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The seizure and forfeiture of property associated with criminal activity*

N. LIVERPOOL
Faculty of Law, Cave Hill Campus, University of the West Indies, Bridgetown, Barbados

ABSTRACT

Law enforcement agencies are increasingly beginning to recognize the usefulness of attacking groups engaged in organized crime through their assets. The growth and power of these criminal groups depend, to a large extent, on how effective they are in "earning", securing and deploying the financial proceeds of their illegal activities. The mere imprisonment of members of a group and the adoption of restrictive measures against their property, which in many cases is the source of their power and influence, may simply result in the enterprise being run more or less effectively by surrogates or from prison. Such an operation is relatively sophisticated and is the type of activity that might be expected in illicit drug trafficking.

Cautious criminals may attempt to put their illicit profits beyond the reach of the courts within the jurisdiction of which they commit their crimes. In such cases, the existence of provisions allowing the seizure, forfeiture and confiscation of property would be ineffective unless, on the one hand, such provisions could be enforced against equivalent property held within the jurisdiction of the courts or, on the other hand, some type of arrangement could be made with the country where the property may be found. Alternatively, in certain areas of criminal activity, countries may be prepared to take action against property and finances under their own jurisdiction which are derived from or related to the commission of crimes in another jurisdiction.

This study recommends the enactment of legislation which would allow effective confiscatory action to be taken against property associated with criminal activity, and facilitate the seizure of property prior to a criminal trial and the forfeiture of property directly related to or involved in the crime. None of the present legislative models within the Commonwealth are wholly adequate.

* This paper was initially prepared for presentation to the meeting of Commonwealth Law Ministers held at Colombo, Sri Lanka, in February 1983. In editing the material for the present publication, it was necessary to delete several chapters and appendices.

Introduction

Once it is accepted as a matter of policy that the criminal should not be allowed to profit from crime, especially when the health of innocent persons is jeopardized in order to reap such profits, it is but a short step to the conclusion that there is nothing inherently wrong in depriving the criminal of the proceeds, whether direct of indirect, of crime.

In feudal England the concept of forfeiture was based on the intimate bonds of allegiance which existed between subject and lord. Until 1870 all the property, whether real or personal, of a person who was convicted of treason or felony was forfeited to the Crown. However, in the case of felonies other than treason, forfeited land could escheat to an intermediate lord after a year and a day. If the accused fled the jurisdiction of the appropriate courts in order to evade trial, he was outlawed and his property forfeited. Since forfeiture was a fruitful source of revenue for the Crown, there were strong reasons for retaining it, but the severity of the punishment caused juries to return perverse verdicts and led clever offenders to convey their property to trustees in order to evade its effect. Forfeiture on conviction was abolished by the Forfeiture Act of 1870, and forfeiture for outlawry was abolished in 1938.

A similar concept known as deodand,[1] also loosely referred to as forfeiture, can be traced as far back as the Old Testament, and both the ancient Greeks and Romans forfeited things which were involved in certain wrongs. Early Britons also recognized the concept, which originated in the desire for revenge against an offending thing, if not against its owner. Over the years the concept of revenge has gradually faded, but the doctrine has remained, and is used principally to protect the public from harmful objects and to deter crime.

The need for forfeiture in relation to certain crimes can easily be justified. In the case of theft or fraud-related offences, the victim has been deprived of some tangible object or valuable consideration to which the accused is not legally entitled, and whatever the outcome of the trial, the accused should not be permitted to retain or claim any part of the property. Drug-related offences seriously undermine the moral fabric of society, have adverse effects on the health of countless persons who make use of the drugs, particularly the young, and yield huge undeserved monetary rewards to those who make it their business to deal in them. The forfeiture of the proceeds of such crimes can only be of immense benefit to society.

Nevertheless, the law seems to be unable to achieve the desired results, because in some instances, even when goods are clearly liable to forfeiture, a proper interpretation of the legislative provisions does not permit the court to issue a forfeiture order.

[1] In English law, a personal chattel which, having been the immediate occasion of the death of a person, was forfeited to the Crown to be applied to pious uses.

Several statutes currently in force in Commonwealth territories provide for the forfeiture of proceeds of crimes after the accused persons have been convicted, but the power to seize and detain property that has been stolen or is suspected of having been stolen is severely circumscribed, and before the English case of *West Mercia Constabulary* versus *Wagener*, [1, p. 378], it was doubted whether the courts had the power to seize or detain money in a bank account.

