

In the Court of Appeal
(Criminal Division)

Regina
v.

John Palmer

Application for a defendant's costs order

P.Kelson Q.C.

D.A.Thomas

A Dos Santos

Miss C. Pattison

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Submissions

- (1) The appellant has succeeded in his appeal against the confiscation order. He now applies for a defendant's costs order in respect of the proceedings in the Crown Court relating to the confiscation order, and of the appeal against the confiscation order.

The legislation.

- (2) The powers of the Court of Appeal, Criminal Division to make a defendant's costs order in favour of an appellant who has succeeded on an appeal against sentence are provided by the **Prosecution of Offences Act 1985** section 16(4). The relevant parts of the section read as follows:

Where the Court of Appeal -

(c) on an appeal under that Part against sentence, exercises its powers under section 11(3) of that Act (powers where the court considers that the appellant should be sentenced differently for an offence for which he was dealt with by the court below);

the court may make a defendant's costs order in favour of the accused.

(6) A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.

(7) Where a court makes a defendant's costs order but is of the opinion that there are circumstances which make it inappropriate that the person in whose favour the order is made should recover the full amount mentioned in subsection (6) above, the court shall

-

(a) assess what amount would, in its opinion, be just and reasonable; and

(b) specify that amount in the order.

(9) Subject to subsection (7) above, the amount to be paid out of central funds in pursuance of a defendant's costs order shall -

(a) be specified in the order, in any case where the court considers it appropriate for the amount to be so specified and the person in whose favour the order is made agrees the amount; and

(b) in any other case, be determined in accordance with regulations made by the Lord Chancellor for the purposes of this section.

(3) Section 21(1) provides:

In this Part -

"proceedings" includes - (a) proceedings in any court below; and (b) in relation to the determination of an appeal by any court, any application made to that court for leave to bring the appeal" ...

(4) The relevant regulations are the **Costs in Criminal Cases (General) Regulations 1986** (S.I. 1986 No. 1335). Regulation 5 provides as follows:

(1) Costs shall be determined by the appropriate authority in accordance with these Regulations.

(2) Subject to paragraph (3), the appropriate authority shall be -

(a) the registrar of criminal appeals in the case of proceedings in the Court of Appeal ...

The practice of the Court of Appeal, Criminal Division

(5) Section 16(4) clearly gives the Court of Appeal, Criminal Division a discretionary power to make a defendant's costs order in favour of an appellant who has succeeded in an appeal against sentence only and who is not legally aided or in receipt of a representation order. As such cases are relatively uncommon, an attempt has been made to identify the general practice of the court in making or declining to make such orders in such cases. A series of searches of the Smith Bernal Casetrack database was carried out, using a variety of phrases chosen to identify relevant decisions.

(6) A total of fifty five cases decided since 1996 where the question of a defendant's costs order has been considered following a successful sentence appeal have been identified. A further six cases dealing specifically with confiscation orders have been identified. A small number of cases, in which there was some confusion between legal aid orders and defendant's costs orders, have been excluded. It cannot be asserted that every such case has been identified, but it is submitted that the cases identified do give a fair picture of the general practice of the court.

(7) In forty two of the cases (76%) , a defendant's costs order was made. In five of the thirteen cases in which the Court declined to make a defendant's costs order, (**Huntley, Mills, Phillips, Potts, Wynn-Jones**) reasons were given which were specific to that case. In the other eight cases (**Billson, Bosomworth, Colthrop Board Mills Ltd, Dutton, Friskies Petcare (UK) Ltd, Grimley, Haider, Taylor,**) no reasons were given.

(8) In the absence of reasons for refusing a defendant's costs order in those eight cases, the ground for refusal is a matter for speculation. It is possible to match those cases with other comparable cases in which an order was made. For instance, an order was made in **F Howe and Son Ltd.**, but not in **Colthrop Board Mills Ltd** or **Friskies Petcare (UK) Ltd**; orders were made in some cases of causing death by dangerous driving (**Bowler, Crook, Dickinson, Firbank and Shaylor**) but not in **Taylor**; an order was made in **Alagoz** but not in **Billson**, although both cases were serious drug trafficking cases. Orders were made in **Chorlton, Roberts, and Humphreys** but not in **Haider** (both cases of handling).

- (9) On the basis of this survey of relevant decisions of the Court of Appeal, Criminal Division, it is submitted that the following principles are generally followed by the Court of Appeal, Criminal Division in the exercise of the Court's discretion under the Prosecution of Offences Act 1985 section 16(4).
- (a) A privately funded appellant whose appeal against sentence is successful in whole or part will normally receive the benefit of a defendant's costs order, irrespective of the nature and gravity of the offence or the severity of the original sentence.
 - (b) A defendant's costs order will be refused only if there is a particular reason in the circumstances of the case which make it appropriate to refuse such an order.
 - (c) The fact that the appellant has brought the costs upon himself by committing the offence for which he has been sentenced, is not in itself a ground for refusing a defendant's costs order.
 - (d) The fact that the appellant has adequate means to pay his own costs is not a ground for refusing an order.
- (10) It is submitted that where the Court declines to make a defendant's costs order on an application by appellant who has succeeded in his appeal, the appellant is entitled to a statement of the Court's reasons for refusing the order.
- (11) A list of cases, with brief summaries, in which the Court of Appeal, Criminal Division has considered defendants' costs orders is set out as Appendix 1.

Application to confiscation orders

- (12) Particular attention has been given to the small number of cases involving confiscation orders. Transcripts of these cases are set out in Appendix 2. The cases are as follows:

Berry July 14, 1999

Confiscation order under the Drug Trafficking Act 1994 reduced in amount; defendant's costs order made.

Dixon November 30, 2001

Confiscation order quashed, compensation order substituted; defendant's costs order made.

Morgan and Morgan March 23, 2000

Confiscation orders quashed, compensation orders substituted; defendants' cost order refused

Sorrelli May 25, 1999

A confiscation order under the Criminal Justice Act 1988 quashed on the ground that the loser had initiated civil proceedings against the appellant; defendant's costs order refused on the

ground that "the whole necessity of these proceedings was created by Mr. Sorelli's original dishonest conduct".

Ross [2001] 2 Cr.App.R.(S.) 484

Confiscation order under Drug Trafficking Act 1994 quashed on the ground that no application was made before the appellant was sentenced and the Crown Court had no jurisdiction to proceed. "The appellant is entitled to an order for his costs to be paid out of central funds under section 16(4)(c) of the Prosecution of Offences Act 1985" (per Potter L.J at para. 29).

Woodhead January 14, 2002, [2002] EWCA Crim. 45

Confiscation order under Criminal Justice Act 1988 quashed on the ground that the sentencing judge failed to exercise his discretion on ordering a postponement under section 72A. Defendant's costs order refused on the ground that "the matter was not pursued as it could and should have been below".

(13) It is submitted that there is a clear analogy between the circumstances of the present case and those of **Ross**, in that all the proceedings after May 23, 2001, in relation to confiscation were, in the light of the Court's judgment, without jurisdiction.

(14) It is accordingly submitted that the appellant is entitled to a defendant's costs order in respect of the following matters:

Legal costs of the proceedings in the Crown Court July 2001

Costs of commissioning a survey in response to the prosecution survey

Costs of accountants' report

Legal costs of the proceedings in the Crown Court in April 2002

Legal costs in relation to the appeal against the confiscation order.

(15) It is submitted that the amount of the order should be left to be determined by the Registrar in accordance with the Costs in Criminal Cases (General) Regulations 1986, but that the Court should indicate that these heads of costs are covered by the order.

Appendix 1.

Appeals against sentence generally.

Cases are listed in alphabetical order; the surname of the appellant is in bold. Cases in which defendant's cost orders were refused are italicised. Defendants' costs orders were made in all other cases listed.

ROBERT **ADDISON**

Five years imprisonment for firearms offences reduced to three years' imprisonment

PARVEZ IQBAL **AHMED**

Four and a half years' imprisonment for supplying heroin reduced to three years.

ISMAIL **ALAGOZ**

Twenty four years' imprisonment for importing heroin reduced to twenty years.

LINDA MARGARET **BERRY**, MICHAEL JOHN **BARTRAM** AND TREVOR WILLIAM **BEACOCK**

Four years imprisonment, with confiscation orders in the amount of £150,000, reduced to three years and nine months.

Stephen Morgan **BILLSON**

Seventeen years' imprisonment for importing heroin reduced to fourteen years. Defendant's costs order refused.

SOPHY **BIRD** SARAH **HOLT**

Three months and two months for contempt of court by refusing to give evidence reduced to one week.

SALLY ANN **BIRD** and ROBERT CRAWFORD **BROWN**

Sentences of eighteen months, and disqualifications under the Company Directors Disqualification Act 1986, reduced.

Stephen **BITCON**

Sentences totalling three and a half years for assaults and criminal damage reduced.

CHRISTIAN TROY **BOWLER**

Two years imprisonment for causing death by dangerous driving reduced to 12 months

ANNE BOSOMWORTH

Nine months' imprisonment for perjury and perverting the course of justice reduced to six months. Defendant's costs order refused.

KEITH WILLIAM CHORLTON, MICHAEL ROY ROBERTS, AND PAUL IVOR HUMPHREYS

15 months imprisonment for handling stolen goods reduced to 19 months

COLTHROP BOARD MILLS LTD

Fines totalling £350,000 for health and safety offences reduced to £200,00; defendant's costs order refused

KEITH JOHN COPELAND

Fifteen months' imprisonment for affray reduced to nine months.

JEFFREY JAMES CROOK

Nine months imprisonment for causing death by dangerous driving reduced to three months.

CHRISTIAN CARLOS CUENCA-RUIZ ELENA SANCHEZ-MUNOZ HUSSAIN SHAFIEI

Custodial sentences for "money laundering" offences reduced in length; order made in favour of one appellant.

Charlene DAVIES and Duncan James COUSINS

Seven years imprisonment for burglary and administering a noxious substance reduced to five years.

CERI DAVIES

Fine of £25,000 for health and safety offences reduced to £15,000.

STEPHEN VIVIAN DAVIES, PAUL JOHN ASHMOLE, JEFFREY JAMES PARRY AND GERALD COURTNEY

Six years imprisonment for conspiracy to manufacture amphetamines reduced to five years

ANTHONY DAVID DICKINSON

Four and a half years' imprisonment for causing death by dangerous driving reduced to three and a half years.

STUART ANDREW DIXON

Six months' imprisonment for failing to pay contributions to occupational pension fund varied to fines.

MICHAEL JOHN DOYLE and others

Various custodial sentences for conspiracy to defraud reduced

ALAN WILLIAM DUTTON

Three years imprisonment for inflicting grievous fault really harm reduced to two years; defendant's cost order refused

E.P.

Four and a half years imprisonment for indecent assault reduced to three and a half

PAUL WILLIAM FAIRWEATHER

Twelve months' imprisonment for dangerous driving reduced to eight months.

