

In the Court of Appeal
(Criminal Division)

Regina
v.

John Palmer

Advice on the applicability of the Criminal Justice
Act 1988 section 74A.

D.A.Thomas

Attridge Solicitors
The Colleen Bawn
196 Southwark Park Road
Bermondsey
London SE18

- (1) I am asked to advise whether, in the event of the Court of Appeal Criminal Division quashing the confiscation order made by the Crown Court in respect of Mr Palmer, it will be open to the Crown to initiate further proceedings with a view to a fresh confiscation order.
- (2) The power of the Crown to initiate further confiscation proceedings in a case other than a drug trafficking case depends on section 74A of the Criminal Justice Act 1988. Section 74A was inserted into the Criminal Justice Act 1988 by the Proceeds of Crime Act 1995, section 5. The Proceeds of Crime Act 1995 came into force on November 1, 1995.
- (3) Transitional provisions in relation to various amendments made by the Proceeds of Crime Act 1995 to the Criminal Justice Act 1988 are dealt with in section 16 of the 1995 Act. The relevant parts of the section reads as follows:

(3) Subject to subsections (4) to (6) below, this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint, and different days may be appointed under this subsection for different purposes.

(4) Section 14 above and this section come into force on the passing of this Act.

(5) Section 1 above shall not apply in the case of any proceedings against any person where that person is convicted in those proceedings of an offence which was committed before the commencement of that section.

(6) Sections 8(1) and 9 above shall not apply where the offence, or any of the offences, in respect of which the confiscation order was made was committed before the commencement of section 1 above.

- (4) It will be seen that the transitional provisions section makes no reference directly to section 5, although it does refer specifically to the amendments made by section 1 of the Act to section 71 of the 1988 Act (in subsection 16(5)), and to the amendments made by sections 8 and 9 to various sections of the 1988 Act dealing with the enforcement of confiscation orders.
- (5) In considering whether it is open to the prosecution to initiate fresh confiscation proceedings under section 74A, it is necessary first to consider whether section 74A applies to proceedings for offences committed before November 1, 1995, and then whether, if it does so apply, it is possible for the prosecution to satisfy the requirements of section.
- (6) In my opinion, section 74A does not apply to proceedings in respect of any offence committed before November 1, 1995, and in the circumstances of the present case, the prosecution would not in any event be able to satisfy the requirements of the section.

The general principle against retrospective operation of criminal statutes.

- (7) Quite apart from Article 7 of the European Convention on Human Rights, it is a general principle of English criminal law that a statute adversely affecting the rights of the

individual will not apply to matters arising before the statute came into force, in the absence of express statutory language to the effect that it does. The scope of this principle was examined in the case of *Re Barretto*, (1994) 99 Cr.App.R. 105, which was concerned with a closely related subject.

(8) The facts are taken from the headnote:

B pleaded guilty to conspiracy to supply cocaine, a Class A prohibited drug, and was sentenced to 20 years' imprisonment. In January 1990 the trial judge applying the procedure laid down by the Drug Trafficking Offences Act 1986, certified that B had benefited from drug trafficking in the sum of £595,519.91 and that the amount recoverable by way of confiscation was £287,603.29. A confiscation order in the latter sum was made with a consecutive term of three years' imprisonment in default of payment. In 1991 the police learned that international money orders owned by B and purchased by him from the sale of drugs, which on sale had realised £104,624.93, had been used by B to pay off the confiscation order. In January 1992 a receiver was appointed on the ground that the recoverable sum had not been fully paid. The confiscation order had been made prior to the commencement on July 1, 1990, of the Criminal Justice (International Co-operation) Act 1990. The receiver applied under section 16 of that Act for a certificate that the amount which ought to have been realised from B was greater than the amount taken into account when the confiscation order was made. B opposed the application contending that section 16 did not apply to confiscation orders made before the 1990 Act came into force. The judge dismissed the application on the ground that section 16 did not have a retrospective effect. On appeal by the receiver to the Court of Appeal, Civil Division. **Held**, dismissing the appeal, that whereas the Drug Trafficking Offences Act 1986, e.g. by sections 1(3) and 2(1)(a), provided that that Act should apply to certain events occurring before its commencement, there was no such provision in section 16 of the Criminal Justice (International Co-operation) Act 1990. While the confiscatory and default provisions in the 1986 Act were broadly penal provisions, intending to fix a drug trafficker's obligations at the time the confiscation order was made, subject to any appeal, it did not treat them as having forfeited his property rights. Thus, as under section 16 of the 1990 Act which introduced a new procedure, any provision which increased a money judgment retrospectively particularly if coupled with an additional liability to imprisonment would disturb such rights, it thereby contravened the presumption against retroactivity. Further (*per* Staughton L.J.) section 16 of the 1990 Act required that the confiscation order be made prospectively. Accordingly, even without applying the presumption against retrospectivity, it did not apply to the confiscation order made against B.

