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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 26 October 2018

B e f o r e:

LORD JUSTICE GREEN
MR JUSTICE GOOSE
THE RECORDER OF PRESTON
HIS HONOUR JUDGE MARK BROWN
(Sitting as a Judge of the CACD)

R E G I N A
v
CARL O'FLAHERTY

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Mr A Nixon appeared on behalf of the **Applicant**
Miss P Small appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE GREEN:

A INTRODUCTION: THE ISSUE

2. This application has been referred to the full court for determination. It concerns an application for leave to appeal against an order for variation of a confiscation order by the increasing of the amounts otherwise to be paid. The basis of the application was that the prosecution had discovered other assets belonging to the application which, it contended, should be taken into account and would have the effect of increasing the sums now to be paid by the applicant. The central ground of appeal concerns the approach taken by the judge who heard the application by the Crown to increase the amount to be paid. At that hearing counsel for the Crown adopted an essentially passive approach and did not challenge, by way of cross-examination, the account advanced by the applicant which disputed ownership of the assets now said to belong to him, even though the success of the Crown's application depended upon the court rejecting the applicant's version of events and analysis of various loans made to him by a third party. In the event the judge decided to ask questions of the applicant himself and he then made findings adverse to the applicant. It is now argued that the interventionist approach adopted by the judge was unfair, tantamount to bias,was inconsistent with Article 6 and led to an unfair hearing and in consequence an unlawful order increasing the confiscation order and amount to be paid.

B THE FACTS

As such this case causes a significant point about the position judges should take when confronted by an approach to the testing of the evidecnce by the Prosecution which the judge deems inadequate.

3. We turn to the facts. On 5 December 2016 in the Crown Court at Teesside, the judge, Recorder Miller, varied the available amounts under confiscation orders imposed on the applicant in 2010 and 2013 pursuant to section 22 of the Proceeds of Crime Act 2002. The variations were as follows. First, a confiscation order imposed in 2010 was increased from £5,135 to £30,350.20p. Second, a confiscation order imposed in 2013 was increased from £871.51 to £26,684.55.

4. The circumstances resulting in the 2010 convictions arose from events on 24 August 2007 when the applicant and another were stopped by officers in a vehicle which was subsequently searched. Twenty small bags of cannabis and one large bag of cannabis were found within the vehicle. The applicant's home address was searched and a large quantity of cash was found. The cash was contaminated along with cannabis.

5. On 22 March 2010 the applicant pleaded guilty to possession with intent to supply a class C drug, namely cannabis, and possession of criminal property, namely £2,090. On the same day he was sentenced to 50 weeks' imprisonment suspended for 12 months with an unpaid work requirement of 150 hours.

6. On 1 November 2010 the applicant was ordered to pay a confiscation order for £5,135 under section 6 of the Proceeds of Crime Act 2002. This comprised a benefit figure

from the criminal conduct of £30,350.20, and an available amount figure of £5,135. It resulted in a confiscation order in the sum of £5,135. The available amount was to be paid within 28 days, in default of which a period of imprisonment of 28 days was to be served. The terms of the confiscation order left a disparity of £25,215.20. By the date of the hearing for reconsideration of the available amount the applicant had paid the requisite amount.

7. The circumstances resulting in the 2013 convictions occurred following a police investigation in February 2011 when it was discovered that the applicant and others had loaded cash onto a Thomas Cook Cash Passport Account throughout 2010 and 2011 in order to launder money. On 18 January 2013 the applicant was convicted of conspiracy to convert, transfer and remove from England and Wales criminal property contrary to section 1(1) of the Criminal Law Act 1977. On 4 June 2013 he was sentenced to 18 months' imprisonment. The applicant was in breach of a suspended sentence order which was activated in part (three months) and ordered to run consecutively. On 20 December 2013 the applicant was made the subject of a confiscation order for £871.51 under section 6 of the Proceeds of Crime Act 2002, comprising a figure for benefit from criminal conduct of £27,556.06 and a figure for available amount of £871.51. This led to a confiscation order for £871.51. The available amount was to be paid within 28 days or in default the applicant was to serve a period of imprisonment of seven days. The terms of the order left a disparity of £26,684.55. By the date of the hearing for reconsideration the applicant had paid the requisite amount.

8. Subsequently, the police identified a realisable asset held by the applicant in the form of property at 25 Recreation Road, Leeds registered in the name of the applicant ("the property"). On 5 April 2016 a restraint order was made pursuant to section 40(6) and 41 of the Proceeds of Crime Act 2002 prohibiting the applicant from disposing of, dealing with or diminishing the value of the property.