STUART FARRELL

Seven years' imprisonment for conspiracy to supply cannabis reduced to six years.

ANDREW FERRIS

Eight years imprisonment for possessing Class A drugs with intent to supply reduced to seven years.

DAVID FIRBANK

Two and a half years' imprisonment for causing death by dangerous driving reduced to twentyone months.

RICHARD FRANCIS FLEMING

Fifteen months' imprisonment for dangerous driving and related offences reduced to nine months.

Brian **FRANCE**

Six years' imprisonment for causing death by dangerous driving reduced to five years.

FRISKIES PETCARE (UK) LTD

Fines totalling £600,000 reduced to £250,000; defendant's costs order refused

MATTHEW STEPHEN GRIMLEY

42 months imprisonment for burglary reduced to seven months; defendant's cost order refused.

GW

Six years' imprisonment for various sexual offences against children reduced to five years.

SYED JAMAL HAIDER

Eighteen months' imprisonment for handling stolen goods reduced to twelve months. Defendant's costs order refused.

PHILIP HARVEY and **KEVIN RODENBY**

Four months' imprisonment for dangerous driving reduced to two.

F HOWE & SON LTD

Fines for Health and Safety Act offences by a company reduced.

MARK TREVALIAN HUNTLEY

Three and a half years' imprisonment for causing grievous bodily harm with intent reduced to two and a half months; defendant's costs order refused as reduction was an "act of mercy".

MANWAR HUSSAIN

Six years imprisonment for importing heroin reduced to four years.

STEPHEN DIXON INGHAM

Conviction of careless driving on conviction for causing death by dangerous driving; order for payment of prosecution costs reduced from £5,000 to £50.

PAUL ANTHONY KIDD , **GRAHAM HARRY MOORE** and **WILLIAM ALFRED HAWARD**

Five years' imprisonment for conspiracy to steal reduced to four years.

FREDERICK L LIDDLE, **MICHAEL STANLEY VAN ACKEREN** AND **BHUPINDER SINGH BASSI**

Four years imprisonment for being concerned in facilitating illegal entry reduced to three years.

M.H.

Sentences totalling 10 years for various offences of indecency towards a niece reduced to a total of a six years.

ROBERT WALTER MARTIN AND JOSEPH MIDDLETON

Four years imprisonment for conspiracy to defraud reduced to three years

BRIAN MILLS

Sentences totalling six and a half years for obtaining by deception and assault reduced to three years; defendant's costs order refused on the ground that counsel had failed to point out illegality of sentence in Crown Court.

CHARLES MOORE

Twelve years' imprisonment for importing cannabis reduced to ten years.

AGGREY MUKEMBO

Five years' detention in a young offender institution for robbery reduced to three and a half years.

THOMAS MULLEN and TURHAN MUSTAPHA

Eighteen years' imprisonment for conspiring to supply heroin reduced to sixteen years; a confiscation order in excess of £1 million upheld.

Paul Michael **PHILLIPS** Simon Andrew **BROWN** Benjamin **THAKE** Graham **HOWE**
Robert Francis **FITZGERALD**

Nine years' imprisonment for possessing amphetamine with intent to supply reduced to eight years; defendant's costs order refused on the ground that appellant had made a false application for legal aid.

John Alan **POTTS**

Fifteen months' imprisonment for dangerous driving varied to a community rehabilitation order; defendant's costs order refused on the ground that the original sentence was correct and the sentence had been varied on the basis of a report on the appellant's condition in prison after sentence.

ROLLCO SCREW AND RIVET CO LTD

Fines totalling £70,000 for health and safety offences upheld; order to pay the cost of the prosecution reduced from £ 30, 000 to £20,000. Half of the appellant's costs to be paid.

BAKHSHISH KAUR SANGHA

18 months imprisonment for manslaughter varied to a probation order.

RITCHIE LEE SHAYLOR

Three years' imprisonment for causing death by dangerous driving reduced to eighteen months.

LUTFIYF SHEVKI

Nine years' imprisonment for conspiracy to supply class A drugs reduced to seven years.

JOHN TAYLOR

Four years' imprisonment for causing death by dangerous driving reduced to two and a half years; defendant's costs order refused, no reason given.

EDWARD RONALD THOMAS AND PAUL ALAN TAYLOR

Six years imprisonment for robbery reduced to five years.

JOHN GALE THRING

Two years imprisonment for conspiracy to defraud reduced to 18 months.

TROPICAL EXPRESS LTD

Fines of £20,000 for loading dangerous goods on to an aircraft reduced to £5,000.

FREDERICK WILLIAM WESTWOOD

Eight years' imprisonment for handling stolen goods reduced to six years.

MOHAMMED WASIM

Twelve months imprisonment for obtaining housing benefit by deception reduced to six months.

PHYLLIS WINN-JONES

A fine of £550 with a disqualification for six months for driving without due care and attention reduced to four months; defendant's costs order refused. The appellant had had " the benefit of the mercy of the court."

Appendix 2

Confiscation order cases

BERRY

No: 98/4598/Z5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Wednesday 14th July 1999

B E F O R E :

LORD JUSTICE TUCKEY

MR JUSTICE HUGHES

and

HIS HONOUR JUDGE RIVLIN
(Acting as a Judge of the CACD)

R E G I N A

- v -

PAUL BERRY

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
180 Fleet Street, London EC4A 2HG
Tel No: 0171 421 4040 Fax No: 0171 831 8838
(Official Shorthand Writers to the Court)

MR S NICHOL appeared on behalf of the Appellant
MR D GEEY (MR J AGEROS) appeared on behalf of the Crown

JUDGMENT
(As Approved by the Court)

Crown Copyright

Wednesday 14th July 1999
JUDGMENT

LORD JUSTICE TUCKEY: On 12th December 1997 in the Liverpool Crown Court the appellant was sentenced to three years' imprisonment following his conviction for supplying 4.8 kilogrammes of cannabis resin.

The prosecution's case was based upon observations on the appellant's home. On 30th May 1996 Karl Whittaker was seen entering carrying a small package and later emerging with a bag which he placed in the boot of his car. Whittaker was followed and stopped and the bag was found to contain the cannabis in five large blocks. The appellant was not arrested until September 1996. He made no comment in interview and denied the offence at trial.

On 25th June 1998, following a five day enquiry under the Drug Trafficking Act 1994 ("the Act"), the trial judge, His Honour Judge Crompton, made a confiscation order in the sum of £68,706.54. This was the amount by which the judge found the appellant had benefited from drug trafficking. His realisable assets were larger. The benefit included £34,055 which at trial was agreed to be the street value of the drugs. This was based upon the evidence of the Crown's expert who said:

"Cannabis is commonly sold at street user level in small polythene bags or wrapped in cling film on average for £7 per gramme. If controlled drugs are purchased in bulk the price reduces."

At the Drug Trafficking Act inquiry the appellant, who continued to deny the offence, contended that as it was the Crown's case that he supplied the cannabis in bulk for onward distribution he was acting as a wholesaler and therefore he had only benefited to the extent of the wholesale price and

not the retail or street price of the drugs. In the course of the inquiry the officer in the case agreed that the wholesale value of the drugs was substantially less than the street value, but he could not say by how much.

Mr Nichol, counsel for the appellant then as now, submitted to the judge that as there was no evidence of what the wholesale value was, no benefit had been shown, so the £34,055 should not have been included in the confiscation order. The judge rejected this contention saying:

"In my view, in the absence of any other evidence I am entitled to take the view that he has benefited from drug trafficking in that sum and therefore I do rule that he has benefited to the sum of £34,055."

The appellant appeals with the leave of the full court from this part of his decision.

The relevant statutory provisions are contained in the first seven sections of The Act. By section 2(2) if the court is to make a confiscation order it must first determine whether the defendant has benefited from drug trafficking. Section 2(3) says that:

"For the purposes of this Act a person has benefited from drug trafficking if he has at any time...received any payment or other reward in connection with drug trafficking carried on by him..."

If the court decides that the defendant has benefited, the court has to determine and then order to be paid "the amount to be recovered". This is the amount which the court has assessed as the value of the defendant's proceeds of drug trafficking, if that is less than his realisable assets, or the amount of his realisable assets if it is more. The standard of proof required to determine any question under The Act is the civil standard.

Section 4 says how the proceeds of drug trafficking are to be assessed. Thus:

"4(1) For the purposes of this Act-

(a) Any payments or other rewards received by a person at any time...in connection with drug trafficking carried on by him... are his proceeds of drug trafficking; and

(b) The value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

(2) Subject to subsection (4)...below, the Crown Court shall, for the purpose -

(a) of determining whether the Defendant has benefited from drug trafficking, and

(b) if he has, of assessing the value of his proceeds of drug trafficking,

make the required assumptions.

(3) The required assumptions are -

(a) that any property (defined by the Act to include money) appearing to the court -

...

(ii) to have been transferred to (the Defendant) at any time since the beginning of the period of six years ending when the proceedings were instituted against him, was received by him...as a payment or reward in connection with drug trafficking carried on by him,

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him."

Subsection (4) says that the court shall not make any required assumption if it is shown to be incorrect in the defendant's case or there would be a serious risk of injustice if the assumption was made.

Section 6 deals with how realisable assets are to be assessed. Section 7 deals with the value of property. Thus:

"7. (1)...For the purposes of this Act the value of property (other than

cash) in relation to any person holding the property is the market value of the property...

(2)...references in this Act to the value at any time...of any payment or reward are references to...the value of the...payment or reward to the recipient when he received it..."

These are not easy provisions to follow but in a case of supply such as this any payment or other reward received by the supplier for the drug at the time he supplies it would obviously be the proceeds of drug trafficking. This can be determined under section 4(1)(a) without recourse to the assumptions. The other approach, relying on the assumption in section 4(3)(b), is to say that the drugs had been purchased out of payments received by the defendant in connection with drug trafficking carried on by him. In this case the proceeds of the drug trafficking are the amount paid by the supplier for the drugs (his "expenditure" to use the language of the section). That was how the court proceeded in R v Dore (1997) 2 Cr.App.R (S), 152 where the appellant pleaded guilty to possessing cocaine with intent to supply. Under the section 4(3)(b) assumption it was held that he must have paid £10,800 for the drugs. This was therefore the value of his proceeds from drug trafficking.

