther objected to the admissibility of this evidence as hearsay.

A *voir dire* was conducted respecting the admissibility of the hearsay evidence. The Applicant agrees that it is hearsay, and that it does not come within either the principled approach, where necessity and reliability are established, or the traditional exceptions to the rule excluding hearsay evidence. However, the Applicant says hearsay evidence is admissible at an application under section 490(9) of the *Criminal Code*, if the court finds it to be credible and trustworthy before it is received, and the court can then decide what weight to give the evidence based upon the circumstances.

Is hearsay evidence in general admissible in an application under section 490 of the *Criminal Code*?

Analysis

Section 490 of the *Criminal Code* is silent respecting the use of hearsay evidence, and I am aware of no judicial precedent relating specifically to its admissibility at a hearing under section 490.

Parliament has given statutory direction respecting the use of hearsay at bail hearings and at sentencing hearings. At bail hearings, section 518(1)(e) of the *Criminal Code* provides "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances." At sentencing hearings, section 723(5) of the *Criminal Code* says:

> Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person
>
> (a) has personal knowledge of the matter;
>
> (b) is reasonably available; and
>
> (c) is a compellable witness.

If Parliament is specific about use of hearsay in some proceedings under the *Criminal Code* and does not address its use in others, one interpretation is that Parliament intended hearsay to be used only where it is specifically authorized.

However, the Applicant submits that, if hearsay is to be used at bail and sentencing

hearings, it was necessary for Parliament to specifically permit its use because liberty of the subject is at issue. However, that will never be the case under section 490. Under section 490, no one is on trial; section 490 relates only to the disposition of seized property.

The Supreme Court of Canada, in *R. v. Zeolkowski* (1989), 50 C.C.C. (3d) 566, held that hearsay evidence is admissible in a firearms acquisition and prohibition hearing because the statute provides for the court to consider "all relevant evidence." The Supreme Court found that, by using this expression, Parliament intended to allow evidence that would normally be excluded at a trial.

The Applicant submits that proceedings respecting disposition of seized property should not be subject to strict rules of evidence, but rather should be less formal. The person seeking return of property may be an innocent owner whose property has been seized by the state in its investigation of another. Sometimes, perhaps often, the innocent owner is self-represented. In the circumstances of each case, the Applicant submits the court has and should have discretion to receive and consider evidence it considers credible and trustworthy. This was the approach taken by the British Columbia Supreme Court in *Regina v. Clymore* (1992), 74 C.C.C. (3d) 217, where the court held that hearsay evidence is "not inadmissible" in proceedings under section 462.38 of the *Criminal Code* for forfeiture of proceeds of crime.

However, that approach was specifically rejected by Moir J. in *R. v. Marriott*, [2000] N.S.R. No. 421. He decided hearsay evidence in general cannot be heard in an application to forfeit proceeds of crime made under section 462.38.

Before a Judge orders forfeiture of proceeds of crime under section 462.38, the Judge must be satisfied, among other things, that proceedings in respect of an enterprise crime offence committed in relation to that property were commenced. See paragraph 462.38(2)(b).

The proceedings before me are under different provisions of the *Criminal Code*, but I too am being asked to make an order forfeiting proceeds of crime. Should the standard of proof be different depending upon which procedure is followed? Should the standard of proof be less stringent, and therefore forfeiture more readily obtained, where no charges have been laid against anyone than when specific enterprise crime charges are being or have been prosecuted?

In urging the merits of informal proceedings for applications under section 490, the Applicant points to administrative tribunals and labour relations boards where hearsay evidence is generally admissible, subject to weight. The reasons for the different rules of evidence before administrative bodies is explained in *The Law of Evidence in Canada* (2nd edition) by Sopinka, Lederman and Bryant (Toronto: Butterworths, 1998), at paragraph 6.347:

> The rationale for shying away from strict adherence to the hearsay rule, and the rules of evidence generally, is that administrative proceedings are not normally as adversarial as criminal and civil cases. Moreover, policy and social issues are often

> considered in such proceedings. Evidence with respect to these issues by its nature contains a hearsay component which cannot be separated out. Furthermore, individuals who are not legally trained are often members of the tribunal or act as representatives of the parties and would not be familiar with the rules of evidence.

None of these considerations apply to applications under section 490 except that parties may be self-represented.

Hearsay evidence may not be reliable. It is not under oath or affirmation, and the person with first hand knowledge is not subject to cross-examination. The need for cross-examination is identified by Lefever, Prov. Ct. J., in *Certas Direct Insurance Co. v. Alberta (Attorney General),* [2001] A.J. No. 1346. The judgment outlines the procedure which should be followed in an application under section 490 of the *Criminal Code*. In paragraph 38 of the judgment, it says, "Any party who has filed an affidavit is subject to cross examination upon the affidavit."

The *Criminal Code* authorizes hearsay evidence in other proceedings but not in proceedings under section 490. I do not find the existence of a persuasive rationale for the admissibility of hearsay in proceedings under section 490. The Supreme Court of Nova Scotia has held that hearsay is not admissible in proceedings for the forfeiture of proceeds of crime under section 462.38. Hearsay evidence is not subject to the safeguards of evidence under oath or affirmation and subject to cross-examination. Its reliability cannot be tested or fully assessed.

Conclusion

I find that hearsay evidence in general is not admissible in proceedings under section 490 of the *Criminal Code*.

During the voir dire for the determination of this issue, the Applicant acknowledged that this application for forfeiture must fail if the hearsay evidence is excluded.

Accordingly, the application is dismissed, and the contents of the courier package will be returned to Mr. Justin Luther.

DATED at Dartmouth, Nova Scotia, this 20th day of November, 2001.

D. William MacDonald
A Judge of the Provincial Court of Nova Scotia