9. On 5 December 2016 the Crown applied under section 22 Proceeds of Crime Act 2002 and rule 33 15 of the Criminal Procedures Rules 2015 for reconsideration of the available amount determined in relation to the 2010 and 2013 confiscation orders. The Crown argued that the applicant had an equity of £65,000 at the property which equated to an agreed valuation.

10. The applicant opposed the application upon the basis that a family friend and employer of the applicant, Mr Khalal Usta, had provided the applicant with £30,000 for him to purchase the property. Mr Usta had provided the money as an investment with an agreed return to him of £40,000.

11. In preparation for the hearing Mr Usta prepared a written statement dated 4th November 2016. In this he said, and we summarise: (a) that the applicant had been employed by him for about two years and that he paid PAYE for him; (b) that he was aware that the applicant had been in prison for money laundering; (c) that he had decided to invest £30,000 with a return of £10,000 payable in six months; (d) that as security he had made two electronic transfers of funds and that the applicant would provide proof of this in due course, but that this being so he would not do so in his statement to avoid duplication of exhibits given his understanding that the applicant would exhibit the

relevant evidence; (e) that after six months had elapsed the applicant had told him that he had attempted to sell the property but that it had become subject to a restraint order; (f) that he had not registered his interest in the property with the Land Registry; (g) that there was no proof of the agreement save for the record of the money transfers, proof of which was not, for reasons given, put before the court by way of exhibit to the statement; and (h) that there were no HMRC records of the applicant ever having been employed by Mr Usta and no records of PAYE ever having been made in the applicant's name, due to the making of a simple error in the way in which the applicant's name had been recorded on relevant official documents.

12. During the hearing of the application, Mr Usta gave oral evidence. The full text of his examination in chief consumes less than a single page of the transcript. Mr Usta simply confirmed that the contents of his prior written statement were true. Examination in chief followed on from a discussion between the judge and counsel, in the course of which counsel for the prosecution had indicated that there would be no cross-examination of Mr Usta. Counsel stated that there was nothing that could be questioned in the witness statement and that this was in effect a case where it was for the court to form its own conclusions.

13. At the end of the examination in chief of Mr Usta, and in the context of the prosecution indicating that they had no questions to ask, the judge asked Mr Usta a series of questions which focused upon some obvious points arising from his statement. We return to the nature of the questions posed by the judge later in this judgment.

14. The applicant then gave evidence. He confirmed the contents of his prior but undated statement as true. He had heard that the postcodes in Leeds were changing so properties in the LS11 area were to be changed to LS1 postal area. He thought that this would increase property values so he sought to acquire a property. He had a mortgage agreed in principle with Santander to purchase 25 Recreation Road. However, this was withdrawn after a surveyor's report. He approached his boss, Mr Usta, to see if he would invest in the property. The purchase price for the property including fees was £43,000 and £30,000 came from Mr Usta.

15. The applicant then transferred £13,000 from his own business account for the remainder of the monies. He refurbished the property and received an offer for £65,000. He then learned of the restraining order which the crown had obtained against the property, but he had no idea why it had been brought into force and served. He said that the agreement with Mr Usta had been oral only. He had sought to obtain a mortgage from Santander bank but there was no written evidence of this before the court. He had not sought to obtain a mortgage from anywhere else. He was able to show on his mobile phone, his bank statement showing £20,000 and £10,000 transferred into his account from Mr Usta's company account. He did not however have evidence with him and it was not therefore before the court.

16. The prosecution did briefly question the applicant. The cross-examination assumes under two pages of the transcript and focused upon the absence of any written agreement to record the transaction. The judge did not proceed to ask questions of the applicant.

C THE JUDGMENT

17. In his judgment, the judge observed that the burden of proof was not a high one. It was for the applicant to satisfy the court on the balance of probabilities that Mr Usta had provided £30,000 as an investment in the property with an agreed return of £10,000. He concluded that the standard of proof had not been met. He concluded that it was unlikely that a successful businessman such as Mr Usta would have lent 30,000 from the company account with no documentation. He did not accept that Mr Usta knew the applicant as well as he claimed. There was no credible evidence that the applicant had approached Santander. In fact, it was incredible that anyone such as the applicant with any understanding of money would agree to an arrangement which was to be so enormously profitable to the person lending the money.