Mr Nichol suggests a third approach which is to say that the drugs are "property transferred to the defendant" so, based on the assumption in section 4(3)(a) they are to be treated as a payment or reward in connection with drug trafficking. The value of the payment or reward (the drugs) would be the value to the recipient when he received it (section 7(2)). We agree that in some cases in which the defendant is found in possession of drugs and the evidence does not suggest that he bought them, it will be necessary to consider under the section 4(3)(a) assumption whether they have been transferred to him as a payment or reward for earlier drug trafficking. It may be that a defendant has received drugs by way of barter or reward or payment in kind. It will then be necessary to decide how the drugs should be valued for the purpose of valuing the defendant's

benefit. It is clear from Dore that for the purpose of assessing realisable assets, drugs in the defendant's possession must be valued at nil because they have no market value. However, we observe without deciding that it does not necessarily follow that the same would apply when considering the antecedent question of valuing the defendant's benefit. It is not necessary to decide this point because this is obviously not a case where the section 4(3)(a) assumption was or should be made. The drugs had been supplied by the appellant. The obvious inference was that he had been paid for them (the first approach). If he still had them it would have been more likely than not that he had bought them and so the section 4(3)(b) assumption would have been made (the second approach).

But whichever of these two approaches is adopted in this case the court was still faced with the problem of assessing the value of the appellant's proceeds of drug trafficking in the absence of any evidence from him as to what he paid or received from the drugs or the circumstances in which he came to supply them.

Surprisingly this problem has not been authoritatively resolved in any case which we have been able to find.

In R v Butler (1993) 14 Cr.App.R (S) 537 the court was concerned with an appellant who was found in possession of drugs with intent to supply which had a street value of £8,000. He had purchased them for less and argued that the purchase price was the value of his benefit and not the street value. Of this point Mr Justice Popplewell giving the judgment of this court said:

"That has not been pursued before us, and it has in our judgment no merit."

Later in the judgment the court said that the price paid for drugs held by a drug trafficker may be a payment or other reward if earlier drugs had been sold and the later drugs purchased, but as that had not happened in that case the confiscation order should not have been made. Other than in the

passing reference which we have quoted the court did not consider how it might value a payment or reward in the form of drugs.

Most of the text books on this subject do not discuss this problem either. But in the Drug Trafficking Act 1994 (3rd Edition) by Rudi Fortson the following passage appears:

"How, then, does the court assess the value of a controlled drug which was received by a defendant as a payment or reward? One solution is to assess its potential value if sold illegally. It is imprudent always to look to the street value of the drug because that figure is usually based on the drug being broken down and sold in the smallest units encountered at street value.

Much may depend on the quality and quantity of the drug received by the defendant and his position and role in the enterprise. If the amount of the drug is small then its street value may be a meaningful basis upon which to determine its value in the hands of the defendant. If the amount of the drug is large, or substantial, then the defendant is unlikely to sell it in small units at street level. There will be cases when it is much more realistic to look to the wholesale value of the drug."

This discussion assumes that the court is assessing the value of the drugs under the section 4(3)(a) assumption but the passage also suggests how the court might assess the value of a payment or other reward received for the drugs under section 4(1)(a) in a case such as this.

So we return to the instant case bearing in mind that it is generally for the Crown to bring the case within the statutory criteria and prove their case and that there are no assumptions about value as such.

In his submissions Mr Nichol accepted that the evidence showed that the appellant had benefited from drug trafficking but in the absence of evidence as to the wholesale value of the drugs the court could either have ignored the value of the drugs altogether for the purpose of its assessments or adjourned the case to see if the parties were able to agree the wholesale value, failing which to enable the Crown to call evidence of this value. As the Crown were on notice of the point the judge, he submits, should have gone for the first of these options. He adds that the difficulty about the other option is that in the absence of evidence from the appellant the court would not know the

circumstances in which he came to supply the drugs. He might have been a warehouseman, a courier or might otherwise have been acting under orders from another.

This last submission vividly illustrates the problem which the court faces where the defendant chooses to say nothing. If he was a warehouseman, a courier or some other minion he might have received very much less than the value of the drugs for his services and would by definition not have bought them. Conversely he might have supplied the drugs to a warehouseman, a courier or a minion to enable them to be sold for his benefit at street value.

Mr Nichol submits that in this case the only possible inference from the evidence and the jury's verdict was that the appellant had supplied the drugs in bulk. He does not suggest that it should be inferred that the appellant was a warehouseman, a courier or some other minion. In other words he was supplying for his own account and the assessment of what he was paid or received fell to be made on this basis. This is a realistic approach. A defendant who chooses to say nothing cannot complain if legitimate inferences are drawn against him. This was clearly a legitimate inference which the judge could have drawn even if Mr Nichol had argued for some other conclusion.

But can the judge's assessment of the value of the proceeds of this supply be justified? We think it only can be if it was open to him to conclude that the appellant had received payment of the street value or some other reward of equivalent value for supplying the drugs as he did. This is what is contemplated by section 4(1)(a) and is the subsection of section 4 which the judge was obviously applying. He could have proceeded on the section 4(3)(b) assumption but that would have yielded a lesser amount since this would be the amount paid by the appellant as opposed to the amount received by him for the drugs.

It is important to note that section 4(1)(a) speaks of payments or other rewards received. Mr Geey, counsel for the Crown, submitted that a prospective reward was within the subsection. We cannot accept this submission. The past tense is clearly used. This shuts out one possible inference on the facts of this case which is that the appellant supplied the drugs in order for them to be sold by others for his benefit at street value or to be warehoused for him until he could sell them himself at such value. In neither case would street value or its equivalent have been received, although in that case the appellant's expenses of selling in such circumstances would not fall to be deducted (see R v Banks (1997) 2 Cr.App.R (S) 110).

So the only way in which the judge's conclusion can be justified is if it was open to him to infer that the appellant had actually received street value or its equivalent. We think it was not. Whilst the judge could have inferred that the appellant sold to those who were to sell at street value, so he was the last in the line of wholesalers if there were more than one, he could not have inferred that the appellant was paid street value because otherwise those to whom he supplied would have made no profit. That cannot have been the case.

It follows that we do not think the judge's decision can stand. However, as it is clear that the appellant did receive payment or reward for his supply of the drugs, it would be quite wrong to ignore this altogether. We reject Mr Nichol's submissions to the contrary. We have the power to vary the order which the judge made. We think we should do so since if the matter was remitted to the judge for reconsideration (which is the alternative) he is unlikely to be in a better position than he was when he heard the matter and we are now. We bear in mind also that this DTA inquiry has lasted for five days already and its cost.

The judge was not without evidence of value. He had evidence of the street selling price. The absence of evidence from the appellant did not require him either to find that this was what the

appellant had received or to fold his hands and make no finding about what his receipts had been. Some discount from the street value which was more than minimal fell to be made to reflect the fact that the appellant was probably selling wholesale. On the evidence to which we have referred and in the absence of any evidence on the topic from the appellant, we think the judge would have been justified in making a 20 per cent discount. That is a substantial discount. If it is less than the actual discount in this case the appellant can hardly complain.

We should make it clear that we are not saying that if this point arises in any other case 20 per cent is the appropriate discount. All we are saying is that on the facts of this case we think this is the right amount. We anticipate that in most cases the Crown should be in a position where its case is that the defendant has supplied in bulk to give the same kind of evidence of the likely price he would have obtained as it did in this case as to the likely price at street value. The defendant may seek to rebut it if he wishes either by his own evidence or by the evidence of those with experience of the illicit market.

It follows that we will allow the appeal to the extent of reducing the confiscation order by £6,811 (that is 20 per cent of £34,055), in other words, to a total of £61,895.54. To that extent this appeal is allowed.

MR NICHOL: My Lord, there is an application for a defendant's costs order. Costs out of central funds. The court has power to make that under section 16 of the Prosecution of Offences Act 1985. The court has a discretion to make that. There is no guidance as to how that discretion would be exercised but in my submission the costs order normally follows the event and since the court has allowed the appeal I would ask for a costs order.

LORD JUSTICE TUCKEY: Yes. Just remind me of the provision. Where is it in Archbold?

MR NICHOL: It is at Chapter 6, paragraph 5, on page 737 of the current edition. The particular section is section 16(4)(c).

LORD JUSTICE TUCKEY: Yes. What is the position so far as his legal aid is concerned? Was he legally aided for the DTA inquiry?

MR NICHOL: He was legally aided for the DTA inquiry in the lower court. I make no application in respect of that. The position at this court is somewhat confused because initially when the application for leave was made to the full court the defendant was not legally aided.

LORD JUSTICE TUCKEY: Yes, because leave had been refused.

MR NICHOL: Yes. He funded that application privately but at that application an order was made granting him legal aid. That was the order of the full court on 14th May 1999 and that covered the application for leave as well as the hearing.

LORD JUSTICE TUCKEY: As well as this hearing. What is not covered by that order?

MR NICHOL: I hesitate to interrupt but there was on the last occasion that I was before your Lordship, on 28th June 1999, a curious note for the full court which is with, I presume, your Lordships' papers.

LORD JUSTICE TUCKEY: I am not sure it was. I remember now that you referred to it.

MR NICHOL: It says that the appellant had been unable to satisfy the Registrar as to his eligibility for legal aid and therefore it seems he was not legally aided. That took me by surprise; I was informed of it five minutes before the hearing. That, as I understand it, remains the position.

MR JUSTICE HUGHES: So entitled to legal aid; has not made the necessary declaration, or not satisfactorily, as to his means and therefore is without. Is that it?

MR NICHOL: Yes, as I understand it his solicitors, my instructing solicitors, furnished the details to the Registrar. The Registrar said he was not satisfied with those details.

MR JUSTICE HUGHES: Yes.

LORD JUSTICE TUCKEY: Can the Crown help?

MR AGEROS: My Lord, it may be that I cannot assist greatly on this. I have spoken to Mr Geey, but I certainly do not know the detail of the appeal or anything relating to the costs.

LORD JUSTICE TUCKEY: This is not something with which the Crown would be concerned anyway.

Mr Nichol, if there is no legal aid and we do preface it by that and we will assume that there is not -- because we are not going to make an order which decides which public purse it comes out of -- but if there is none then we will make a defendant's costs order for the appellant's costs, both of the hearing before the full court and the hearing before us, to be paid out of central funds.

MR NICHOL: I am obliged.

