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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand,
London WC2

Wednesday, 31st July 2002

B e f o r e:

LORD JUSTICE RIX

SIR IAN KENNEDY

and

THE RECORDER OF BRISTOL
HIS HONOUR JUDGE CROWTHER QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

-v-

JOHN PALMER

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MR D A THOMAS & MISS A DORRELL appeared on behalf of the appellant

MR D MATTHEW appeared on behalf of the Crown

P R O C E E D I N G S

1. LORD JUSTICE RIX: On 15th July this court heard the appeal of Mr Palmer against the confiscation order made against him on 23rd April 2002 by His Honour Judge Gordon. At the conclusion of the hearing of this appeal the court reserved judgment. Since then, with the imminence of the end of the legal term today, the court has been requested by the appellant, if the court were able to do so, to state its decision on this appeal in advance of giving its reasons for that decision. In making that request, the appellant has suggested that the court's decision may affect the status of the appellant's prisoner categorisation. The court is therefore content to state its decision in advance of its reasons --
2. MR MATTHEW: My Lord, I do apologise for interrupting, but may I bring to the court's attention a potential difficulty that giving a decision without reasons at this stage may give rise to.
3. LORD JUSTICE RIX: Yes. I am grateful. You should have got up straight away since that was the subject matter of today's --
4. MR MATTHEW: I am sorry. The prosecution has been left a little trailing as to the actual sequence of events, and I apologise that I did not do it earlier. The problem is this. If there is to be a certification of a question to the House of Lords, that has to be done within 14 days of the decision.
5. LORD JUSTICE RIX: Yes.
6. MR MATTHEW: I would agree that it may well be that it is unlikely from the prosecution's point of view that we would ask for the court to certify a question, but what we will not be able to do is to ask the court to certify a question until we have had the reasons for any decision. If the reasons for the decision are to be given shortly, then no doubt the prosecution could accommodate itself and make it within the 14 days of today's date, but if it is intended that the reasons be given at some later date, then the prosecution is put in a completely impossible position.
7. LORD JUSTICE RIX: Can time not be extended?
8. MR MATTHEW: The statute suggests that it can only be done at the defendant's application for an extension of time. Does your Lordship have Archbold? It is section 34 of the Criminal Appeal Act 1968. It is at chapter 7-257. In the current edition that is page 994.
9. LORD JUSTICE RIX: Yes.
10. MR MATTHEW: Subsection (1), as the court will see, sets out the 14 day period. Subsection (2) suggests that an extension of time can only be made on the defendant's application, not on the prosecution's.
11. LORD JUSTICE RIX: Yes. Have you spoken about this to your learned friend?
12. MR MATTHEW: My Lord, I am afraid I have not. I am afraid my thought processes have been moving along this morning and finally reached the point where I stood up as your Lordship was speaking, and therefore I apologise to the court and to my learned friends.
13. LORD JUSTICE RIX: Yes. Mr Thomas, I am not sure whether to call on Miss Dorrell or you. At any rate, is there any difficulty?
14. MR THOMAS: My Lord, the first thing I would say is it is a perfectly common and normal practice in this court to announce a decision and give reasons later. That happens routinely. So this is not an uncommon problem.