Seizure

Tangible assets

It is when accused persons still have the proceeds of the crime in their possession, and before they are able to dispose of them, that the power to seize and preserve is most needed. A conviction obtained after the assets have been dissipated will certainly not meet the main object, which is to deprive them of assets to which they are not justly entitled and to prevent them from putting them beyond the reach of the law, and also of those who are legally entitled to them.

In common law the police are entitled on a lawful arrest, at least on a charge of treason or felony, to take and detain property found in the possession of suspects, if it will form material evidence in the prosecution of the crime. The reason for this additional power was clearly and succinctly stated by the judge in *Dillon* versus *O'Brien and Davis* [2] in the following oft-quoted words:

> "... the interest of the State in the person charged being brought to trial in due course necessarily extends, as well as to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form."

In that case the judge was also called upon to decide whether this right extended to cases of misdemeanour. He held that it did.

The power of the police to seize or detain goods was considered and extended by the Court of Appeal in *Chic Fashions (West Wales) Ltd.* versus *Jones* [3], where it was held that on entering a house with a search warrant or with the occupier's consent, the police had the power to seize goods which they reasonably believed to have been stolen or obtained fraudulently. They were empowered to detain the goods for such time as was reasonably necessary to complete their investigations, and if their investigations revealed that the goods had either been stolen or fraudulently obtained, they could further detain them for subsequent production at the trial as material evidence, if necessary, or restitution to their rightful owner. But once

appeared that the goods were not stolen or fraudulently obtained and not needed as evidence, the police had to restore them to the person from whom they had been taken, even if it was clear to everyone concerned that that person was not entitled to them.

It should be noted that the decision in *Chic Fashions* extended the purpose, as stated in the *Dillon* case, for which goods could be detained by the police, because whereas the judge in the latter case had referred to the preservation of material evidence as the ground for seizure and detention, in the *Chic Fashions* case the additional ground of restoration to the rightful owner was included. But whatever the grounds stated, it is clear that in neither case is the accused legally entitled to the goods in question. Therefore, an order to deprive the accused of the goods could in no way be considered inequitable if they do not belong to the accused in the first place.

Intangible assets

So far, it is clear that the law empowers the law enforcement authorities to seize goods or tangible assets. Until recently, however, it was thought that the courts had no power to seize assets of an intangible nature, such as money in a bank account. The enormous profits now made by the perpetrators of fraudulent transactions and those involved in drug-related offences require a change in practice, through the seizure of property pending trial, and its confiscation after trial and conviction. It can also be argued that a prior conviction should not be a prerequisite to either forfeiture or confiscation. The fact that the property is intangible means that it is more easily disposable, and grave injustice could follow unless an attempt is made to remedy this deficiency in the law.

Since tangible property could have been seized on the authority of *Dillon* and *Chic Fashions*, it was but a short step to extend seizure to all types of property, tangible or intangible, which seems to have been the approach adopted in the *West Mercia* case [1]. In order to do this, his lordship merely adopted the submission of counsel for the plaintiff, that "... the police have a common law right to seize or preserve property which is the subject of crime", and that the court should lend them support in doing so. However, this decision gives rise to two important questions, namely:

(a) Do the police have an interest in seeking civil remedies to restore stolen or fraudulently obtained property?

(b) What is the proper procedure to be adopted to achieve this result?

Both these questions will be dealt with later.

It was conceded in the *West Mercia* case that justices of the peace had no power to issue a search warrant to seize and preserve monies held in a bank account. The common law did not permit it and equity had never been called id of the criminal law in such circumstances. The civil remedy of tracing

was open to the owner, but apart from being tedious and time-consuming, it too was limited in effect, since it did not extend to land. Such a vital omission must be remedied if an efficient armoury against the perpetrators of organized crime is to be built up and maintained. The *West Mercia* case is therefore authority for the principle that when it is alleged that a person has obtained money dishonestly and paid it into a bank account, the courts are empowered to place an embargo on withdrawals from the account, pending the outcome of the trial of the accused.

The decision was upheld by a majority of the Court of Appeal in *Chief Constable of Kent* versus *V and Another* [4], where the questions of standing and procedure were thoroughly reviewed.

Standing and procedure

Once it is conceded that there is no power in the criminal process to issue a warrant of search and seizure in respect of intangibles, resort must be had to civil procedure. In the *West Mercia* case, the court froze the account by virtue of the powers which it claimed had been conferred upon it by Order 29, Rule 2 (1) of the Rules of the Supreme Court, which reads as follows:

> "On the application of any party to a cause or matter the court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter."