DIXON

Neutral Citation Number: [2001] EWCA Crim 2785
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Friday 30th November 2001

B E F O R E :

MR JUSTICE ROUGIER

and

MR JUSTICE HUGHES

R E G I N A

- v -

Christine Joan DIXON

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR C EVANS appeared on behalf of the Appellant
MISS Z JOHNSON appeared on behalf of the Crown

JUDGMENT
(As approved by the Court)
CROWN COPYRIGHT

1. MR JUSTICE HUGHES: This appellant was convicted on her plea of guilty at the Inner London Crown Court on 9th May 2000 of a serious series of thefts from her employers who were a well-known charity. The appeal, for which she has leave, calls into question not the ten months' imprisonment she received, about which there could be and is no complaint, but a confiscation order made subsequently by the learned judge.
2. The amount that was charged in the counts to which the appellant pleaded guilty was £14,400. The Crown gave notice of their intention to ask the court to consider a confiscation order under section 71(1) of the Criminal Justice Act 1988. On 7th July, about a month after he had sentenced her, the judge dealt with that question. He held, inevitably, that the appellant had benefited from the offences to which she had pleaded guilty to the tune of £14,400, and her realisable assets being determined at £120,000 the judge made that determination also. He then said this:

“I am then under a statutory duty to require an offender to pay the benefit or the amount appearing to the court to be the amount that might be realised at the time that the order is made, whichever is the less. I therefore make a confiscation order in the sum of £14,400.”
3. In fact by that time the losing charity had instructed its insurers to seek compensation by way of civil action from the appellant. The very day after the confiscation order was made the charity began that civil action. It was an action in which they claimed £74,400, and that £74,400 included within it the £14,400 which had appeared on the indictment and to the theft of which the appellant had pleaded guilty. The charity duly obtained summary judgment for the £14,400, part of its claim, on 24th January 2001. The appellant had leave to defend for the balance. We need not go into the subsequent history of the civil action as to the balance. It is not necessary because it is conceded that the judgment, insofar as it is for the sum of £14,400 must stand.
4. The confiscation order having been made, the appellant in due course complied with it. The sum of £14,400 due under it has been paid to the Crown. We understand from the helpful information given to us today by Mr Evans on behalf of the appellant, that although the judgment in favour of the charity in the civil action for the sum of £14,400 remains outstanding, the appellant has not additionally paid that sum or any sum in satisfaction of that judgment.
5. The statutory provisions relating to confiscation and compensation orders are without doubt a rather thorny area. This is not the occasion on which to go into them in any detail. However, we should draw attention to the decision of this court in R v Mitchell and Mitchell (unreported) 200003520/Y5, in which considerable assistance is given as to the statutory provisions and the appropriateness in individual cases of, on the one hand, a confiscation order and, on the other hand, a compensation order. It is enough for the purposes of this appeal to draw attention to the following observations of this court in the judgment delivered by Kennedy LJ:

“As Mr Mitchell has pointed out, appearing today on behalf of the Crown in respect of this matter, the purpose of a confiscation order is to remove the benefit of criminal conduct. But the court will always be at pains to ensure that so far as possible the victim is compensated and that, as we have already

indicated, ought to be the first priority.”

6. The statutory provisions ordinarily impose upon the court a duty to make a confiscation order when the Crown sets the procedure in motion. That is the position as the judge understood it to be in the present case. However, section 71(1C) of the Criminal Justice Act 1988 creates an exception. Where the court is satisfied that a victim of the relevant criminal conduct has instituted, or intends to institute, civil proceedings against the defendant in respect of the loss, injury or damage, then, first, the court has not a duty, but merely a power, to make a confiscation order, and, secondly, if it does, the amount of it is in the discretion of the judge.
7. We hasten to say, lest we be misunderstood, that it does not follow that the confiscation order will be wrong in a case where the civil proceedings are brought. There may be several situations in which it would be right to make such an order. An obvious example, but only one, is if the offender's benefit from the offending exceeds the amount likely to be recovered in civil proceedings. That, however, is not this case.
8. We also draw attention, without the need to dwell upon them, to the provisions of section 72 of the Act. They make it clear that if the court has before it the possibility of both a confiscation order and a compensation order the confiscation order is to be considered first, but is to be left out of account when considering a compensation order. There is also a provision in section 72(7) which can in some cases be of assistance to the losing victim if both a compensation order and a confiscation order are made because that subsection in effect gives to the loser the opportunity to take advantage of the Crown's enforcement powers in a case where the assets of the offender are not sufficient to satisfy both orders in full. That however, again, is not this case.
9. Consistently with those principles we have no doubt that had the judge appreciated that the law permitted, rather than required, the making of a confiscation order, he would have, as his first priority, sought to ensure that this £14,400 was paid to the losers rather than to the Crown. That he did not appreciate that is readily understandable. But there was rather deeply buried in the substantial confiscation order papers an indication on page 9 of the Crown's first statement that the charity was proposing to bring the civil action which it did. The result is that in law the judge was not, although he thought he was, obliged to make a confiscation order. The judge also took the view on his reading of the section that he was not entitled to make a compensation order. In that we have to say he fell into error as section 72 makes clear.
10. What is to be done? The Crown is in possession of £14,400 paid under the confiscation order, when the people who ought to have the money are the charity. There was no obligation to make the confiscation order. We propose to allow the appeal. We quash the confiscation order. We are concerned to do everything that we can to ensure that that does not mean that the £14,400 returns to the appellant. Even though she is under obligation of the judgment of the Civil Court to pay it to the charity, it is in everybody's interests, including hers, that the opportunity for it to be dissipated on the way should not arise. We propose to make a compensation order in favour of the charity, Save the Children, in the sum of £14,400. We are unable to direct it, but we express the hope that armed with that order the Crown will be in a position to do whatever it can to ensure that the money is paid directly to the losing charity.
11. Mr Evans added to his submission a request that we should make an order that the appellant

recover any interest on the money held by the Crown since its payment to it. We are satisfied that we at least have no power to make that order. Our powers are limited to quashing the order of the court below. Whether the appellant has any other remedy, is not for us to say.

MR EVANS: My Lord, I am obliged. In the circumstances, this has been a privately funded appeal. I am of course duty bound therefore to make an application for the successful appellant's costs.

MR JUSTICE HUGHES: Out of central funds?

MR EVANS: Out of central funds. And bearing in mind the nature of the proceedings against her, I can assure your Lordships that any penny that comes her way is of assistance, not only to her but to Save the Children charity.

MR JUSTICE HUGHES: Whether it is of assistance to the charity depends on the outcome of the action.

MR JUSTICE ROUGIER: Yes, very well, from central funds. Thank you both.

MR EVANS: That of course is to be taxed, or can I give your Lordship's a figure.

MR JUSTICE ROUGIER: I think taxed.

MORGAN AND MORGAN

No: 99/6490/Y4, 99/6491/Y4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Thursday 23rd March 2000

B E F O R E :

LORD JUSTICE MANTELL

MR JUSTICE ROUGIER

and

HIS HONOUR JUDGE FRANCIS ALLEN

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

REGINALD EDWARD MORGAN

RICHARD PUGH MORGAN

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
180 Fleet Street, London EC4A 2HG
Tel No: 0171 421 4040 Fax No: 0171 831 8838
(Official Shorthand Writers to the Court)

MR D WYNN-MORGAN appeared on behalf of the APPELLANTS

MR MA KELLY appeared on behalf of the CROWN

JUDGMENT

(As approved by the Court)

Crown Copyright Thursday 23rd March 2000

12. MR JUSTICE ROUGIER: On 4th March 1999 in the Crown Court at Mold these two appellants pleaded guilty to counts of procuring the execution of a valuable security by deception and of furnishing false information. The offences arose out of false invoices submitted in order to obtain grants for the renovation or repair of various buildings. The two appellants were the landlords or owners of those buildings.

13. Sentence was adjourned, but it should be noted that at the time of the plea it seems that subsections (1) to (4) of section 72 of the Criminal Justice Act 1988, as amended by the Criminal Justice Act 1993, were still in force. The prosecution had served notice inviting the court to consider a compensation order under section 71 and the amount of such order.

14. It is necessary at this stage to recite the relevant provisions of section 71 of the Act, headed “Confiscation Orders”:

“(1)Where an offender is convicted in any proceedings before the Crown Court ... of an offence of a relevant description it shall be the duty of the court--

(a) if the prosecutor has given written notice to the court that he considers that it would be appropriate for the court to proceed under this section, or (b) if the court considers even though it has not been given such notice that it would be appropriate for it so proceed to act as follows before sentencing ...”

15. By subsection (1A) what follows is this:

“The court shall first determine whether the offender has benefited from any relevant criminal conduct.”

16. By subsection (1B):

“Subject to subsection (1C) below, if the court determines that the offender has benefited from any relevant criminal conduct, it shall--

(a) determine in accordance with subsection (6) below the amount to be recovered in his case by virtue of this section, and

(b) make an order under this section ordering the offender to pay that amount.”

17. On 28th September the two appellants were sentenced to terms of imprisonment and confiscation orders were made, in relation to Reginald Morgan in the sum of £71,000; in relation to Richard Morgan, £314,000. Those financial penalties had two distinct ingredients: the first comprised the amount which was actually obtained from the authorities by the application for the grant, and the second was the enhanced rents which the appellants were able to receive in consequence of those grants.

18. Dealing with the former category, in the case of Richard the amount obtained was £167,756, and in the case of Reginald £57,284. However, before making the confiscation order, it was the learned judge himself who spotted a potential problem of jurisdiction under section 72A of the Act and invited argument upon it.

19. Section 72A provides, in its relevant parts, as follows:

“(1)Where a court is acting under section 71 above but considers that it requires further information before--

(a) determining whether the defendant has benefited ...; or

(c) determining the amount ...

it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.”

20. Then by subsection (3):

“Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) above which ... exceeds six months beginning with the date of conviction.”

21. At the conclusion of the argument the learned judge ruled that though there were no exceptional circumstances, yet section 72A had no application since in his view it related solely to determinations which took place after sentence. He went so far as to say that he thought the section should be construed as if some such words were written into it.

22. The essence of the present appeal, which comes by way of leave of the learned single judge, is that the learned sentencing judge was in error. It is the appellants’ contention that the overall effect of the statute is that determinations concerning compensation orders have to be made within six months of conviction.

23. These sections and analogous legislation have already been considered by this Court. In the case of Shergill and others (unreported, 24th February 1999) attempt was made to say that “conviction” occurring in subsection (3) of section 72A included not only conviction but sentence as well. The Court rejected that argument and held that the word “conviction” means either a plea or a finding of guilt and does not mean “sentence”.

24. In the case of Cole (unreported, 22nd April 1998) this Court considered the provisions of section 3 of the Drug Trafficking Act 1994 which, for present purposes, are precisely similar to those of the 1988 Act and provide for a similar power to postpone determination of confiscation issues until after sentence. Having quoted the relevant section Judge LJ, giving the judgment of the Court, said this:

“Section 3 therefore creates a convenient code which permits the court to pass an appropriate sentence before having determined whether to make a confiscation order under section 2, and simultaneously maintains the necessary control over the process which could otherwise become protracted and ultimately unfair. Although the court is plainly able to fix a date for any subsequent hearing, the power created by this section is to postpone the determination not to a date, but for a period. The provisions are clear. The court should normally deal with a confiscation order within six months of the conviction. In exceptional circumstances this period may be exceeded.”

25. It is to be noted that the learned Lord Justice in the passage quoted makes it clear that the underlying rationale of the legislation is that to prolong questions of confiscation would lead to unfairness. Both cases, however, concerned compensation orders which were made after sentence.

26. In the present appeal the prosecution maintain, as they did before the learned judge, that this is not a section 72A situation at all since what the learned judge did on 5th March was merely to adjourn sentence, sensibly enough, until other persons who were jointly indicted

had been tried and that the fact that the determination of confiscation had to mark time was merely coincidental and did not amount to a formal postponement. The court, so it was urged, was still acting under section 72.