15. LORD JUSTICE RIX: True.
16. MR THOMAS: And I do not see why this case is any different. If the prosecution are in difficulties, and I do accept the problem that they have, let me assume for the moment that your Lordships allow the appeal and quash the confiscation order, without anticipating what your Lordships' reasons may be, there can only be three reasons: we succeed on ground 1, ground 2 or ground 6. It would be perfectly open to the prosecution to ask the court, and it is a matter for the court, to certify a question arising out of any of those three grounds, and if it would help the prosecution I actually have questions with me on those three grounds.
17. LORD JUSTICE RIX: It is much better for it to be dealt with with the judgment before one.
18. MR THOMAS: My Lord, yes, certainly, but not if it is going to delay your Lordship announcing the decision this morning. Much better, I entirely agree, that the prosecution should be able to take careful thought about the terms of the judgment when it is delivered --
19. LORD JUSTICE RIX: What is the difficulty about this? If it is the case that time can only be extended on the application of the defendant, it is at the defendant's request that we are here this morning.
20. MR THOMAS: Yes.
21. LORD JUSTICE RIX: To give a decision, but in doing so we would not intend to prevent, by a mere matter of timing, a certification of a question.
22. MR THOMAS: I think, if it would help, the defence will invite the court to extend the time limit.
23. LORD JUSTICE RIX: Yes.
24. MR THOMAS: The defence is in the difficulty, of course, that if we have succeeded in the appeal we are not in a position to ask the court to certify any question, so we are in that difficulty, but subject to that I am now instructed to invite the court to extend the time limit for such reasonable time as the prosecution require.
25. LORD JUSTICE RIX: Then the reasonable time would be 14 days from the giving of our reasons, would it not? The 14 days runs from the refusal of leave, does it not?
26. MR MATTHEW: From the decision, my Lord. An application to the Court of Appeal for leave shall be made within the period of 14 days beginning with the date of the decision.
27. LORD JUSTICE RIX: Yes. We are going to retire in a moment to consider this. Do you see any difficulty in the light of Mr Thomas' invitation to the court to extend time?
28. MR MATTHEW: My Lord, I do, I am afraid. If you look at subsection (2), the wording is that:

“... the Court of Appeal may, upon application made at any time by the defendant, extend the time within which an application may be made by him...”
29. I do not think that Mr Thomas, although I appreciate what he is seeking to do, it is very reasonable, has the power to invite the court to extend time to the prosecution. I do not think the court has the power to do that under the terms of the statute.
30. MR THOMAS: My Lord, I wonder before your Lordships rise if I could just make one further -- this has taken us by surprise. In section 34 the application to the court for leave to appeal shall be made within the period of 14 days beginning with the date of the decision of the court.

31. LORD JUSTICE RIX: Yes.
32. MR MATTHEW: What is that decision? Is it the decision of the court on the appeal or is it the decision under section 33(1) to certify the question? Before there can be any question of leave to appeal, the court must certify a question as being fit for appeal. That is a two-stage process. First, there is an application for a certificate. As your Lordship well knows, commonly the court grants a certificate but then refuses leave. The application for leave to appeal will then be made directly to the House of Lords. That, in my submission, is at least one interpretation of section 34(1), that is the time limit, in which case unless there is a period -- I am also being reminded about the case of Cadman Smith(?), in which the point arose and the prosecution did come back. There, I think, there was some failure of communication. I have not, I am afraid, read that case recently so I would not like to rely on it.
33. LORD JUSTICE RIX: The question of certification is dealt with, did you say, in section 33(1)?
34. MR THOMAS: 33(1), paragraph 7-293. As far as I am aware, my Lord, there is no time limit beyond the limit which the court would reasonably impose. There is no statutory time limit on an application for a certificate.
35. LORD JUSTICE RIX: The decision referred to in 33(1) and 33(2) is the decision on the merits, is it not?
36. MR THOMAS: That is one interpretation. What is the decision referred to in section 34, beginning with the date of the decision of the court - is that the decision of the court on the merits of the appeal or the decision of the court on whether or not there is a point of law of general public importance fit to be certified?
37. SIR IAN KENNEDY: In my experience these applications for a certificate are always made within 14 days. The notion that you could come back after a couple of months --
38. MR THOMAS: My Lord, I think that is obviously correct, but there does not appear to be any statutory time limit. The statutory time limit, if I am correct in this interpretation, applies to the interval between the certificate and the application for leave to appeal. Normally, of course, as your Lordships well know, either party seeking to go to the House of Lords would make a double-barrelled application, certificate and leave. If they granted the certificate and refused leave then they will go to the House of Lords. That, in my submission, is where the 14 days -- there may well be cases where there is a certificate granted but either party may wish to consider whether it is worthwhile pursuing the appeal even with a certificate, so it would make sense to say that that time limit -- in our submission, section 34 could be read back to section 33.
39. LORD JUSTICE RIX: We will rise for a moment.
40. MISS DORRELL: Before you do, and before your Lordships rule on this, not on the law but on the merits of the matter, your Lordship is aware, I know, that Mr Palmer's mental state has been causing concern. Ten days ago a consultant psychiatrist approved for the purposes of section 12 of the Mental Health Act was commissioned to see him and did so. He has provided those who represent the appellant with a draft report. I do not have it, but I have spoken to the psychiatrist myself, and I am able to tell your Lordship that the contents of the report are to this effect. The appellant is now suffering from a depressive illness which has been caused in part by his incarceration, but in some part by awaiting the decision in this appeal. This psychiatrist is with Mr Palmer now. He will provide a final report in the next few days. Those who represent the appellant are most anxious, as I am sure the court will understand, that his mental state is not endangered any further than it needs to be.
41. As far as the practicalities, and accepting my learned friend's difficulties, if the appeal is allowed, is