(9) The provision authorising the prosecution to apply for an increase in a confiscation order on the basis that the amount that might be realised had been incorrectly determined was inserted into the 1986 Act by the Criminal Justice (International Co-operation) Act 1990. There is a strikingly clear analogy between that situation and the insertion into the Criminal Justice Act 1988 of section 74A, authorising the prosecution to initiate new confiscation proceedings sometime after the conclusion of the trial and sentence in the Crown Court.

(10) The following is the key passage from the speech of Sir Thomas Bingham M.R.:

"Whereas the Act of 1986 expressly provided that the Act should apply to certain events occurring before its commencement, I find no such express provision in the Act of 1990. It seems to me inconceivable that a prosecution under section 14 could be successfully founded upon a concealment or a transfer which took place only at a time, before the commencement of the Act, when such conduct was not criminal. I would be surprised if interest could be claimed under section 15 as a result of delay in payment at a time when there was no statutory or other right to interest. So the context does not, as it seems to me, give rise to an inference that section 16 was intended to have retroactive effect. In the absence of any express or implied indication that Parliament intended section 16 to have retroactive effect, it is necessary to look at the operation of section 16 more closely to see if it invites application of the presumption against retroactivity.

While it is true that a confiscation order is made before sentence is passed for the substantive offence, and the term of imprisonment in default is passed to procure compliance and not by way of punishment, these are in a broad sense penal provisions, inflicting the vengeance of society on those who have transgressed in this field. While it is also true that the Act of 1986 provides for drug traffickers to be stripped of their gains, it does not treat them as having forfeited their property rights. It puts them in much the same position as a defendant subject to a money judgment, but with a penalty for non-payment. So any provision which increases a money judgment retrospectively, particularly if coupled with an additional liability to imprisonment, does in my view disturb a defendant's settled rights. While again it is true that section 16 is procedural in the sense that it introduces a new procedure, it is not in my view merely procedural: it can lead to a substantial increase in a defendant's financial obligation and to a lengthened term of imprisonment in default. It falls well outside the purview of the procedural exception. It is, however, preferable to discard labels and look at the substance of the matter. If the receiver is right, Mr Barretto is liable to have his financial obligation increased and his term of imprisonment extended on terms and by a procedure which could not have been relied on in February 1990 after the confiscation order was made. Subject to appeal or application by him his obligation was then finally fixed. To permit this obligation to be increased and the penalty strengthened by means of a law enacted subsequently would in my view contravene the presumption against retroactivity as this has, I think, been understood in English law: see *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd* [1993] 3 W.L.R. 266, 272-274. It would subject Mr Barretto to substantial disadvantage by applying a change in the law to events which occurred well before the change."

(11) The following points were made by Staughton L.J.:

Let us assume that section 16 of the Criminal Justice (International Co-operation) Act 1990 refers to, or includes, cases where a confiscation order was made before the Act came into force. On that hypothesis it is in my opinion retrospective legislation in some degree. One of the requisites for its action is drawn from time antecedent to its passing: see *Inhabitants of St. Mary, Whitechapel* (1848) 12 Q.B. 120, 127, by Lord Denman C.J. Is that prima facie objectionable so as to bring the presumption against retrospective effect into force? In my opinion it is. A new penalty is being imposed for conduct which occurred before the Act became law. I appreciate Mr Mitchell's argument that a confiscation order is not penal. But I am afraid that I cannot accept it. Whether or not such an order is part of the sentence (and it appears

not to be for some purposes), it is an unpleasant legal consequence which follows conviction. That to my mind brings the presumption into play.

We have been reminded of what I said in *Secretary of State for Social Security v. Tunncliffe* [1991] 2 All E.R. 712, 724, that the presumption was against the unfair enactment of a law which wholly or partly operates on past conduct. That was followed by Sir Thomas Bingham M.R. in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd* [1993] 3 W.L.R. 266, 274. Mr Mitchell submits that there is nothing unfair in requiring a drug trafficker to surrender gains which he has made in the past and concealed from the court on a previous occasion. But I do not think that one should go into detail to that extent. It will generally be unfair to increase the penalty for any past conduct however disreputable.

So the presumption applies and that by itself could well be enough to dismiss this appeal."

(12) Roch L.J. agreed:

"The issue is the proper interpretation of section 16 of the Criminal Justice (International Co-operation) Act 1990, whether the section applies to confiscation orders made by virtue of the Act of 1986 whenever those orders were made or only to those confiscation orders made after the Act of 1990 came into force, that is to say after July 1, 1991.