18. The judge found that the money transferred by Mr Usta from the company into the applicant's account was part of a dishonest arrangement designed to mislead anybody who might try to enforce the orders which had been made against the applicant. He was satisfied that Mr Usta did not have any interest in the property. In the event, the confiscation orders were therefore varied as sought by the Crown.

D THE CHALLENGE TO THE JUDGMENT

19. It is now argued on behalf of the applicant that the judge erred in principle on grounds which we can summarise as follows. First, there was an appearance of bias because the judge undertook cross-examination of Mr Usta when the evidence was unchallenged by the Crown and when there was no evidential basis provided for the questioning, by the investigating officer or any witness for the Crown. Second, the judge made findings unsupported by the evidence. Third, the judge erred in that he made findings not put to the witnesses. Fourth, the judge failed to address relevant matters and/or took into account irrelevant matters. At base the complaint is that the judge acted in an unfair manner contrary to ordinary common law principles and Article 6 ECHR.

20. The Crown has served a Respondent's Notice in which the following is advanced. First, the judge was entitled to ask questions of witnesses to assist him. Second, the applicant was represented and further questions could have been asked of him by his own counsel to address any answers provided to the judge, and as such the applicant suffered no prejudice at all. Third, the judge's findings were cogently set out in the judgment and are convincing and logical. Fourth, the monies transferred were nothing more than an unsecured loan and no proprietary interest in favour of Mr Usta was created.

21. In the Respondent’s notice the Crown accepts that the judge included findings on matters not explicitly put to the witnesses and conceded that there is authority to support the proposition that it should be made plain to witnesses when their evidence is not to be accepted. Confiscation proceedings are part of the sentencing process and even though they do not involve determination of a criminal charge, they nonetheless acquire the qualified rights contained within Article 6.

22. The Crown submits that leave to appeal should be granted and an appeal allowed but only upon a strictly limited basis designed to correct some mathematical errors which

the Crown has subsequently identified in the original confiscation orders. It is not necessary for us in the course of this appeal to go into the details of these errors. It is common ground between the parties that the errors do exist and need rectification and we will return to this in due course.

E ANALYSIS AND CONCLUSION: THE JUDGE'S RIGHT TO INTERVENE

23. We turn now to set out our analysis and conclusions. We start by considering the applicant's objection to the manner in which the judge asked questions during the hearing. Case law makes clear that in principle a judge sits to hear and determine issues raised by the parties and not to conduct an investigation or enquiry on behalf of society as a whole, but as Lord Denning observed many years ago in Jones v National Coal Board (1957) 2 QB 55, a judge is "not a mere umpire to answer the question "how is that?" and the duty of a judge is above all to find the truth and to do justice according to the law".

24. In R v Jauvel [2018] EWCA Crim. 787, 27 March 2018, the President of the Queen's Bench Division observed in the light of Jones v National Coal Board that finding out the truth in a criminal matter was a combined task for the judge and the jury and that it was critical that nothing be done by a judge to create the impression that the judge had taken sides. An excessively interventionist or aggressive judge might convey to a jury an impression that the judge was against one side or another and that could unfairly influence a jury's perception of the merits. In that case the court identified three types of intervention which could give rise to grounds of appeal. These were, first, interventions inviting the jury to disbelieve defence evidence which was put in such strong terms that the resulting prejudice was to the jury incurable by proper directions that the facts were for the jury and not the judge. Second, interventions making it impossible for defence counsel to perform his or her duty in presenting the defence. Third, interventions which had the effect of preventing the defendant or a witness from doing justice and telling his or her story in a fair manner. We do not construe the judgment in Jauvel as setting out a definitive or exhaustive list of the circumstances in which an issue for appeal might arise.

25. In Barnard v DPP [2011] EWHC 1648 Admin, Beatson J (as he then was) addressed the case of judges demanding that witnesses answer questions which no counsel considered relevant. The judge stated at paragraph 30:

> "It is important for those presiding over trials and appeals at the Crown Court to remember that, notwithstanding the case management powers given to them by the Criminal Procedure Rules, our system remains adversarial and is not inquisitorial. Where a judge insists on a person answering a question where the parties, and in particular the prosecution, which has the responsibility for the conduct of the case against a defendant, do not consider the issue relevant, it does give the impression that the judge has descended into the fray in an inappropriate way."