This provision clearly contemplates the existence of a cause or matter between the parties before the court, as a prerequisite to the exercise of its power thereunder. There was no cause or matter in dispute between the parties, and it was this, more than anything else, which made the judge extremely troubled about the application and, in particular, about whether the plaintiffs could be said to have any *locus standi* to move the Court for the relief which was sought [1]. It was at least doubtful if such *locus standi* could be said to exist, but the judge based his decision on the narrower ground that since the police have a common law right to seize or preserve property which is the subject of crime, the court ought to lend its support to them in doing that.

In the case of the *Chief Constable of Kent,* the court had been approached by way of a different procedure, probably because of the doubts expressed in the earlier decision on the *West Mercia* case. Here the Chief Constable issued a writ and then applied for an injunction to restrain the accused from withdrawing any monies from the bank accounts.

Both the importance and the complexity of the matter are such that clear legislation should be introduced to empower certain police officers, as of

right, where they believe on reasonable grounds that monies standing to the credit of a bank account are traceable to property which had been obtained from another in breach of the criminal law, to apply to the court for an order either to prevent withdrawals from that account, or that the monies should be paid into court. Such an application could be made in the most convenient forum, whether it be a civil or a criminal court. If such legislation were adopted, it could help to solve both questions of standing and procedure which were raised in the cases discussed above. It is assumed that throughout the Commonwealth the principle of the *Dillon* case, as extended by *Chic Fashions*, would be generally accepted as good law.

The effect of seizure

The right to seize property, whether tangible or intangible, before the guilt of the accused has been established in a court of law will clearly need to be circumscribed for various reasons. First, it may adversely affect the ability of the accused to carry on legitimate business either alone or in association with others. Secondly, the monies in the account or the tangible assets seized may legally belong to both the accused and some other person who has neither been suspected nor accused of a crime, or it may belong exclusively to third parties although it is ostensibly under the ownership, control or protection of the accused. Thirdly, such seizure may be in breach of one or other of the rights of the accused which have been guaranteed under a written constitution.

Effect on accused

The inherent dangers to a *bona fide* trader from an application to freeze his or her account must constantly be borne in mind since they are potentially very harmful. The otherwise innocent shopkeeper who is persuaded to permit his or her place of business to be used as a collection point for the exchange of cash in return for prohibited drugs may, for example, have deposited some of the money into the account with the intention of paying it over to sellers of the drugs. Such funds should clearly be seized and, as will be argued later, confiscated. But at least pending conviction, it would be inequitable to freeze the whole of the trader's bank account, since his or her normal means of livelihood could well be jeopardized.

It would be wrong to ignore the fact that the stopping of a business account, even for only a few days, may well result in financial disaster for the business concerned. It is imperative, therefore, that the proprietor of a business whose account has been frozen pursuant to an *ex parte* application should be afforded the earliest opportunity to address the court. And even where an order has been made after hearing all the parties concerned, it should be flexible enough to permit the court to vary or discharge it, if new

evidence is brought to light which justifies such variation or discharge. Only in this way can a fair balance be maintained between the interest of the community as represented by the prosecutor, on the one hand, and the right of a trader to operate a business unhindered so long as he or she does so within the law, on the other.

Both these points were accepted in *West Mercia* and in *Chief Constable of Kent*. In the first case, the injunction was granted until further order with a clear indication by the judge that the words "further order" were not a mere formality, because he could conceive of situations in which the accused might wish to put before the court evidential material which would indicate that some latitude ought to be allowed to the company to trade from its own bank account. In the second case, the Master of the Rolls stated that if the accused had any special reason for making payments out of his accounts he had only to ask and proper payments would be permitted. In fact, the accused was given leave to apply for the release of such sums as he might need for his defence or otherwise.

Effect on third parties

An order for freezing assets may also adversely affect third parties and for that reason needs to be carefully studied before implementation. It has already been seen that dicta in both *West Mercia* and *Chief Constable of Kent* contemplate that in certain circumstances the accused may apply to the court for sums to be drawn out of his account. This power should, for obvious reasons, apply to a third party who has a proprietary interest in the property seized. It would be unjustifiable and inequitable to seize property that did not belong to an accused if the third party has no knowledge that, in the case of tangible assets, his property has been directly used to perpetrate crime or, in the case of intangible assets, that his funds are being seized because they merely happen to be in a joint account with monies that belong to the accused.

It would seem that in such cases, knowledge by the third party should be a vital factor. If the third party has no knowledge of the criminal conduct of the accused, then he should be able to recover his property without question. Where, however, it can be shown that the third party knew, or ought to have known, of the conduct of the accused, he should be required to go further and show that he was in no way involved in that conduct, nor did he facilitate it. The principles governing the rights of third parties to have their property exempt from seizure apply equally to forfeiture and confiscation, and will be duly taken into account here.