27. In our judgment, the most recent case of *Miranda* (unreported, 15th February 2000) is fatal to that contention. In that case the appellant pleaded guilty to VAT fraud on 6th July 1998. Sentence was adjourned. On 1st April 1999 he was sentenced to imprisonment and at the same time a confiscation order was made. On appeal, and on the facts of that case, the position taken by the appellant was that since the prosecution had served notice and the court had ordered the appellant to respond to that notice under section 73, it was thereby seeking further information and thereby was acting under section 71, so that the six-month time limit came into play in the absence of exceptional circumstances. The Crown took two points, which we take from the judgment of the Court given by Nelson J. I quote from paragraph 43:

“The distinction must be drawn, the Crown submit, between a postponement of determination under section 72A because of need for more information, and a simple adjournment of sentencing, which of necessity involves the adjournment of the determination of the confiscation order. In such circumstances the general provisions of section 72 apply simply requiring the sentence to follow the confiscation order as it did in this case.”

28. The other point taken was that section 72, the first four sections of which were still in force (they have subsequently been repealed by the Proceeds of Crime Act), created something which was called a primary determination, a process which had to be complete, before the court could be said to be acting under section 71. This contention was rejected as an artificial and unnecessary concept.
29. In rejecting the first of those submissions, the Court said this at paragraph 50:

“The adjournment was ordered, on the face of it for two purposes; firstly to adjourn the appellant’s sentence until after such time as his co-accused had been tried and secondly to postpone the determination of the confiscation order proceedings until such time as the court had the necessary further information to make those determinations.

It cannot properly be said in the view of this Court that when the matter was adjourned on 6th July 1998 the adjournment was solely for the purpose of adjourning sentence and merely had the coincidental effect of also adjourning the confiscation proceedings. The confiscation proceedings themselves plainly had to be postponed until such time as the court was provided with the necessary information in order to make its determination.

We are therefore satisfied that a postponement under section 72A was made here even though neither the court nor the parties may have focused on that section when dealing with the matter on 6th July 1998.”

30. It seems to us that in its essential features the present case is indistinguishable from *Miranda*.
31. Mr Kelly, for the respondent, made a valiant attempt to persuade us that there was a vital

distinction, in that the court in the present case has not got as far as making a positive order for the appellants' answer to the prosecution's notice. But we think that this is a distinction without a difference. As Miranda makes clear: once the court is apprised, by whatever route, of forthcoming determinations for the purposes of confiscation, then it is acting under section 71 and the six-month time limit applies. It may well be that in cases like the present, where sentence is perfectly properly postponed, for instance, until co-defendants can be tried, and that postponement takes more than six months, a problem will arise. Indeed, as Mr Kelly rather ruefully suggests, it may well be that this is not what Parliament intended. But piecemeal legislation such as the present risks an unintended result in unforeseen situations. Accordingly, we are of the opinion that this appeal must be allowed.

32. But that is not an entire end of the matter. The learned sentencing judge, in giving his ruling on the matter, stated that, if it should be that he was wrong concerning the confiscation order, he would nevertheless have made compensation orders in favour of the authority issuing the grant of the two sums mentioned; that is to say, £57,284 where Reginald was concerned, and £176,756 in the case of Richard. On behalf of the appellants, counsel does not suggest that that would be in any way improper or objectionable. We propose in those circumstances, having quashed the confiscation order, to make compensation orders in the sums mentioned in relation to the two appellants.
33. MR WYNN-MORGAN: I have two applications. The first, I anticipate, may not cause the Court any difficulty; and it is that if you would be so kind as to allow 28 days for the discharge of the orders that have just been made. ?
34. LORD JUSTICE MANTELL: Compensation orders - just remind me of the sums again, would you?
35. MR WYNN-MORGAN: £176, 756 in respect of Richard Pugh Morgan, and £57,284 in respect of Richard Edward Morgan.
36. LORD JUSTICE MANTELL: 57 for Richard or Reginald?
37. MR WYNN-MORGAN: Reginald.
38. LORD JUSTICE MANTELL: 28 days to pay.
39. MR WYNN-MORGAN: Please.
40. LORD JUSTICE MANTELL: Yes.
41. MR KELLY: Can I just make this point that Radnorshire District Council has disappeared and it is now called Powys?
42. LORD JUSTICE MANTELL: There is no problem about that Mr Wynn-Morgan, is there?
43. MR WYNN-MORGAN: Those instructing me will consult with my learned friend when writing the cheque.
44. LORD JUSTICE MANTELL: Was there another matter that you wanted?
45. MR WYNN-MORGAN: There was, and it is this. Neither Mr Richard Morgan nor Mr Reginald Morgan has the benefit of a legal aid certificate. I am instructed to make

application that their costs be discharged from central funds. I anticipate, my Lords, that having made the application I have discharged my duty in the matter.

46. LORD JUSTICE MANTELL: You have discharged your duty.
47. MR WYNN-MORGAN: Thank you, my Lord.
48. LORD JUSTICE MANTELL: The application is refused.

SORRELLI

No: 9805010 Y4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Tuesday 25th May 1999

B E F O R E :

LORD JUSTICE ROCH

MR JUSTICE HARRISON

and

MR JUSTICE ELIAS

R E G I N A

- v -

PAOLO SORELLI

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
180 Fleet Street, London EC4A 2HD
Tel No: 0171 421 4040 Fax No: 0171 831 8838
(Official Shorthand Writers to the Court)

MR C PURLE QC & MR S STAFFORD-MICHAEL appeared on behalf of the Appellant
MR E BROWN appeared on behalf of the Crown

JUDGMENT

(As Approved by the Court)

Crown Copyright

Tuesday 25th May 1999

JUDGMENT

LORD JUSTICE ROCH: On 26th March 1993, at the Southwark Crown Court following a trial before Her Honour Judge Pearlman and a jury, the appellant, Paolo Sorelli, was convicted of seven counts of conspiracy to defraud. A month later he was sentenced to three years' imprisonment on Count 1, made the subject of a confiscation order under section 71 of the Criminal Justice Act 1988 in the sum of £429,010 with five years' imprisonment consecutive in default and, in addition, he was ordered to pay £65,428 towards the costs of the prosecution. On Counts 2 to 7 he was sentenced to two years' imprisonment on each, though the periods of imprisonment were to run concurrently with each other.

Mr Sorelli made application to the Single Judge for leave to appeal against sentence, it being clear from the notice of appeal that the application related to the periods of imprisonment and not to the confiscation order as such. The Single Judge refused that application, and Mr Sorelli renewed his application to the Full Court.

However, before the application came before the Full Court Mr Sorelli signed a notice of abandonment abandoning all those proceedings then extant before the Court of Appeal Criminal Division. At the time the confiscation order was made the member of the Serious Fraud Office who was the case controller, Mr Sorelli's prosecution being conducted by the Serious Fraud Office, stated in a notice:

"I am not aware of any civil proceedings instituted against the defendant for these offences."

The offences concerned the activities Mr Sorelli and of Mr Szrajber in relation to the placing of contracts between BP and companies from whom BP wished to obtain supplies. It was alleged that

Mr Szrajber and the appellant had enabled those certain companies tendering for such contracts from BP to obtain information which assisted them in being the successful tenderers for those contracts.

The fraud was a matter of profit to Mr Sorelli and Mr Szrajber in two ways. First it allowed them to obtain from companies to whom they supplied the information, who were successful tenderers, a commission and, secondly, it may have enabled those companies to obtain the contracts at a higher price than BP would otherwise have had to pay had those companies not been in possession of the confidential information passed to them by Mr Sorelli and Mr Szrajber.

At the time the confiscation order was made there were no proceedings mounted by BP against either Mr Sorelli or Mr Szrajber, and on the material before this Court there was no indication at that time that such proceedings would be started. However, on 10th December 1996, more than three and a half years after the confiscation order was made, BP did commence proceedings in this country against Mr Sorelli and Mr Szrajber. Three of the sums claimed in those proceedings, on the ground of unjust enrichment, represent the three sums which made up the figure of £429,010 in the confiscation order.

Mr Sorelli put in a defence to that action on 4th February 1997. No further step was taken by British Petroleum until 30th April 1998.

The commencement of those proceedings led Mr Sorelli to apply for leave to appeal against the confiscation order out of time. That application, in addition to the hurdle that the application for leave was out of time, faced a further problem, namely the consequence of the notice of abandonment dated 17th February 1994. The matter came before this Court on 31st March 1999, and, having considered the authorities in relation to the effect of notices of abandonment, this Court decided that it had the power to, and would in the circumstances, grant Mr Sorelli leave to appeal out of time.

That appeal has come before this Court today. Mr Sorelli is again represented by Mr Charles Purlé QC and Mr Stafford-Michael, and we have the advantage that the Serious Fraud Office have been represented by Mr Brown. In addition, and the Court is grateful for this, BP have had representatives of that company present at Court in the person of a solicitor and leading counsel instructed by the company.

We proceed on the assumption that a confiscation order is an order designed to deprive a person convicted of crime of the profits of his criminal activities, but that a confiscation order is not to be an additional penalty to the penalties by way of imprisonment or fine or other penal order imposed by the trial court.

We have not heard oral argument on that point today, but we have had the advantage of reading a substantial skeleton argument prepared by counsel for the appellant.

We also consider it right to proceed on this basis, in the absence of any opposition from the respondents, represented by Mr Brown, and also because the other party interested in this matter, British Petroleum, have had a presence in Court today and therefore we have had the benefit of knowing the attitude of that company to the course proposed.

Mr Sorelli swore an affidavit in October 1998 in which he has indicated that were the confiscation order to be quashed he would not seek to have a penny of the sum of money which he has paid pursuant to the confiscation order returned to him. He would intend that that money should be paid directly to British Petroleum as a part satisfaction of the claims that British Petroleum make against him.

In that affidavit Mr Sorelli points out that were the confiscation order to stand and were BP's claims in their action against him to be successful, the result would be that he would have to pay twice for the unjust enrichment he received from his fraudulent and dishonest activities, and that, in the submission of those acting for him, is not the purpose of a confiscation order.

We consider that in the particular circumstances of this case it is right that we should allow this appeal and quash the confiscation order. We are invited to make an order in particular terms by Mr Purle, on behalf of the appellant, and that order is accepted as a proper order by Mr Brown on behalf of the Serious Fraud Office. In addition it has been indicated to us that those representing British Petroleum are content that an order should be made in that form, and that those representatives of British Petroleum have made a significant contribution to the wording of that order.

The order has been read to us and will be engrossed and will become the order of the Court. The gist of the order, we indicate, so that it becomes part of this judgment, is that the money which the appellant has paid under the confiscation order to the Crown will be repaid to the appellant's solicitors, on the undertaking of the appellant's solicitors, that on receipt of that money the solicitors will pay it directly to BP Amoco in irrevocable part satisfaction of claims made by that company against the appellant in action 1996, B-1436. On that undertaking we order that the money be paid to the appellant's solicitors. We have already quashed the confiscation order.