It is apparent from case law that there are no black and white rules which govern cases such as this. Each case will turn upon its facts and will at heart involve the reviewing

court deciding whether elementary principles of fairness have been breached. Such principles include rules relating to bias and the appearance of bias.

26. In our judgment, we are clear that the judge did not transgress any limits upon his jurisdiction, nor do we consider that the judge acted unfairly or caused any unfairness, and nor do we consider that any properly informed objective third party observer would have considered that the judge was biased or unfair in any way. First, it is important to bear in mind that this was not a case before a jury. Here the judge was being asked to make findings of fact in the context of a sentencing exercise relating to confiscation. There was no risk that by his questioning a jury could have been improperly swayed. The judge was the fact-finding tribunal. Second, under the Criminal Procedure Rules judges are nowadays bound to adopt a more pro-active stance to ensure that justice is done in a fair and proportionate manner. This is not of course an invitation to judges to take over the role of prosecuting counsel, but it is a point of departure when considering earlier cases decided at a time when reticence was considered to be more of a virtue. Third, we have looked very carefully at the transcript of the questioning by the judge. It cannot be criticised for being discourteous or aggressive. It was politely, albeit sceptically, enquiring. When an answer was given which, it can be seen from the judge's later ruling, he did not accept, the judge did not attack or criticise the witness but simply noted the answer and moved on. Fourth, the questioning of Mr Usta by the judge was not extensive; it amounts to just less than two pages of the transcript. The first questions asked for clarification of the terms of the alleged loan. Then the judge sought clarification that the agreement had not been reduced to writing and that no solicitor had seen the agreement or advised upon it. Then the judge sought clarification as to whether Mr Usta had been concerned that the applicant had just been released from prison for money laundering. Then the judge sought clarification that there were no records of the applicant having been an employee of the lender. The questioning focused upon confirmation or clarification of matters that Mr Usta had already set out in his witness statement. It did not in any material way seek to dig or delve more deeply than this. Fifth, the small number of questions that the judge asked were glaringly obvious matters that in our view any judge paying attention to the evidence would have been puzzled and indeed sceptical about. For reasons which we do not understand, counsel for the prosecution did not raise these matters with Mr Usta by way of cross-examination, although they cried out for challenge. It is neither accurate nor fair to say that the questioning by the judge amounted to cross-examination. The judge exercised considerable self-restraint and simply obtained from Mr Usta confirmation as to what his case was. Had Mr Usta been properly questioned by the prosecution, in our view no intervention would have been needed from the judge. Sixth, at the end of the judge's questions he invited counsel for the applicant whether he had questions by way of re-examination and counsel indicated that he did.

27. The supplementary questions focused upon whether Mr Usta knew that the applicant had a confiscation order hanging over him. In the course of his answer Mr Usta said that he had been aware that the applicant had a "spent small sentence" but he did not know for what. The judge then asked whether Mr Usta knew what the appellant had been in prison for and Mr Usta said that he did not. It is in this regard apparent that this answer contradicted Mr Usta's own written previous statement where he acknowledged that he was aware that the applicant had been imprisoned for money laundering. There

then followed a brief exchange as to the applicant's employment position. What is plain from the transcript is that counsel for the applicant had a full opportunity, which was taken, to ask any questions that he wished arising out of the judge's interventions. Had there been a hint of unfairness it was open to counsel to remedy that by re-examination.

28. In these circumstances, we reject the submission that the judge acted in a manner which showed bias, apparent or real. We reject the suggestion that he trespassed beyond the proper judicial function. To the contrary, the judge efficiently and courteously sought clarification of the applicant's case. For us to have found otherwise would have been to impose shackles upon the right of a judge to enquire in a fair and proportionate manner as to the truth of the matter and to raise concerns that were in his or her mind. We consider that in circumstances such as this, it is the duty of the prosecution not to accept the evidence at face value but to test it rigorously. It is in this manner that the prosecution assists a court. Where, however, a judge does not receive full assistance, this is not a reason for the judge to resile from performing his duty to do justice and to seek the truth. Miss Small, who appeared today for the Crown and who was not counsel during the application in issue, accepted this analysis.