If the accused and the third party have bought real property in equal shares and the court is minded to make an order to freeze the property of the accused, the question naturally arises as to the nature of the order which should be made in such circumstances. It is clear that a provision which empowers the court to freeze the entire asset would be so harsh as to border

on the unconstitutional in many countries. Yet it is important that the accused's share of the asset should be attached, lest he or she dispose of it before the trial. In such a case, a charging order may be the appropriate remedy, but it should be borne in mind that even with such an order, difficulties could arise as to the share of the accused in the property, and complicated accounts may have to be drawn up in oder to arrive at a fair solution.

If the third party has a mortgage or charge on the property, the problem may be more easily solved, since at any given time, a mortgagee or chargee will almost always be in a position to prove what is the accused's indebtedness to him. Any legislation contemplated should, however, specifically confer on third parties the right to approach the court in a summary way in order to have their rights vindicated, and no unreasonable time-limit should be placed on the third party's application, especially where he may not be aware of the fact of seizure. If the third party's interest is registered, as in a case of joint ownership or a mortgage or charge or bill of sale, the applicant for seizure will be fixed with notice by the mere fact of registration, but provisions could be made for publicizing an application for seizure, and no amount of publicity should be regarded as being too extravagant.

Another question likely to arise is whether the accused should be allowed to withdraw funds to meet unsecured debts, for example, to maintain his family or to pay utility bills. Such a question does not lend itself to easy answers. Since in pre-trial procedure the accused is presumed innocent until proven guilty, it could at least be argued that since, if his guilt is not subsequently proved, the assets will have to be returned to him, he should be able to utilize some of them for essential purposes. On the other hand, the applicant for seizure may be able to show that the accused had no funds in that particular account before he embarked on his criminal activities, and that even if he is not convicted, he should not be entitled to the proceeds or profits of crime. It is undesirable to lay down any hard and fast rules. Each case should be decided on its merits.

In the first instance, the application should be made to the court which ordered the seizure, with a right of appeal by the party dissatisfied with the decision. This would include the State and any third party whose property has been affected by the decision.

The constitutional question

Most countries of the Commonwealth are governed by written constitutions with enshrined fundamental rights and freedoms, including, for example, protection for the privacy of the home and other property, protection from deprivation of property without compensation, and pro-

visions to ensure protection of the law. Where the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts, this is not held to be inconsistent with or in contravention of the right to protection of the law, but care must be taken in passing legislation such as that which has been recommended in this paper, so as to ensure that the clause protecting the deprivation of property without compensation is not breached.

Various provisions of the constitution of Barbados illustrate the above points. The relevant section states that no property or interest or right over property, shall be compulsorily acquired except by or under the authority of a written law which prescribes the principles on which and the manner in which compensation is to be determined, and which gives a person claiming compensation a right of access to the High Court. However, nothing contained in or done under the authority of any such law is to be held to be inconsistent with or in contravention of the section, to the extent that it makes provision for the acquisition of property by way of penalty for forfeiture in consequence of a breach of the law.

Where, therefore, a person has been convicted, properly drafted provisions could pave the way for forfeiture. But such provisions need to be carefully worded and distinctly set out so that the courts which are required to administer them may be able to act with the minimum of room for error. With this in mind, therefore, the provisions of a recent bill intended to amend the Narcotic Drugs Act of Barbados would seem to be too wide and consequently open to serious objections. The bill is an attempt to provide for the revision of penalties under the Act, and for the forfeiture of all articles used in the commission of an offence as well as any profits arising therefrom. However, no guidance is given as to either the procedure to be used in case of forfeiture, or the method to be used in investigating the nature and extent of profits made as a result of the commission of the offence. Consequently, it is likely to face the same restrictive interpretation which has been applied to similar legislation in the United Kingdom. In addition, if it is intended to include the provisions for confiscation which have been recommended elsewhere in this paper, then it would also be open to serious constitutional objections.

Legislation on forfeiture

Many statutes confer power on the courts to order forfeiture of articles whose possession is prohibited, such as the statutes governing the publication of obscene materials. The gist of the offence in this type of case is the possession of the offending article, hence the requirement that it be removed from the possession of the offender by forfeiture, on conviction. But an examination of a random list of those statutes reveals that although in some cases the wording may seem to be insignificant, in others the differences may

be vital. In some cases, for example, a conviction is not required before forfeiture. Notable among these is the power of forfeiture conferred for breach of the provisions of various customs regulations, and in other cases the court is permitted rather than required to forfeit, although in such cases the power conferred may in fact be much wider, in that forfeiture is made to apply to anything which relates to the offence. In the United Kingdom, a time-limit for making an order of forfeiture has been imposed.

