No: 201602794/C5

Neutral Citation Number: [2017] EWCA Crim 421
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 14 March 2017

B e f o r e:
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE HOLROYDE

MR JUSTICE ANDREW BAKER

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R E G I N A
v

RAYMOND ANDREW NEVITT

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Mr A Mitchell QC appeared on behalf of the **Appellant**
Mr S Trimmer QC appeared on behalf of the **Crown**

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J U D G M E N T1. MR JUSTICE HOLROYDE: This is a renewed application for an extension of time of nearly 8 years to appeal against a confiscation order made, pursuant to the provisions of the Criminal Justice Act 1988, in the sum of £1.6 million by His Honour Judge Steiger QC, sitting in the Crown Court at Manchester Crown

Square on 2nd September 2008.

2. The learned judge had presided over two trials in which the applicant was accused. In the first, which we refer to for convenience as the "B indictment", the applicant was convicted of conspiracy to defraud.

3. The brief circumstances were that the applicant was the managing director of a company which provided training in the northwest of England. Under his direction and using false documents a group of companies called "the Ravelle Group" was set up. These companies were controlled by the applicant.

4. Companies within The Ravelle Group made applications for public funds in the form of grants for training. In fact no training occurred. Various fictitious documents were created in support of these applications. In late 2000 the Engineering and Marine Training Authority paid out £66,070.

5. In the second trial, which we refer to as the "A indictment", the applicant was convicted of five counts of fraudulent trading. Those charges related to his involvement in the dishonest promotion and management of three of the companies within the Ravelle Group.

6. It is necessary to say a little more about the chronology of those proceedings. It was on 3rd October 2006 that the applicant was convicted on the B indictment. His sentence was adjourned. He was granted bail. He then absconded. He remained unlawfully at large at all material times throughout the subsequent proceedings. On 15th December 2006 he was sentenced in his absence for the offence of which he had been convicted on the B indictment. The sentence imposed was one of 27 months' imprisonment, though that was later reduced on appeal, again heard in his absence, to a term of 18 months.

7. Then on 20th March 2008, after a trial in his absence, the applicant was convicted of the offences on the A indictment. On 20th May 2008, still in his absence, he was sentenced to terms of 45 months' imprisonment concurrent one with the other and also concurrent with the sentence on the B indictment.

8. Later in 2008, between 2nd and 5th May, confiscation proceedings under the 1988 Act were heard against the absent applicant and his four co-accused. The applicant was not represented, although the judge arranged for a representative from the applicant's former solicitors to be present and to take a note of proceedings. The prosecution contended that the benefit figure in relation to the offence on the B indictment was £77,203.32, and that in respect of the A indictment the benefit figure was £3,329,429.35. The applicant had served a statement in response to the application in relation to the B indictment but had taken no action in respect of confiscation in relation to the A indictment.

9. It was submitted for the prosecution that the applicant had put forward no evidence to

discharge the burden which lay upon him to show that his realisable assets were less than the benefit figure sought.

10. The judge, with a very proper regard for the fairness of the proceedings, specifically invited prosecuting counsel to assist the court with any arguments which the prosecution thought might have been advanced by the applicant had he been present. The judge further required that the figures referred to in the various statements prepared by prosecution witnesses should be confirmed by those witnesses on oath, and the learned judge himself asked a number of questions of the witnesses. He sought, and received, confirmation that so far as was known to the prosecution, the applicant was still alive, was living in Spain and appeared to be enjoying a life-style which would require significant resources.

11. The judge took the view that the evidence in the trials he had heard showed the applicant to be a profligate spender. The judge felt it would therefore be unfair to the applicant to treat the whole of his benefit as being his realisable assets. He concluded that a fair figure for confiscation would be £1,600,000, that is to say rather less than half of the benefit figure shown in relation to A indictment. Given that the applicant had provided at least some response in relation to the B indictment, the judge adjourned that part of the confiscation application. In the event he made the confiscation order which we have mentioned and allowed the applicant the period of 6 months in which to pay.

12. It is necessary next for us to refer to section 71 of the Criminal Justice Act 1988 which so far as material provides:

> "(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 to proceed,
>
> to act as follows before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct."