Mr Mitchell for the receiver argues that section 16 of the Act of 1990 applies to confiscation orders whenever made. He concedes that the section does not say so expressly, but he argues that that is the necessary implication of the section read in the context of the Act of 1986 and the Act of 1990. Mr Mitchell submits that decided cases such as *Director of Public Prosecutions v. Lamb* [1941] 2 K.B. 89, a decision of the Divisional Court, and *Carter-Fea v. Graham* (1964) 62 L.G.R. 279, also a decision of the Divisional Court, are authority that sections such as section 16 of the Act of 1990 will be interpreted by the courts so as to have a retroactive effect. In my view this argument fails.

That this is the correct interpretation of the section is underlined, in my judgment, by certain of the provisions of the Act of 1986. Parliament in the Act of 1986 made it clear when it wished the provision to be retroactive in its effect. For example, see section 1(3) of the Act which provides:

"For the purposes of this Act, a person who has at any time (whether before or after commencement of this section) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking."

Section 2(1)(a) of the Act which deals with the assessment of the proceeds of drug trafficking has similar wording.

No comparable words appear in section 16 of the Act of 1990. It would have been very simple for Parliament to have included after the words "ordered to pay by a confiscation order" the words "whether made before or after the commencement of this provision," had Parliament intended section 16 to apply to confiscation orders made prior to the coming into force of this section.

In the absence of such words, and assuming that section 16 is ambiguous, I would apply the well established rule of the interpretation of penal statutes, that they should not be given retroactive effect in the absence of express words to that effect unless

the implication that Parliament must have intended the penal provision to have retroactive effect is inescapable."

- (13) I would consider it likely that if an attempt were made to initiate fresh confiscation proceedings in this case, the court would consider itself bound to apply the reasoning in *Re Barretto* and come to the same conclusion in respect of section 74A.

The wording of section 74A

- (14) A second line of reasoning leading to the same conclusion is provided by the wording of section 74A(1). The section reads as follows:

(1) This section applies in any case where—

- (a) a person has been convicted, in any proceedings before the Crown Court or a magistrates' court, of an offence of a relevant description;
- (b) *the prosecutor did not give written notice for the purposes of subsection (1)(a) of section 71 above*; and
- (c) a determination was made for the purposes of *subsection (1)(b) of that section* not to proceed under that section or no determination was made for those purposes.

- (15) Subsection 71(1)(a) and (1)(b) are found only in the version of the Act as amended by the Proceeds of Crime Act 1995; by virtue of section 16(5) they do not apply to the present case. The references to those subsections in section 74A(1) provide a clear indication of a Parliamentary intention that the procedure under section 74A should apply only in those cases to which the amended version of the 1988 Act applies. The amended version of the Act does not apply to the present case.

- (16) This interpretation is reinforced by reference to section 74A (5):

(5) Where, having decided in pursuance of subsection (3) above to proceed under section 71 above, the relevant court determines that the defendant did benefit from relevant criminal conduct—

- (a) *subsection (1B)(b) of that section shall not apply* and subsection (6) of that section shall not apply for determining the amount to be recovered in that case;
- (b) that court shall have a power, *instead of a duty*, to make a confiscation order; and
- (c) if the court makes an order in exercise of that power, the sum required to be paid by that order shall be of such amount, not exceeding the amount which (but for paragraph (a) above) would apply by virtue of subsection (6) of that section, as the court thinks fit.

- (17) Subsection (1B)(b) is one of the subsections inserted into the 1988 Act by section 1 of the 1995 Act. Similarly, the reference in subparagraph (b) to the duty of the court to make a confiscation order can only be a reference to the duty imposed by section 71(1), as inserted by section 1 of the 1995 Act.

- (18) It follows that the wording of section 74A, quite apart from any general rule against the retrospective interpretation and application of criminal statutes, indicates a Parliamentary

intention that the new section should only apply to cases to which the amended version of the 1988 Act applies.

(19) I do not consider that it would be open to the Crown to argue that the procedure under section 74A applies to count 2. In the circumstances of the present case, count 2 is subject to the pre-1995 Act provisions of the 1988 Act, and the reasoning above would apply, although not necessarily the application of the general principle in *Re Barretto*.

If section 74A did apply, could the prosecution make use of the section?

(20) If, contrary to these arguments, the court were to hold that it was open to the prosecution to initiate fresh confiscation proceedings under section 74A, would the prosecution be in a position to do so. It seems highly unlikely that they would. They would run up straight into an obstacle in section 74A(1), in that they have indeed served a notice for the purposes of subsection 71(1)(a). It is true that this notice did not satisfy the statutory requirements of the present case, but nevertheless it was and was expressed to be a notice under that subsection. I imagine the prosecution would have the greatest difficulty in avoiding this obstacle.

(21) In addition it would be necessary to show that the prosecution relied upon evidence which they did not have at the time of conviction. Again it does not seem that the prosecution would be able to do so.

(22) I accordingly am reasonably confident that there is no realistic chance of the confiscation proceedings in this case being resurrected under section 74A.