Section 43 of the Powers of the Criminal Courts Act, 1973 (United Kingdom), for example, has conferred on the courts a general power of forfeiture, but section 11 of the Courts Act, 1971 effectively imposes a time-limit within which this power can be exercised. In *R* versus *Menocal* [5] an order for forfeiture had been made in respect of a sum of money which was found on the person of the accused, and which was admittedly in her possession for the purpose of being handed over for the payment of illegally imported drugs. The Courts Act imposes a time-limit of twenty-eight days on the power of a Court to vary a sentence after it has been pronounced, but the order in the *Menocal* case was made more than twenty-eight days after conviction. The House of Lords had no hesitation in holding that there was no jurisdiction to make the order. The decision in this case clearly strengthens the submission that confiscation orders could be used to supplement forfeiture orders where the Court is unable to make up its mind at the time of conviction whether or not to order forfeiture.

Section 43 applies to property which is in the possession or control of the accused at the time of his apprehension, and is limited to cases where the offender has been convicted of a certain type of offence, namely one which is punishable on indictment with imprisonment for a term of two years or more. But even where it is shown that the property was in his possession and control, the prosecution is required to go further and satisfy the court that the property has been used, or was intended to be used, for the purpose of committing or facilitating the commission of an offence.

Certain specific powers of forfeiture, such as that contained in the Firearms Act, 1968 (United Kingdom), do not require the property to be linked to the offence at all, so that after the conviction of a person for the offence, the court may order the forfeiture of any guns and ammunition found in his or her possession. This power may seem reasonable in respect of gun-related crimes, since an offender may have a large selection of firearms, only one of which was used in an attack, but it is certainly unreasonable to conceive of this power being applied to any offensive weapon, since the variety of things which are capable of falling within this category is infinite.

Lawmakers may wish to consider whether forfeiture should be confined to relate to the specific offence of which the offender has been charged, or whether there should be a general power of forfeiture circumscribed by a time-limit within which it may be imposed. Where it is not necessary to charge or convict a person before forfeiture, the types of offence are clearly

defined and follow a well-known pattern. It may therefore be felt that all legislation embodying forfeiture provisions should follow traditional lines, leaving it to new provisions on confiscation to cover any other property which cannot be securely linked to the commission of any specific offence, but which is nonetheless clouded with suspicion. Finally, one may also wish to consider whether all powers of forfeiture should not also contain a provision relating to seizure and disposition, or whether a general power as to seizure and disposition should be provided in new legislation, which would include some machinery whereby such power may be effectively utilized.

Analysis of three recent cases

In *Regina* versus *Ribeyre* [6], the court held that an order which had been made under section 27 (1) of the Misuse of Drugs Act, 1971, forfeiting the cash proceeds of the sale of drugs was made without jurisdiction where a person had been convicted of having drugs in his possession with intent to supply. Like the House of Lords in *R* versus *Cuthbertson* [7], the Court interpreted the words of section 27 (1) as relating strictly to the offence of which the person was convicted, and therefore found that since the appellant would not have required his "working capital" for the act of selling drugs, the money was accordingly not "anything shown . . . to relate to the offence".

As will be pointed out later, one of the aims of national and international policy is to strip the offender of his profits, but most legislation so far passed does not seem to have addressed this specific point with sufficient accuracy. It is in cases of this nature that the tracing provisions contained in legislation enacted in the United States and Australia could be most usefully employed. Under those provisions, the assets and bank account of the appellant could be investigated and the difference in amount over a period noted. If the findings raised a presumption on the balance of probabilities that the money was acquired as a result of the sale of drugs, the onus would be on the appellant to prove beyond reasonable doubt that it was not so obtained.

In *R* versus *Uxbridge Justices* [1, p. 129], the accused was found in possession of foreign currency notes, charged and convicted on six counts of dishonest handling and one count of corruption. The police had seized not only the coins found on the accused, but also a considerable quantity of Bank of England, Bank of Clydesdale and Fijian notes found at his home. Because the owners of the currency found at his home were not known, however, he successfully applied to have it returned to him.

The facts showed clearly that the accused had been in the habit of frequenting Heathrow Airport, where he had unlawfully obtained foreign currency. While the notes found at his home could not have been the subject of seizure on the technical ground that they could not be proved to relate to the offence of which he was convicted, it was nevertheless considered as clear

a case as any for confiscation. Legislation should provide that in cases of this nature, notice of confiscation should be served on the accused, and the State should prove on a balance of probabilities that the money had been obtained as a result of criminal activity. The conviction of the accused should be sufficient to raise that presumption. The onus would then shift to the accused to show beyond a reasonable doubt that the currency was not obtained as a result of criminal activity.