Mr Purle or Mr Brown, is there any other matter?

MR BROWN: No, my Lord.

MR STAFFORD-MICHAEL: My Lord, there is an application on behalf of the appellant for an defendant's costs order pursuant to section 16 of the Prosecution of Offences Act 1985.

Costs application heard

LORD JUSTICE ROCH: Mr Stafford-Michael, we are not going to accede to your application.

We take the view that the whole necessity of these proceedings was created by Mr Sorelli's original

dishonest conduct and therefore this case is very different from a defendant who is acquitted at first instance or who has his convictions quashed on appeal.

MR STAFFORD-MICHAEL: As your Lordship pleases.

LORD JUSTICE ROCH: Mr Purle, will you see that the order is engrossed and provided to the Associate?

MR PURLE: Of course, that will be done.

ROSS

Case No: 2000/02702/W1

Neutral Citation Number: [2001] EWCA CRIM 560
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL APPEALS)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
(His Honour Judge Clifton)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 13th March 2001

B e f o r e :

LORD JUSTICE POTTER
MR JUSTICE STANLEY BURNTON
and
THE RECORDER OF MANCHESTER

REGINA

- v -

KEITH ROSS

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Christopher Convey Esquire (instructed by the Crown Prosecution Service)
Nicholas Johnson Esquire (instructed by Pearson Fielding, Merseyside, for the appellant)

A.

B. Judgment

As Approved by the Court

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LORD JUSTICE POTTER:

(1) INTRODUCTION

1. On 8th November 1999, at the Crown Court at Liverpool, the applicant pleaded guilty on re-arraignment to a serious drugs offence and he was sentenced next day, on 9th November 1999, by His Honour Judge Clifton as follows:

B2. Conspiracy to supply a Class A drug (Heroin): 11 years imprisonment

2. On 10th April 2000, in the same court, the judge made a Confiscation Order under the *Drug Trafficking Act 1994* (“the Act”) in the sum of £41,000, to be paid within nine months, with sixteen months imprisonment in default. The issue raised on this appeal is whether, in the particular circumstances of the case, the judge had jurisdiction to make such an order.
3. The appellant’s original application for leave to appeal against the confiscation order was refused by the single judge. However, leave was granted by the Full Court on 1st December 2000.

(1) THE PROCEEDINGS BELOW

4. The relevant matters so far as the point at issue in the appeal is concerned are that on 8th November 1999, the plea having been taken, the prosecution opened the facts with a view to the judge passing sentence upon the appellant and his three co-defendants. At the conclusion of the prosecution opening, the judge asked ‘What about the Drug Trafficking Act 1994, am I going to be asked to consider that at all?’, to which counsel for the Crown replied: ‘No, Your Honour, you are not’. The matter was then adjourned for sentencing on the following morning.
5. The next day, when the judge was about to pass sentence, counsel for the Crown indicated that he was after all asking for an inquiry under s.2 of the Act and for such inquiry to be postponed. The judge asked defence counsel whether they wished to say anything and Mr Birts QC, for a co-defendant of the appellant who had also pleaded guilty (McFaul), objected. He said:

“There has been a misunderstanding and it is most unfortunate. the clear impression which McFaul had, and I think it is shared by the other defendants, is that there was going to be no inquiry in this case, and plainly expectations have been risen and legitimately risen. It is very unfortunate that this should now happen.”

6. The judge then said that he understood and asked counsel for the appellant whether he wished to say anything. He indicated that he did not. Without ruling on the matter, or adding anything further, the judge then said:

“It does not affect the sentences anyway, of course, that I am about to pass.”

and he then proceeded to pass sentence on all four defendants.

7. After sentencing was complete and the defendants had left court, the judge said to counsel for the Crown:

“Mr Joyce, in view of the fact that there is likely to be an inquiry under the Drug Trafficking Act, I do not think it appropriate to say anything more at the moment.”

8. Mr Joyce then asked the judge if he would fix a term during which any inquiry must be carried out. Before the judge proceeded further, Mr Birts asked the judge whether he was going to permit the prosecution to proceed with an inquiry, because, if so, he (Mr Birts) wished formally to object. The judge then observed:

“There are two avenues. Either the prosecution can off their own bat decide to proceed, or I independently can direct the prosecution that they serve a statement under s.11.”

9. Mr Birts stated that he was asking the judge not so to direct because expectations which were raised that there would be no such inquiry had been reinforced by the assurance given to the court the previous day that no such proceeding would take place, he said:

“As a matter of legitimate expectation, we would ask that the court should say that the prosecution has had its opportunity to make this application and it is now in a position where it cannot blow and cold, and therefore there should be no direction.”

10. The judge then asked whether, on the assumption that Mr Birts was correct, he (the judge) did not have a separate right to decide to direct service of a statement under s.11. Mr Birts then took the point that:

“... you have now pronounced sentence and, as I understand the Act, section 2 ... provides that the order can only be made where the defendant has not previously been sentenced or otherwise dealt with in respect of his conviction for the offence.”

That is the point which is now before us.

11. Argument then followed before the judge upon the wording of s.2 and s.3 of the Act, following which the judge ruled that the inquiry should take place. In the course of that ruling, he made clear what had been in his mind at the time he proceeded to sentence the defendants. He said:

“It seemed to me that if there was going to be a question of abuse of process – I do not know whether those actual words were used, I think they were actually – that if I were having to consider the question of abuse of process before either I, in my capacity under s.2(1)(b), or the prosecutor succeeded in his application, then I ought to hear the questions and law on abuse of process. It certainly was not something I was prepared to do with the defendant standing there waiting there to be sentenced on an important matter.

The implication I would have thought obvious to everybody was that I would proceed to sentence and that the question of an abuse of process and then the question whether there should in fact be an

inquiry under section 2 would be considered at leisure when the defendants knew what was their fate.”

12. He went on to rule that:

“... section 3 in its various subsections says that ... determination may be postponed and sentence passed beforehand. In my view, even if as a fact the prosecutor had not asked the court to proceed under this section before sentence, and even if as a fact the court had not indicated yea or nay it seems to me that the act still allows that question to be addressed after sentence has been passed, and certainly within twenty-eight days of sentence being passed.

As a matter of fact, I hold that the words in section 2, subsection (1) had been fulfilled in any event, that before the moment of sentence the prosecutor had asked the court to proceed and that that was the intention of the court. Therefore, I dismiss this point.”

(2) THE PROVISIONS OF THE 1994 ACT

13. The relevant provisions of the Act are as follows:

“Confiscation Orders

- 2.(1) Subject to subsection (7) below, where a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences (and has not previously been sentenced or otherwise dealt with in respect of his conviction for the offence or, as the case may be, any of the offences concerned) then
 - (a) if the prosecutor asks the court to proceed under this section, or
 - (b) if the court considers that, even though the prosecutor has not asked it to do so, it is appropriate for it to proceed under this section, it shall act as follows.
- (2) The court shall first determine whether the defendant has benefited from drug trafficking.
- (3) ...
- (4) If the court determines that the defendant has so benefited, the court shall, before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with the section 5 of this Act the amount to be recovered in his case by virtue of this section.
- (5) ...

(a) Postponed Determinations

- (3)(1) Where the Crown Court is acting under section 2 of this Act but considers that it requires further information before –
- (a) determining whether the defendant has benefited from drug trafficking or
 - (b) determining the amount to be recovered in his case by virtue of that section, it may, for the purpose of enabling that information to be obtained, postpone making the determination for such period as it may specify.
- (2)-(6)
- (7) Where the court exercises its power under subsection (1) or (4) above, it may nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the relevant offence or any of the relevant offences.
- (8) Where the court has so proceeded, section 2 of this Act shall have effect as if –
- (a) in subsection (4), the words “before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned” were omitted;
 - (b) ...”

(3) THE GROUNDS OF APPEAL

14. The grounds of appeal and the argument of Mr Johnson for the appellant may be shortly stated. He points out that the provisions of s.2(1)-(4) echo the provisions of the Act’s predecessor, the *Drug Trafficking Offences Act 1986*, under which any inquiry and confiscation order had to be made *before* sentence was passed: see the words within brackets in 2(1) ‘*and has not previously been sentenced or otherwise dealt with in respect of his conviction for the offence ..*’ and, in 2(4), ‘*before sentencing or otherwise dealing with him in respect of the offence..*’. Although, for lack of appropriate information, it will more often than not be impracticable for a Confiscation Order to form part of the ordinary sentencing process, and therefore postponement of a determination under s.2(2) will be necessary, s.3, which provides for the postponement of determinations, is conditional upon the requirement that the court, when acting under s.2 of the Act ‘*considers that it requires further information before*’ making its determination. Where the court does so consider, ‘*it may nevertheless proceed to sentence ...*’: see s.3(7).
15. Thus, submits Mr Johnson, in order to invoke the power to postpone an inquiry, it must be shown that the court is (i) acting under s.2 of the Act with a view to determining whether the defendant has benefited from drug trafficking and (ii) has considered and decided that it requires further information before such determination can proceed.

16. Mr Johnson submits that the facts of the case clearly show that the judge had not decided whether or not to act under s.2 of the Act at the time he imposed his sentence, let alone that he required further information in order to do so. He had not directed his mind to this question. Such a decision was not implicit or to be assumed because (a) the judge expressly stated in the course of his ruling that he intended to proceed to sentence first, leaving over the question whether there should in fact be an inquiry under s.2 to be considered ‘at leisure’ (see paragraph 11 above); (b) in order to establish a postponement under s.3(1) it is necessary to establish the taking of a positive judicial decision in that respect. In this respect, Mr Johnson relies upon the words of Judge LJ in the recent decision in *R –v- Shevki and Steele* C. A. 14th December 2000 (Cases: 200/2948/Y3 & 1999/5880/Z2) at para 26) when he said:

“The court is required to make a positive decision postponing the determination. It does not follow from the fact that an order has not been made, when it might have been, that the order (*sic*) must have been postponed, or be deemed to have been postponed. Mere temporising delay, or inaction, does not amount to postponement of a determination. In short, following an application from one side or the other, or as a result of the court acting on its own initiative, for the purposes of s.3, a judicial decision is needed, and unless made within the permitted period (whether for postponement, or for an extension in “exceptional circumstances”) the jurisdiction to make the order for postponement lapses.”

See also the decision of this court in *R –v- Kelly* (2000) 2 Cr App R(S) 129, per Laws LJ at 136.

17. For the Crown, Mr Convey (who did not appear below) submits as follows:

(1) There is nothing in the Act which *expressly* requires that the court’s initial decision to postpone determination be made before sentence is passed. Nor, in reviewing the court’s powers of postponement in *Shevki and Steele* did Judge LJ say so.