13. On behalf of the applicant Mr Andrew Mitchell QC puts forward a number of grounds of appeal. In particular, he argues that it was unlawful for the learned judge to make the confiscation order in the absence of the applicant. On that basis, he submits that the extension of time should be granted even though it is, on any view, a very lengthy extension and one which is solely attributable to the applicant having absconded from justice. We therefore consider first the ground of appeal which causes Mr Mitchell to argue that it was unlawful to make the order in the applicant's absence.

14. Both Mr Mitchell and Mr Stuart Trimmer QC, on behalf of the respondent, have invited the court's attention to the decision of this court in the case of R v Spearing [2011] 1 Cr App R(S) 101. That case also was concerned with confiscation proceedings under the Criminal Justice Act 1988, which had taken place in the absence of the appellant.

15. Silber J, giving the judgment of the court, said this at paragraphs 11 and following of his judgment:

> "11. The grounds of appeal are that the judge was wrong to proceed in the applicant's absence and that he should have postponed the hearing until the applicant was apprehended.
>
> 12. The case for the applicant therefore depends on there being some obligation on the part of the judge to defer holding confiscation proceedings until an absent defendant, who had also been absent during the trial, decided that he would re-appear.
>
> 13. The confiscation proceedings were, as we have indicated, conducted under Part 6 of the 1988 Act. There is nothing in those proceedings which precludes confiscation proceedings taking place in the absence of a defendant who decides to abscond. Nor can the applicant receive any assistance from either common law or the European Convention on Human Rights because in Jones [2003] 1 AC 1, the House of Lords held that when a defendant absconded from trial, he thereby waived his right to legal representation both at common law and under the European Convention. We would consider that by analogy this approach would also apply to confiscation proceedings, so that where a defendant absconds and leaves his legal representative without any instructions, this would, at common law at least, enable the court to continue with the confiscation hearing in his absence."

16. Silber J then went on to deal with a submission made by way of analogy between the 1988 Act and the Proceeds of Crime Act 2002.

17. Mr Trimmer argues that that authority conclusively establishes that it was lawful for the judge in this case to proceed in the absence of the applicant. Mr Mitchell contends to the contrary. He seeks to draw an analogy with the Drug Trafficking Act 1994, a statute which was not considered by this court in the case of Spearing.

18. Mr Mitchell's argument is as follows. The 1988 Act itself is silent as to whether confiscation proceedings may be heard in the absence of the offender and it makes no provision by which an absent offender, upon his subsequent return to the jurisdiction, could seek review of any order made in his absence. The only remedy provided for such an absent offender would be his right of appeal, which as a matter of common

sense would be likely to involve an application for an extension of time.

19. Mr Mitchell acknowledges that the position under the Drug Trafficking Offenders Act 1986 was similar in this respect to the position under the Criminal Justice Act 1988. But, he points out, only a few years later, when Parliament enacted the Drug Trafficking Act 1994, Parliament did provide a comprehensive scheme by which a defendant, in whose absence a confiscation order had been made, could invite the court to review that order.

20. Mr Mitchell contends that the inference to be drawn from that brief legislative history is that Parliament in 1988 could not have intended that an absconding offender whose confiscation proceedings came within the Criminal Justice Act should be dealt with less favourably than an absconding drug trafficker whose confiscation fell to be dealt with under the 1994 Act.

21. The conclusion to be drawn, submits Mr Mitchell, is that Parliament when enacting the 1988 Act must have intended that no confiscation order would be made in the absence of the offender. So, submits Mr Mitchell, the court in this case should simply have adjourned the confiscation proceedings for as many years as it may have taken for the applicant either to return voluntarily or to be returned to the jurisdiction.

22. Mr Mitchell points out, and seeks support for his argument from the fact that, amendments were made to the 1988 Act in both 1993 and 1995, but the opportunity was not taken to introduce into the 1988 Act a scheme for absent offenders, similar to that in the Drug Trafficking Act 1994.

23. Mr Trimmer, in response, submits that there is a simple answer to this point. It is, argues Mr Trimmer, that the applicant was dealt with under the 1988 Act. The 1988 Act, by analogy with the decision of the House of Lords in Jones, must be taken to have contemplated proceedings in absence and the applicant can derive no support from different statutory judgments under different provisions. Mr Trimmer submits that the fact that Parliament did not introduce any relevant amendment in either 1993 or 1995 confirms that view. He points out moreover, that when the 2002 Act was passed, transitional provisions preserved the 1988 Act in relation to offences committed before the 24th March 2003.