The third case which has revealed the weakness of current English legislation is *R* versus *Cuthbertson* [7]. In that case, the House of Lords, in interpreting section 27 of the Misuse of Drugs Act, 1971, felt that the question of forfeiture should not be approached with any preconception that Parliament must have intended the section to be used as a means of stripping professional drug traffickers of the whole of their ill-gotten gains, however laudable that conclusion might appear to be. Their lordships accepted the submission that forfeiture under the provisions of the statute was limited to the accoutrements of the crime, that is, the tools, instruments or other physical means used to commit crime.

In this case it was also clear that the accused persons had accumulated considerable sums of money by illegally manufacturing dangerous drugs, yet the proceeds of their crime were kept out of the reach of the forfeiture provisions of the statute because they had been charged with and convicted of the offence of conspiracy, which was not an offence created by the Act. Their lordships held that in order to justify forfeiture the accused had to be convicted of an offence under the Act, and that the power of forfeiture would be applied only to tangible things capable of being physically destroyed and not choses in action or other intangibles, and even then only to those tangibles which are shown to the satisfaction of the court, to relate to the offence.

This is another instance in which the procedure for confiscation could supplement that of forfeiture. The court was satisfied that the accused were professional drug traffickers, and consequently, if the legislation recommended in this paper were in force, a notice of confiscation served on them would have placed on them the onus of proving beyond reasonable doubt that the funds were not obtained as a result of trafficking in drugs. If the proceedings in *Cuthbertson* and *Ribeyre* had been taken against the appellants under the provisions of the Customs Act of Australia, there seems to be no doubt that the provisions of the Act would have been wide enough to have ensured a forfeiture of the monies involved.

Confiscation

Confiscation is most likely to be particularly relevant in two distinct types of situation. The first is where the transaction which yields the profit is itself illegal, and the second situation arises where the transaction itself is

lawful, but the profit is increased by illicit means, such as the sale of prohibited drugs, the sale of pornographic material and the transportation of illegal immigrants. Attempts to confiscate profits are likely to meet with the approval of a large section of the population, especially where the transaction which yields the profit is illegal.

Legislation to deal with the second type of case may not, however, evoke the same level of support. For example, the manufacturer who ignores pollution controls or illegally discharges waste may increase his profits tremendously, so also may the owner of a listed building[2] who demolishes it in order to obtain an increased purchase price for the vacant site. But in this type of case the conscience of the community is not similarly aroused to the same degree of reprehension. Nevertheless, it is suggested that such cases could, at some later stage, also be considered suitable for the application of confiscatory legislation.

Confiscation may in theory be achieved by the simple process of imposing an appropriate fine. But experience has shown that the expectation of the lawmaker and the public may not always be satisfied by the imposition of fines. In addition, a number of problems have been identified which could severely curtail the effectiveness of using fines for this purpose. The problems fall into the following two categories: ineffective information gathering procedures and means of enforcement.

Before a suitable fine can be imposed, the procedure for gathering information in most Commonwealth countries clearly needs to be strengthened and improved. The essence of confiscation is that the accused is thought to have acquired assets to which he or she is not entitled. It is therefore, essential that accurate facts concerning the size of the profits are placed before the courts, and this can only be done satisfactorily by painstaking investigations which are likely to prove costly in terms of both time and money.

As far as the means of enforcement are concerned, many of the offences are triable summarily and it frequently happens that the profits of the crime far exceed the maximum fine which the court is empowered to impose. It would therefore seem appropriate either to increase the fine which may be imposed or to state a minimum but no maximum, leaving it to the magistrate, in the light of evidence disclosed at the hearing, to use his discretion in the matter.

One further problem is also very real, as local experience shows. The fine is expressed in terms of a sum of money. The offender may choose not to pay it, preferring instead to serve a term of imprisonment and hope that he will be able to enjoy the fruits of his crime, in addition to accrued interest, on his

[2] In the United Kingdom, a building officially designated as having architectural or historical importance, and thus protected from demolition.

release from prison. In order to avoid this, the procedure for confiscation should be set in motion so that a full-scale investigation may be undertaken.