your Lordship going to be in a position to specify which grounds are allowed, because if your Lordship is, then that may assist the Crown sufficiently to allow them at least to make the application to the Court of Appeal for leave to appeal to the House of Lords, and if they find themselves in the common position of then having to perfect their application, that should not cause any difficulty. Thank you, my Lord.

(The court retired)

42. LORD JUSTICE RIX: We think that the difficulty is one that can be got over by the Crown making an application to the court for leave to appeal to the House of Lords, if it desires to do so, following the decision today, and that application could then be adjourned until the reasons are available. Does anyone see any difficulty with that?
43. MISS DORRELL: No, my Lord.
44. LORD JUSTICE RIX: Then the application will have been made within 14 days.
45. MR MATTHEW: My Lord, I cannot see any objection to that. One tampers with these statutory time limits with trepidation, but it does seem to be a way of doing it.
46. LORD JUSTICE RIX: Mr Thomas?
47. MR THOMAS: My Lord, I do not think the defence has any objection to that course. I would simply ask that the prosecution should inform the defence when they make a decision as soon as possible so that the position can be clarified. There are other matters dependant on the -- such as the restraint order for instance.
48. LORD JUSTICE RIX: Yes. The reasons would be circulated to the legal representatives in the usual way in advance of handing down. The Crown would then be in a position to know exactly what it wanted to do.
49. MR THOMAS: Yes.
50. LORD JUSTICE RIX: And to inform Mr Palmer's representatives about that.
51. MR MATTHEW: Yes, of course.
52. LORD JUSTICE RIX: So that when we were next in court, which we anticipate being at the beginning of next term, everything will be dealt with.
53. MR MATTHEW: Yes. My Lord, I do not want to press the court at all, but in practical terms, may I ask when the court anticipates the reasons will be circulated, roughly.
54. LORD JUSTICE RIX: On the basis that they would be handed down at the beginning of next term, shortly in advance of that.
55. MR MATTHEW: Very well, my Lord, yes. I was thinking, among others things, of my leader's holiday plans.
56. LORD JUSTICE RIX: No difficulty there?
57. MR MATTHEW: Not that I am aware of, no.
58. LORD JUSTICE RIX: The court is therefore content to state its decision in advance of its reasons. The appeal against the confiscation order is allowed. It follows that the appeal against the order to

pay prosecution costs is also allowed. The confiscation order and the costs order are therefore quashed. We will publish our reserved reasons as soon as we are able to do so.

59. MR THOMAS: My Lords, I think your Lordships have had an anticipatory skeleton in relation to a defendant's costs order.
60. LORD JUSTICE RIX: Yes.
61. MR THOMAS: That now, of course, becomes a real question. Your Lordships will appreciate that there was something of a hedging of bets, we were prepared for the other outcome as well.
62. LORD JUSTICE RIX: Yes.
63. MR THOMAS: We now make the application. I have set out the grounds in some considerable detail, first, because in this case obviously the defendant's costs are very substantial indeed, and, secondly, because there is in the books and in the reported decisions a total absence of any articulated guidance on the principles which the court will follow.
64. LORD JUSTICE RIX: Yes.
65. MR THOMAS: And I have attempted to fill that gap to some extent --
66. LORD JUSTICE RIX: We are grateful to you, Mr Thomas. We have discussed this amongst ourselves. Subject to anything you would want to say, of course, we feel that since this is a discretionary order that you are seeking, it is best and indeed can only properly be dealt with when the parties have the reasons of the court before it.
67. MR THOMAS: My Lord, yes. I just thought while your Lordships were present if there was any further elaboration needed, and I do not think there is, the arguments are set out fully in the submission. The only additional point that I would make, for what it is worth, is that at every stage in the proceedings where the appellant has lost he has been ordered to pay the prosecution costs. This, of course, is not an order against the prosecution in any sense, but I think he might reasonably expect that the same rule should be applied on an occasion when he has succeeded. Beyond that I do not think there is anything I can usefully add to the written submissions.
68. LORD JUSTICE RIX: We are certainly grateful to you for the research that you have carried out, and we have read it. We will return to those matters in due course.
69. MR THOMAS: Thank you.
70. MR MATTHEW: My Lord, may I make an oral application for this court to certify a point of general public importance for leave to appeal against the decision of this court, grounds to be lodged after the reasons for the decision have been distributed.
71. LORD JUSTICE RIX: Yes. We will be grateful if, upon the distribution of the reasons -- it is best done by agreement, is it not -- by agreement with the appellant's counsel certify any appropriate questions that you want to put about before the court, so that that question is ready.
72. MR MATTHEW: Certainly, my Lord.
73. LORD JUSTICE RIX: When we next meet.
74. MR MATTHEW: Of course, my Lord, yes.
75. LORD JUSTICE RIX: So there is no need for any further --