24. We have reflected upon these competing arguments. We are unable to accept Mr Mitchell's submissions. The decision in Spearing is, in our judgment, entirely correct in drawing the analogy with the decision of the House of Lords in Jones. We do not accept Mr Mitchell's suggestion that if the points which he now makes to us had been before the court in Spearing, then the decision in that case would have been different. We are not persuaded, despite Mr Mitchell's advocacy, that it is possible or appropriate to reason backwards in time from the statutory regime enacted in 1994 in relation to drug traffickers to draw an inference as to Parliament's intention in relation to a different type of offender in 1988. The submissions which Mr Trimmer makes in this

regard are, in our view, well founded.

25. It follows that this first and primary ground of appeal advanced by Mr Mitchell fails. The confiscation order was not unlawful on the basis which Mr Mitchell suggests.

26. That decision is, in truth, sufficient to conclude the matter. The only cogent basis on which such a lengthy extension of time could be sought might be the proposition that an unlawful order had been made. Since however, we find that submission to be unarguable, it follows that there is no proper basis for an extension of time.

27. Out of deference to Mr Mitchell's submissions, we do nonetheless deal very briefly with the three other grounds of appeal which he advanced. First, he questioned whether any sufficient notice had been given under section 71 of the 1988 Act. There seems to us to be no merit in this point. Notice was undoubtedly given in relation to the B indictment because the applicant served a statement in response. There has been no suggestion until now that no sufficient notice was also given in relation to the A indictment. The prosecution assert that a notice was served and although the prosecution are at this stage only able to produce an unsigned filed copy of that notice, it seems to us that the applicant cannot realistically expect to benefit from any loss of documentation which has occurred during the many years when he has been unlawfully at large.

28. In any event, even if there were some doubt about the service of a valid notice in relation to the A indictment, there is clear authority that the absence of such a notice would not be fatal to the validity of the confiscation order (see R v Tahir [2006] EWCA Crim 792 at paragraph 35). Moreover, even if there were a deficiency in the service of notice, no possible injustice could have flowed from it. It was plainly appropriate for the learned judge to proceed to consider confiscation in relation to both indictments. If the point now made on the applicant's behalf had been made at that time rather than nearly 8 years later, the learned judge would no doubt have taken the course available to him under section 71(1)(b)of the 1988 Act.

29. Next, it is submitted that the decision of the learned judge to allow 6 months to pay the confiscation order was unjust. It was based, submits Mr Mitchell, on no proper enquiry into the practicability of realising such assets as the applicant possessed. The problem with this argument is of course that the burden lay on the applicant and he had taken no steps whatsoever to inform the court as to his assets. The judge was satisfied that he had hidden assets and made a generous reduction from the benefit figure in an endeavour to be fair to the applicant. It is difficult to see what further enquiry could possibly have been made by the learned judge into the practicability of realising assets which were, by definition, hidden from the court's view.

30. Finally, Mr Mitchell submits that the learned judge in the course of his ruling misunderstood the circumstances in which an offender who has been made subject to a confiscation order may apply for a certificate of inadequacy. Mr Mitchell points out the clear distinction between such an application - which is based upon a fall in value of an

asset which was identified at the time when the order was made and upon which a value was placed at that time - and an appeal against the court's decision as to the extent of the realisable assets.

31. We accept Mr Mitchell's arguments on this point which we find to be correct. We accept that the learned judge did fall into error in this regard. The error is not however one which affects the validity of the order, not least because the judge in any event made such a substantial reduction from the proven benefit figure in making his finding as to the realisable assets.

32. In those circumstances, we conclude that there is no basis upon which the necessary extension of time can or should be granted. The renewed application for that extension accordingly fails and is dismissed.

33. MR TRIMMER: My Lords, the Crown seek an order for the costs of the prosecution in this respect. It may seem a fruitless application but those are my instructions.

34. MR MITCHELL: My client is in prison, and has now a debt approaching £3 million, given the interest. My Lord it is only an application.

35. PRESIDENT OF THE QUEEN'S BENCH DIVISION: This was an application for leave only. We will not make an order for costs.

36. MR MITCHELL: We are grateful. Thank you for the hearing.