(2) He submits that the court should lean against any such construction, in that it would operate to defeat the broad overall aim of the Act which is to empower the court both to make, and postpone the making, of a Confiscation Order following conviction of a drug trafficking offence: see *Shevki and Steele* at para 20. He submits that an order for postponement made for the first time after sentence has been imposed would not be prejudicial to the defendant or contrary to any overriding principles of fairness or justice.

(3) The terms of s.2(1) are mandatory and direct that, if the prosecution asks the court to proceed under S.2, it *shall* act as set out in the succeeding sub-sections. Thus the court *must* conduct a confiscation inquiry and calculate the amount of any Confiscation Order which may be made as result of the procedure prescribed by s.2 (c.f. *R –v- Stuart and Bonnet* (1989) 11 Cr App R (S) 89). On that basis, it is to be assumed for the purposes of s.3(1) that, once such a request is made, the court is immediately acting under s.2 and, if it proceeds directly to sentence, it is to be taken as postponing the determination pursuant to the provisions of s.3(1).

(4) Mr Convey points out that, in *R –v- Shevki and Steele*, the court was not directly concerned with the question at issue in this case i.e. whether the *initial* decision to postpone must be made prior to sentence being passed, and submits that any remarks made by the court should be read in that light. he

(5) In these circumstances, it is submitted that the Crown’s request to proceed under s.2(1)(a) *and* its application to postpone the determination, otherwise required to be dealt with prior to sentence under s.2(2), should be treated as implicitly granted by the judge prior to sentencing. The proper construction of what happened was simply that the court had decided to postpone the determination of the amount of the Confiscation Order, and had merely adjourned under its inherent powers the issue of whether or not such a determination should be stayed as an abuse of process. He points out that, in the event, the abuse of process argument was not pursued, counsel limiting themselves to the submission now made in this court.

(4) DISCUSSION

18. In our judgment, s.2 and s.3 of the Act lay down a clear and mandatory sequence to be followed in a case such as the present when a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences, and either the prosecution makes a request within section 2(i)(a), or the court considers it is appropriate to proceed under section 2. We say mandatory because of the first five words of section 2(2).
19. In the interests of clarity we leave out of account for present purposes the provisions of s.2 and s.3 relating to appeals.
20. S.2(4) requires the determination of the amount to be recovered *before* sentencing or otherwise dealing with the defendant in respect of the offence. However, if the Court considers that it requires further information before making either of the determinations referred to in s.3(1)(a) and (b), and if it postpones making the determination for such period as it may specify (see s.3(1)), the court may nevertheless proceed to sentence without making its determination: section 3(7). Where the court has so proceeded, but not otherwise, s.3(8) modifies s.2(4) appropriately.
21. In our judgment, the words of s.3(7) and (8) make it clear that it is only if the court has exercised its power under s.3(1) that it may proceed to sentence without making a determination of the amount to be recovered by virtue of s.2. The word “nevertheless” in s.3(7) seems to us unequivocal.
22. The exercise by the court of its power under s.3(1) involves the making of a judicial decision. That decision must be made expressly. In that respect the statement of Judge LJ in *R –v- Shevki and Steele* cited at paragraph 16 above puts the matter clearly in words upon which we could not improve.
23. In a later passage in the judgment in *R –v- Shevki and Steele* at para 59, Judge LJ said:

“Confiscation orders should normally form part of the ordinary sentencing process. For lack of appropriate information, this will often be impractical. If the conditions in s3(1) or s3(4) are satisfied, and within six months of conviction, the court may decide that the

determination should be postponed. Unless the circumstances are exceptional this should not extend beyond six months after conviction.”

24. Mr Convey relied on that passage as laying down that an order for postponement of a determination may be made for the first time at any time within 6 months of conviction. We are satisfied that in that passage Judge LJ referred to 6 months after conviction as the time during which a postponement can operate ‘unless the circumstances are exceptional’. He was not suggesting that the initial order for postponement may be made after sentence.
25. Mr Convey’s reliance on the fact that the court has a duty to act once the conditions mentioned in s.2(1)(a) or (b) are satisfied, so that the court is thereafter necessarily “acting under section 2” for the purposes of s.3(1), ignores the fact that s.3(1) confers a discretion on the court to postpone making a determination. It is only if that discretion is exercised, by making an order for the postponement of a determination, that s.3(7) and (8) permit sentence to be passed before the determination is made. As Judge LJ said, the exercise of that discretion requires a judicial decision. No particular form of words is required, but the decision to postpone must be made manifest and, in particular, it must specify the period of the postponement, which cannot go beyond 6 months from the date of conviction unless the circumstances are exceptional.
26. In this case there was no such decision before sentence was passed. The judge did not indicate or decide whether or not there would be a determination after sentence. He intended to decide that subsequently, and he did so.
27. We have considerable sympathy with the view the judge took. The broad purpose of the Act is indeed to enable the court to sentence an offender before dealing with the question of determination for the purposes of a Confiscation Order. In addition, as the single Lord Justice observed in granting leave to appeal, once the abuse of process point had been raised, the judge’s decision to postpone the question of the determination until after sentence was taken out of a sense of fairness and humanity. Unfortunately, however, we consider that the wording of the Act required a clear indication by the judge of his decision on the question of determination before passing sentence.

CONCLUSION

28. It follows that the court had no power subsequently to proceed with the making of the confiscation order and it must be quashed. This appeal therefore succeeds.
29. The Appellant is entitled to an order for his costs to be paid out of central funds under section 16(4)(c) of the Prosecution of Offences Act 1985.

LORD JUSTICE POTTER: In this case the appeal is allowed and the confiscation order quashed for the reasons set out in the judgment now handed down and available for any member of the public or press who wishes to read it.

MR CONVEY: My Lord, I wonder if I could raise two matters? I appeared for the Crown in the appeal.

The first matter is a small matter. I did not appear below and I ask if the court's judgment might reflect that.

LORD JUSTICE POTTER: Do we refer you to at some stage as making some submissions?

MR CONVEY: Paragraph 17, my Lord.

LORD JUSTICE POTTER: Right, in paragraph 17 after "for the Crown, Mr Convey" will be inserted in brackets "(who did not appear below)". Yes.

MR CONVEY: I am obliged. More importantly, perhaps, paragraph 19.

LORD JUSTICE POTTER: Yes.

MR CONVEY: The draft judgment appears to be wrongly transcribed from the words "in the interests of clarity we leave out of account" -- sorry, the last sentence of paragraph 18, "we say mandatory because of the last five words of section 2(2)". Might I invite your Lordship to turn to page 6 of your judgment?

LORD JUSTICE POTTER: Paragraph or page?

MR CONVEY: Paragraph. Paragraph 11, paragraph 13, where your Lordship sets out the provisions of the Act.

LORD JUSTICE POTTER: Paragraph 13.

MR CONVEY: Yes. Over the page subsection (2) clearly your Lordship was referring to the first five words of that subsection and it has been wrongly transcribed. My Lord, I think the sentence you intended it to reflect was "we say mandatory because of the first five words of section 2(2)".

LORD JUSTICE POTTER: I see. For the final transcript, paragraph 18, last line but one, delete the word "last" and substitute the word "first".

WOODHEAD

Neutral Citation Number: [2002] EWCA Crim 45

No: 01/2517/X4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London WC2

Monday 14th January 2002

B E F O R E :

THE VICE PRESIDENT OF CACD

LORD JUSTICE ROSE

MR JUSTICE GOLDRING

and

MR JUSTICE TOMLINSON

R E G I N A

- v -

CHRISTOPHER WOODHEAD

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited

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Tel No: 020 7421 4040 Fax No: 020 7831 8838

(Official Shorthand Writers to the Court)

MR D DUFFY appeared on behalf of the APPELLANT

MR C THOMPSON QC & MR M SMITH appeared on behalf of the CROWN

JUDGMENT
(As approved by the Court)

Crown Copyright Monday 14th January 2002

48.1.1.1.1.1. MR JUSTICE GOLDRING: Earlier today we allowed this appeal. The following are our reasons.

48.1.1.1.1.2. The appellant is 48. On 2nd October 2000 at Leeds Crown Court he appeared before His Honour Judge Charlesworth. There were four defendants. One was his son. He pleaded guilty to counts 17 to 26 on the indictment. Each was a count of supplying goods to which a false trade description had been applied contrary to section 1(1) of the Trades Description Act 1968. The counts were specimens. He asked for 109 similar offences to be taken into consideration. On 23rd November he was sentenced to eighteen months' imprisonment. Leave to appeal against that sentence was refused. It has not been renewed.

48.1.1.1.1.3. An application for confiscation was made under section 71 of the Criminal Justice Act 1988. That was adjourned on 23rd November.

48.1.1.1.1.4. On 30th March 2001, at a further hearing, the judge ruled upon submissions regarding the meaning of "benefit" under section 72(4) of the Act. On 2nd April the judge ruled upon the amount of benefit that might be realised. The sum he decided upon was £200,000. That was the order he made. The sum was to be paid by 22nd August 2001. There was a term of eighteen months' imprisonment consecutive in default of payment. There was also a costs order in the sum of £205,000. It is against the confiscation order that the appellant appeals by leave of the single judge.

48.1.1.1.1.5. For present purposes the facts can be taken shortly. In about December 1996 the appellant and his son set up a business selling cars. It was called ABS. The cars were to be sold on the basis of offering guaranteed finance. ABS had an agreement with a finance company called Credit Acceptance Corporation ("CAC"). ABS was fraudulent from the outset. Cars were bought from auction. Their odometers were wound back. They were sold to customers using finance from CAC. The false mileage was represented both to the customer and CAC as true. The customer agreed to pay more for the car than he should have done. CAC provided finance in a greater sum in respect of each car than it would have done had it known the true evaluation.

48.1.1.1.1.6. A substantial number of cars were involved. In opening, it was said that something in the order of £975,000 was the amount of money for which the cars were sold. The profit on them was said to have been about £280,000. The loss to CAC was considerable. First, they advanced too much to the customer on the basis that the car was worth more than in fact it was. Second, when and if the customer failed to keep up his payments, the car was worth less when they took possession.

48.1.1.1.1.7. In 1997, the truth having come to light, CAC began proceedings to recover what they had lost. They finally settled the case for £63,000.

48.1.1.1.1.8. On 24th October 2000 the High Court made a restraint order against the appellant.

48.1.1.1.1.9. On 24th February 2001 Detective Constable Fairhurst made a statement dealing with

the appellant's apparent financial position and the benefit allegedly received.

The Law

The relevant provisions of the Criminal Justice Act 1988.

48.1.1.1.1.10. Section 71(1):

“Where an offender is convicted, in any proceedings before the Crown Court or a magistrates' court, of an offence of a relevant description, it shall be the duty of the court---

(a) if the prosecutor has given written notice to the court that he considers that it would be appropriate for the court to proceed under this section, or

(b) if the court considers, even though it has not been given such notice, that it would be appropriate for it so to proceed,

to act as follows before sentencing [our emphasis] or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct.”