One of the most crucial aspects of any attempt to confiscate property concerns the procedure to be followed by the court which is required to order confiscation. In examining the procedure adopted in the United States of America and in Australia, it will be seen that great care must be taken to evolve a set of rules to deal with the multifarious problems that may arise in interpreting legislation which confers general powers of confiscation. The Australian legislature has adopted a fairly detailed code specifically designed to deal with confiscation in drug-related offences, and it seems that such a procedure aimed at a specific type of offence is easier to administer.

The power of confiscation should be restricted to the more serious offences, since elaborate and expensive procedures are generally required for purposes of computing the illegal gains to be confiscated. But where it can be shown that substantial profits are being made from what are still regarded as relatively minor offences, the power of confiscation could be extended to them.

Lawmakers may wish to consider whether legislation providing for the confiscation of the proceeds of certain crimes ought to be introduced, and for what types of crimes. The Commonwealth Fraud Officer could be requested to consult and to prepare a draft to be circulated among Commonwealth members. It is suggested that confiscation should aim initially at the illicit profits of transactions where the transaction is illegal *per se*. Where the immediate proceeds are sold, exchanged or transferred, other property of the accused should also be subject to confiscation, with adequate safeguards to protect the interest of innocent third parties and creditors of the accused.

It should be borne in mind that confiscation could be opposed as a matter of principle. There will be many persons who, though not applauding the activities of those whose property is to be confiscated, nevertheless feel that it is wrong in principle to confiscate property after the offender has been suitably punished for his crime. And this line of attack is likely to be even stronger when attempts are made to confiscate the proceeds of crime even where the accused is not found guilty of any recognized crime.

There is a school of thought which subscribes to the view that the criminal law should proceed on the assumption that persons should be found guilty of offences in open court, and the sentence determined at once, so that the criminal may know what price he has to pay to meet his debt to society. According to the same view, upon completion of the sentence that should be the end of the matter. It is also felt that in many instances an attempt to attach the indirect proceeds of crime may prove unworkable in practice, an obvious example being where the criminal who has served his sentence subsequently decides to describe his criminal activities in print or write his

memoirs. In addition, it has been urged that confiscation aimed at the indirect proceeds of crime could in certain cases, such as the publication of past criminal activities, have many undesirable effects if, in order to circumvent confiscation provisions, details of a crime could be passed to and published by the children or other relations of the criminal.

These points of view, justifiable though they may be, should not be allowed to interfere with efforts to remove the great social ills which are inflicted on society by the perpetrators of drug-related and white-collar crimes, and should not deter Governments from passing legislation, with adequate safeguards, to combat the spread of these dangerous activities.

The international dimension

The poor record of many countries in successfully prosecuting crimes which span the boundaries of more than one country is very marked in relation to drug-related and white-collar crimes. A concerted effort is therefore required if successful attempts are to be made to stamp out such serious offences. National legislation and local law enforcement efforts seem to be adequate to cope with the small offender. However, under existing legislation in most countries, it is difficult to catch individuals or gangs operating across national boundaries. And even where such individuals or gangs are eventually caught and specific items seized, it is generally conceded that their profits remain largely beyond the reach of the law.

Among the problems which will have to be faced in any attempt to enlist the international community in a concerted effort to eliminate or at least considerably to reduce the profitable activities of organized crime are those of definition and drafting. It is not generally agreed what type of crimes (with the possible exception of narcotics and white-collar crimes involving large sums of money) should fall within this sphere. Nor does it seem likely that there will be agreement on the attachment or confiscation of the indirect proceeds of criminal activity, especially where third parties are involved. In fact, but for the glaring evidence that drug trafficking is severely endangering the health and safety of young people, it is doubtful whether a consensus would have been reached on efforts to restrict the activities of illicit drug dealers.

The determination of what activities should or should not be brought within the criminal law calls for a series of value judgments. Specifically with regard to legislation authorizing the confiscation of the indirect proceeds of crime, there are certain to be many conflicting views. But the fact that many Commonwealth countries have seen fit to pass legislation to combat drug-trafficking, for example, is a clear indication that co-operation at that level could be confidently expected.

Many criminals, particularly those associated with organized crime, operate nowadays at international level. The ease of modern communication

permits almost instantaneous contact with most parts of the world. International travel is in many instances as free from restrictions as internal travel. Trade patterns have also changed, and the move towards the formation of regional and sub-regional trading blocks operates in favour of the international operator, whether legitimate or illegitimate. It is also a fact of life that certain organized criminal groups possess an international infrastructure and capability which permits them to function with ease in more than one country at the same time. It is therefore important that countries should combine both their investigative and law enforcement efforts in order to meet the challenges posed by organized crime on an international scale.