29. We turn now to the submission that in making findings which were adverse to the applicant the judge erred because he arrived at conclusions unsupported by evidence and/or not put to the witness and/or which were addressed irrelevant matters and ignored relevant matters. We do not accept this argument. The criticisms made of the ruling are, at base, different ways of saying that the judge should not have found against the applicant or that it was unfair so to do. When we stand back from this case we, like the judge, also find the accounts put forward by the applicant and Mr Usta incredible. They do not stack up. There is no credible explanation why the loan transaction was not recorded in writing or registered with the Land Registry. There was no credible explanation why no solicitor was involved. There was no credible explanation as to why the applicant's alleged employment with Mr Usta was nowhere recorded. There was no credible explanation as to why the applicant would conclude a deal which was so one sided in favour of Mr Usta. There is no credible explanation as to why Mr Usta would conclude an unevidenced loan with a person who had recently been released from prison for money laundering and who had a series of previous convictions. There is no credible explanation as to why no evidence was placed before the court to back up the applicant's case that he had prior mortgage dealings with Santander. There was no credible evidence to explain why Mr Usta would have failed to adduce the evidence of the bank transfers and the idea that this was avoid duplication of exhibits is frankly nonsensical.

30. The nub of the detailed ruling by the judge was simple. The burden of proof was the balance of probabilities and lay with the applicant. On the facts the judge, for reasons we find convincing, was not satisfied. The judge said at various points in his ruling that he found the evidence "extraordinary" and "implausible". We agree.

31. In relation to the argument that the judge should have put adverse provisional views or conclusions to the applicant and to Mr Usta, this is unrealistic. The issue for the judge was manifest. It was simply whether he believed the applicant and Mr Usta. No one

could have been in any doubt as to this. The questions the judge posed would have made it clear that he was sceptical. They identified glaring weaknesses in the applicant's case. Counsel for the applicant would have known this and had an opportunity to address such concerns in re-examination. Credibility was at the heart of the case and the judge had a duty to make his findings upon this which he did. He granted the application and he was right and entitled to do so.

32. There is a further difficulty with this application. In their witness statements both the applicant and Mr Usta describe and accept the transaction as in effect an unsecured loan of £30,000 with interest of £10,000 within six months. Mr Nixon before us today has attempted to persuade us that in fact the proper analysis of the transaction gave rise to a constructive trust. The judge found otherwise. To the extent that the applicant applied the borrowed money, which was now his money, in acquiring a property, the property was his outright and no question of a beneficial interest or proprietary estoppel or trust arose in favour of Mr Usta. There is no evidence or analysis which could lead to that conclusion. The obligation on the applicant to repay Mr Usta was simply an obligation of a debtor to a lender.

33. Neither of the witnesses say in evidence that such was part of the agreement and given that this was an interest in real property any such agreement would have been required to be in writing. If the applicant was truly indebted to Mr Usta in contract that is a contracted debt which Mr Usta can enforce in the ordinary way.

34. Finally, we address the respondent's argument that permission should be granted so that the original orders can be rectified to take account of errors that the Crown has unearthed which have the effect of overstating amounts to be paid. There is agreement between the parties as to this.

F CONCLUSION

35. In all these circumstances, we grant permission to appeal, but we allow the appeal only to the very limited extent identified by the Crown as arising out of admitted errors and as set out in the Respondent's Notice. The prosecution is invited to draw up an order reflecting the variations to be made and to seek to agree this with counsel for the appellant and then to submit the draft order to the court for approval.

36. MR JUSTICE GOOSE: Can I just raise one point in relation to the agreed reduction on the 2013 indictment? The figure after the section 22 application has been reduced from £26,684.55 to £20,296.56, the default term for non-payment should be reduced. I cannot at the moment find what it was but it ought to come, when one looks at the schedule, to about 12 months.

37. MISS SMALL: My Lord, I did try to assist the court I think at paragraph 30. Indeed, I indicated that under the old provisions of course the maximum default term for sums between £10,000 and £20,000 was 12 months. Slightly above that, the period set in default was actually made in the terms of 15 months, but my Lord it seems sensible to consider 12 months as an appropriate figure. I certainly do not seek to dissuade the court from that.

38. May I, whilst I am on my feet, make one very small clarification. My Lord in your Lordship's judgment the matter of the part payment of the 2013 original confiscation order was referred to in terms that the requisite amount had indeed been paid by the time of the section 22 re-determination. In fact, as your Lordship will recall there is a small amount still outstanding in the sum of £120-odd which is all reflected in the new calculations which your Lordships have already accepted and obviously that will be the basis upon which the draft order will made up.

39. LORD JUSTICE GREEN: Yes, thank you. So you will take all these matters into account, agree it with Mr Nixon and then submit a draft to the court?

40. MISS SMALL: Yes, my Lord.