48.1.1.1.1.11. Section 71(1A):

“The court shall first determine whether the offender has benefited from any relevant criminal conduct.”

48.1.1.1.1.12. Section 71(1B):

“Subject to subsection 1C below, if the court determines that the offender has benefited from any relevant conduct, it shall then--

(a) determine in accordance with subsection (6) below the amount to be recovered in his case by virtue of this section, and

(b) make an order under this section.”

48.1.1.1.1.13. By section 71(1C):

“If, in any case ..., the court is satisfied that a victim of any relevant criminal conduct has instituted ... proceedings against the defendant in respect of ... damage sustained in connection with that conduct---

(a) the court shall have a power, instead of a duty, to make an order under this section.”

48.1.1.1.1.14. By section 72A(1) the court has a power to postpone the determination under the previous section:

“Where a court is acting under section 71 above but considers that it requires further information before---

(a) determining whether the defendant has benefited from any relevant

criminal conduct; or

(c) determining the amount to be recovered in his case...,

it may, for the purpose of enabling that information to be obtained, postpone making the determination for such period as it may specify.”

48.1.1.1.15. By subsection (7):

“Where the court exercises its power under subsection (1) ..., it may nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the offence or any of the offences concerned.”

48.1.1.1.16. By section 73A(2) there is provision for the defendant to provide information. Subsection (2) reads:

“For the purposes of obtaining information to assist in carrying out its functions under this Part of this Act, the court may at any time order the defendant to give it such information as may be specified in the order.”

The issue in this appeal

48.1.1.1.17. It is agreed that the procedure under the Act is mandatory. It is agreed that when deciding whether to sentence before the confiscation proceedings and postpone the confiscation proceedings under section 72A, a judge is exercising a judicial discretion. He is similarly doing so when ordering the production by the defendant of information under section 73A(2) (see Ross, a decision of this Court, case reference number 2000/02702/W1).

48.1.1.1.18. It is agreed that if in this case the judge did not exercise a discretion he had no jurisdiction to make the order or orders he made. Mr Duffy, on behalf of the appellant, submits it is plain from reading the relevant transcript that he did not exercise any discretion. He therefore had no jurisdiction. Mr Thompson QC, who did not appear below, on behalf of the respondent submits he did. We should add that the order under section 72A(2) which the judge made was subsequently set aside.

48.1.1.1.19. The relevant transcript is that in respect of 23rd November. We quote from the relevant passages. This was the hearing at which the appellant and the other defendants were sentenced. At the outset Mr Smith, who was appearing on behalf of the prosecution, said this (page 1F):

“MR SMITH: Your Honour, before I detail the facts in respect of Justin and Christopher Woodhead, the Crown propose to conduct an enquiry into section 71 of the Criminal Justice Act 1988, that is a confiscation order, and the relevant notices have been prepared, which I can hand in to the court and to the defence.”

48.1.1.1.20. They were handed out:

“Could I say in respect of those the Crown would invite the court to adjourn the matter as to any financial orders under that Act.

JUDGE CHARLESWORTH: Yes.

MR SMITH: It is the equivalent of the drug trafficking legislation. Perhaps at the end a timetable could be either agreed or arranged as to when the relevant statement should be served.

JUDGE CHARLESWORTH: Yes.”

48.1.1.1.1.21. At page 39 of the same transcript this interchange is recorded. The judge had passed sentence. An order for costs having been made Mr Barnett, who was representing the son, asked to take instructions. The judge said:

“JUDGE CHARLESWORTH: He seems to be doing reasonably well from the report I have read.

MR BARNETT: Yes.

JUDGE CHARLESWORTH: So far as other matters of costs or compensation are concerned, Mr Smith, there is going to be a further hearing.

MR SMITH: Yes.

JUDGE CHARLESWORTH: And I think, in those circumstances, although the Woodheads are prospering - and I am impressed in fact by what I have read as to how they have prospered since, although that does not enable me to overlook this, as I have, I hope, clearly said - I think I am going to adjourn the question of costs to the hearing which you anticipate there might be, which sounds as if it will be fought, as to what they should pay by way of any compensation or compensation.

MR SMITH: Confiscation.

JUDGE CHARLESWORTH: Confiscation, sorry; we will confiscate the costs if we [need] to, at that time, I think. I mean, on the face of it they are doing so well I could simply order they pay ... [and he sets out a figure], but I do not think that would be right if there is going to be a hearing as to financial matters.

MR SMITH: Yes.

JUDGE CHARLESWORTH: And you anticipate there will be such a hearing?

MR SMITH: Yes.

JUDGE CHARLESWORTH: All right, I adjourn the question of costs to that hearing.

MR SMITH: Your Honour, on the confiscation matter, can I put forward this timetable?”

48.1.1.1.1.22. A little later (page 40A):

“JUDGE CHARLESWORTH: Mr Smith, the timetable.

MR SMITH: A list of questions is with the application under section 73 of the Act.

JUDGE CHARLESWORTH: Yes.

MR SMITH: I would ask for 28 days in which to respond and ask for 56 days for the prosecution to respond to that.”

48.1.1.1.1.23. Mr Harrison QC, representing the appellant, asked for some time. At page 40B, this interchange is recorded:

“MR HARRISON: I just wonder if the prosecution would think it right to take stock and see whether they want to embark on this exercise or not.

JUDGE CHARLESWORTH: Yes, especially in the light of the sentence as well.”

48.1.1.1.1.24. Judge Charlesworth asked Mr Smith whether he was being given instructions:

“MR SMITH: I am to this extent, that the Crown do propose to proceed to a confiscation hearing, given information that is in the possession of the prosecution.”

48.1.1.1.1.25. Mr Duffy submits on behalf of the appellant that it is plain on the face of it that the judge never exercised any judicial discretion at all. He did not consider the provisions of the Act. He did not consider whether or not to make the orders sought by the Crown. He believed, submits Mr Duffy, that he had to make the orders the prosecution asked him to. What was done was therefore done without jurisdiction.

48.1.1.1.1.26. Mr Thompson submits that it was implicit that at the outset of the proceedings, in the interchange at page 1 of the transcript to which we have referred, the judge, in replying to Mr Smith's suggestion that he would invite the court to adjourn the confiscation proceedings, was agreeing to it. He was, in effect, exercising a discretion at that stage. What happened thereafter was on the basis of that agreement. When asking the Crown whether it still wished to proceed he was doing so having regard to section 71(1)(c).

48.1.1.1.1.27. Mr Thompson drew our attention to the case of Miranda [2000] 2 Cr App R (S) 347. That was a case concerned with the issue of confiscation, although the issues it raised were different to those in the present case. There the application for confiscation was postponed. There was no reference in the proceedings to the exercise of any discretion by the judge. The relevant section of the Act was not referred to. In giving the judgment of the Court, Nelson J said this at page 357:

“We are satisfied therefore that the court in acting as it did on July 6, 1998 must have considered that it required further information before it could make its determinations.”

48.1.1.1.1.28. Mr Thompson relies upon the words “must have considered”. He also referred us to the passage:

“We are therefore satisfied that a postponement under section 72A was made here, even though neither the court nor the parties may have focused on that section when dealing with the matter on July 6, 1998.”

48.1.1.1.1.29. Mr Thompson submits it is not, therefore, necessary to refer to the section itself.

48.1.1.1.1.30. We cannot accept Mr Thompson's submissions. It seems to us that each case must depend upon its own facts; what happened before the judge in that particular case. We cannot accept Mr Thompson's submission that at the outset in the passage to which we have referred, the judge was exercising a discretion. It seems to us, having regard to the whole of the transcript, he was not. He at no stage indicated he had considered what he should do, or that he was not obliged to follow what Mr Smith was suggesting should happen. That was so in respect of both orders which he made. Therefore, in the circumstances we have concluded that he did not have the jurisdiction to make them. They (in particular, as is relevant to this appeal, the first) cannot stand.

48.1.1.1.1.31. We would add this.

48.1.1.1.1.32. First, no particular form of words is required in the exercise of the judge's discretion. It must, however, be plain that when he is considering whether to exercise a discretion or is exercising it, that what he is doing.

48.1.1.1.1.33. Second, the judge in this case did not receive the help he should have had, particularly from the Crown. No one ever suggested to him that he had a discretion; no one suggested to him that it was necessary for him to consider the applications being made to him.

48.1.1.1.1.34. In the circumstances, as we have indicated, this appeal is allowed.

48.1.1.1.1.35. MR DUFFY: My Lords, given the judgment, could I apply that the defendant's costs be made accordingly out of central funds? There is a power in the Prosecution of Offences Act 1985 either to order taxation, or I can give a sum, which is an estimate, of the costs to date.

48.1.1.1.1.36. THE VICE PRESIDENT: Have you indicated that sum to the Crown?

48.1.1.1.1.37. MR DUFFY: No, I have not.

48.1.1.1.1.38. THE VICE PRESIDENT: And you certainly have not indicated it to us.

48.1.1.1.1.39. MR DUFFY: The total sum is £50,000 or an order for taxation.

(The Bench conferred.)

48.1.1.1.1.40. THE VICE PRESIDENT: Having regard to the fact that the matter was not pursued as it could and should have been below, we take the view that this is not a case in which costs should be ordered out of central funds.

48.1.1.1.1.41. MR DUFFY: Thank you.

48.1.1.1.1.42. One final matter, my Lords: in the past there have been administrative difficulties in communicating with Switzerland, where the monies are kept. There was a surplus of funds

which took an awful long time to recover. I understand the Crown are willing to write to the Swiss authorities indicating this decision and asking them to release the monies held in their account. A potential problem is that we are not entirely sure where the monies are because they have been requested to be released to magistrates' courts. Would the Crown formally agree to translate the letter to the Swiss authorities and to send it within the course of the next seven days so that that money can be released and it avoids unnecessary litigation abroad?

48.1.1.1.1.43. MR THOMPSON: I can see no objection in principle to the Crown undertaking to use their best endeavours to ensure the money is released. I only hesitate because there may be proceedings about which I know nothing which may have some impact on whether or not that course can be taken. So I would prefer not to give the undertaking in the form that it was sought.

48.1.1.1.1.44. THE VICE PRESIDENT: Yes.

48.1.1.1.1.45. MR DUFFY: May I say I entirely accept if there are other restraint proceedings which are instigated and that will override any issue and any undertaking. What I am simply seeking is that if no further proceedings for restraint are contemplated that the monies are released to us and not simply left in abeyance.

48.1.1.1.1.46. THE VICE PRESIDENT: Yes.

(The Bench conferred.)

48.1.1.1.1.47. THE VICE PRESIDENT: We take the view that the Crown's best endeavours, as indicated by Mr Thompson, are as much as you can reasonably expect. We do not require of them an undertaking.

48.1.1.1.1.48. MR DUFFY: No. Thank you.