76. MR MATTHEW: I am not sure that this is something that I really need to say to the court, but certainly it is the Crown's intention to maintain the restraint order until that is in place, until all questions of appeal are decided. Your Lordship has indicated that a costs order has been quashed. I assume that is the second one made by HHJ Gordon in May and April of this year as opposed to the first one made in May of last year.
77. MR THOMAS: My Lord, yes. That would be the logical consequence, the original costs order comes back into force.
78. LORD JUSTICE RIX: That is right.
79. MISS DORRELL: My Lord, as far as the restraining order is concerned, you will be aware of the compensation which has been ordered. The appellant is not in a position to pay compensation while the order remains in force. I acknowledge, of course, that the restraining order cannot be looked into until your Lordships have given reasons, but as soon as possible after that those who represent the appellant would be grateful if the court, I think it would have to be a single judge of the High Court, could review the restraining order.
80. LORD JUSTICE RIX: The restraint order is there to protect the assets, but is there any difficulty in making payment out of the compensation order?
81. MR MATTHEW: I am afraid the court has been troubled by people being continually taken by surprise this morning, not least my fault. As I recall it, this is the first time we have ever heard the suggestion that the appellant did not have sufficient funds to pay both the compensation and the confiscation.
82. MR THOMAS: My Lord, if I can help my learned friend, I think there may be a solution insofar as the compensation order is concerned. It would be open to the defence to apply to a judge of the High Court for a variation of the restraint order so as to permit an amount to be released to allow the compensation orders to be discharged, not to this court.
83. LORD JUSTICE RIX: I visualised that would be obvious. In a civil jurisdiction if you have a Mareva order but a judgment for payment, then there is no difficulty, is there?
84. MR THOMAS: The difficulty with the restraint order is, surprisingly, it does not fall with the confiscation order, it is independent of the confiscation order. The Court of Appeal Criminal Division cannot quash the restraint order. It would be necessary for one of your Lordships, if the matter were free from remaining complication, to sit as a judge of the High Court.
85. LORD JUSTICE RIX: I understand that. I was making a different point. Suppose in the civil jurisdiction you had a Mareva injunction over the whole of a defendant's worldwide assets, but an order, for instance, for a payment of costs during the course of the litigation, then it would be the slightest matter for it to be dealt with simply by agreement, and there would be a variation of the Mareva which would be routinely approved by the judge to permit the payment out of the costs that have been ordered.
86. MR THOMAS: I think in fact the restraint order was for an amount in excess of the confiscation order that was made anyway, so this matter, I think, can be resolved in that way.
87. LORD JUSTICE RIX: Thank you very much.
88. MISS DORRELL: My Lord, briefly, so that the Crown know where they are, my understanding is the compensation which has been ordered is 2.3 million, and I am instructed that there is 1.2 million available in liquid assets, that is to say cash which is presently under restraint. Therefore if that were lifted or varied the appellant would be able to pay a little over half of the compensation which has

been ordered, and he is anxious to be able to do that.

89. LORD JUSTICE RIX: The Crown has heard that.

90. MISS DORRELL: The money is held at Highbury Magistrates' Court. Thank you very much.

91. LORD JUSTICE RIX: Thank you.