Some of the obstacles to closer co-operation in combating organized crime on an international or even a Commonwealth basis are provided by the cases of *R* versus *Cuthbertson* and *Attorney General of New Zealand* versus *Ortiz* [8]. As the *Cuthbertson* case revealed, there could be a competing claim to the proceeds of crime both by the court of the country in which the criminal is tried and by that of the country in which the assets or other property is to be found. It has been suggested that this complication may be less important than it seems, because the philosophical basis of confiscation is that the accused ought not to profit from his crime, and that the State need not benefit from it.

The problem will necessarily have to be resolved at some time, and it may be that diplomatic rather than legal channels could provide the best avenue for a solution.

Summary of recommendations

Having considered present legislation in various Commonwealth countries and other relevant materials, it is recommended that Governments should consider enacting legislation which will deal effectively with the forfeiture and confiscation of the proceeds, both direct and indirect, of white-collar and drug-related crimes. Neither the powers available under the common law nor recent endeavours at passing legislation have managed to provide most States with effective weapons for use in their struggle against organized crime or, in particular, in their attempts to confiscate the proceeds of criminal activity.

The legislation should make the important distinction between seizure, which is the process whereby before trial, property, both tangible and intangible, may be seized and preserved until the trial, for the purpose of providing evidence of the crime, or for restoration to its legal owner, or forfeiture or confiscation after trial. Forfeiture should be confined as at present to things which are used to commit crime and are before the court at the time of trial, whereas confiscation should refer to the means of tracing

and attaching the indirect proceeds through changes in the character or destination of the property involved.

Provision should be made after the property has been seized for the accused and innocent third parties whose property is affected to be permitted on application to make use of part of the property, where feasible, for limited purposes to be approved by the Court.

For the purposes of this special legislation an order of forfeiture should, as at present, be made at the trial and should be subject to such right of appeal as may be allowed. A recommendation for confiscation could be made by the trial court and thenceforth the practice and procedure mentioned below should be followed. It should be stressed that the cornerstone of the confiscatory process will have been laid by the investigatory process which should begin even before seizure.

Where it is intended to confiscate property, notice to that effect should be given to the accused and to any other person who is known to have or claim an interest in the property to be confiscated. The interests and the property should be specifically described, and the party should be informed in order that he may be represented at the hearing by his legal representative if he so desires. A hearing should follow at which the State should prove on the balance of probabilities that the property or interest which has been recommended for confiscation was obtained by the defendant from the proceeds of, or in exchange for, other property or interests which have been proved to be the subject matter of a crime. It should not be mandatory for the defendant to have been convicted before the process of confiscation can be initiated.

Once the State has proved its case, the onus should then shift to the defendant to prove beyond reasonable doubt that the property or interest was not obtained as a result, direct or indirect, of criminal activity. Both parties should be given a right of appeal, and the decision of the first appellate court should be regarded as final. Provision should also be made for a third party who can prove that he was not aware of the proceedings for confiscation to apply to have the matter reopened within a reasonable period of time.

The confiscatory process should take the form of summary civil proceedings without pleadings. Jury trial should not be available in these proceedings. Once notice of forfeiture is given in the stipulated manner, the matter should be adjourned to await the outcome of the criminal proceedings. But the acquittal of the accused on the criminal charge should have no bearing on the civil action for confiscation, since the reverse-onus clause would place the burden on the accused to prove beyond reasonable doubt that the monies or other property were not obtained as a result of the forbidden illegal activity. Care should be taken to ensure that the judgment obtained will be enforceable in other jurisdictions on the basis of reciprocity.

A fraud liaison officer with the assistance of a panel of experts could be asked to undertake the initial drafting for submission to Member States. It is also recommended that the assistance of the International Police Association should be enlisted in the investigative process, since the resources of many Member States may not be able to bear the expenses involved in the investigation.

Drug trafficking and white-collar crime are big businesses organized to earn huge profits. The statistics relating to these crimes are staggering. The tendency of most enforcement procedures has been to seize illegal products such as narcotics and other dangerous drugs, but the profits made have largely been ignored. The vast profits made from drug-related offences are used, for example, to buy silence from witnesses, to pay bribes, to expand into other illegal activities, to move into new locations, to induce more citizens to join the ranks and to pay for illegal expenses.

So long as these profits go untouched, lost workers and lost products can always be quickly replaced. Even with the leaders in jail, their confederates continue the illegal practices with the profits left behind, and those who have been imprisoned quickly return to their old habits after release. They regard a period of imprisonment as an acceptable risk so long as their earnings are kept intact. Any serious attempt to stamp out such illegal practices must, therefore, have as its ultimate aim the seizure and confiscation of the profits and property which are the proceeds of their crimes.

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