Neutral Citation Number: [2019] EWCA Crim 569

Case No: 2018 ******

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:

Before:

LORD JUSTICE SIMON
MR JUSTICE SWEENEY
and
THE RECORDER OF NEWCASTLE
(HH Judge Paul Sloan QC, sitting as an additional judge of the Court)

- -

Between:

R — **Respondent**

and

S — **Appellant**

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- -

Mr David McNeill for the Crown Prosecution Service

Mr Ian Whitehurst (instructed by Sonn Macmillan Walker) for the Appellant

Lord Justice Simon:

1. This is an appeal brought with the leave of the single judge against an order made under s.22(4)(a) of the Proceeds of Crime Act 2002 ('POCA 2002'). The order was made on 29 March 2018 by a Recorder of the Crown Court (the Recorder). By that order a previous confiscation order was varied and increased from £8,550 to £108,642.81.

2. In order to understand the basis of this order and the grounds of appeal, it is necessary to set out the forensic history.

3. On 3 January 2006 at the Crown Court, the appellant was convicted on three counts charging possessing controlled drugs with intent to supply. These were drugs of class A, B and C. On the same day he was sentenced to a term of 4 years and 6 months.

4. Confiscation proceedings were brought; and on 11 January 2007, the benefit figure was set at £189,621.36; and the available amount was assessed at £18,050.

5. On 15 November 2007, the available amount was varied on an application under s.23 of POCA 2002 to £8,550, comprising £6,395 in cash seized on the appellant's arrest and a further amount of £2,155 which was paid on 15 December 2007. The unsatisfied benefit figure was thus £181,071.36 (£189,621.36 less £8,550).

6. Following his release from prison, the appellant began in business and, in June 2014 acquired a property. It was this acquisition that alerted the authorities, in December 2015, to the possibility of an application to the Crown Court under s.22 of POCA 2002 requesting the Court to reconsider the available amount. In January 2016, a police officer identified the appellant's case as being potentially suitable for a s.22 application, by reference to his ownership of the property.

7. The case was referred to the Crown Prosecution Service (CPS) in February 2016. The CPS obtained a restraint order on the property in April 2016; and began the s.22 proceedings in June 2016.

8. There was a delay between June 2016 and the eventual hearings before the Recorder on 16 February and 29 March 2018. On 2 April 2018 the Recorder set out the reasons for his decision. The reasons are a model of concision and clarity.

9. The Recorder referred to the authorities to which we too were referred: *In re Peacock* [2012] UKSC 5; *Padda* [2014] 2 Cr App R (S) 149; *Leon John* [2014] 2 Cr App R (S) 73 and *Mundy* [2018] EWCA 105 (Crim).

10. He directed himself that a property which was legitimately acquired after the making of a confiscation order was, in principle, within the reach of the POCA process; and that in deciding whether to vary the original confiscation order by

recalculating the sum which was available and substituting a different sum, the Court should apply the provisions of s.22:

> '(4) If the amount found under the new calculation exceeds the relevant amount the court may vary the order by substituting for the amount required to be paid such amount as-
>
> (a) it believes is just, but
>
> (b) does not exceed the amount found as the defendant's benefit from the conduct concerned.'

11. Among the relevant considerations that the Recorder took into account were:

i) the sum outstanding in relation to the original order;

ii) the length of time which had elapsed since the original order;

iii) the additional amount that might now be available; and

iv) the adverse impact on an offender of the making of a further order for payment weighed against the legislative policy in favour of maximising recovery from the proceeds of crime, even from legitimately acquired assets.

No criticism is made of this approach.

12. So far as consideration (i) was concerned, the Recorder noted that the outstanding benefit figure was £181,071.36 and the appellant had paid 'almost nothing' towards the benefit figure of £189,621.36.

13. So far as consideration (ii) was concerned, the Recorder noted that 11 years and 2 months had passed between the original order of January 2007 and the hearing in March 2018, and 10 years and 4 months since the amended order of November 2007. Having referred to the length of time since the original order in *Padda*, 6 years, *Peacock*, 10 years, and *Mundy*, 9 years, the Recorder said this:

> 'Clearly these are longer periods than in any of the appellate cases. While there must come a point where the passage of time becomes a very powerful or even decisive argument against the making of any recalculation under section 22, after careful consideration I have come to the conclusion that such a point has not been reached on the facts of this case. Even so, the passage of time is part of the overall picture; and must form part of my overall task of making a 'just' order.'

14. The Recorder then considered that part of the lapse of time which was due to the time taken by the Prosecution in making the s.22 application. He identified December 2015 as the date at which 'significant and clear evidence about the defendant's means or realisable property' came to light, the test set out in *In Re Saggar (Confiscation Order: Delay)* [2005] 1 WLR 2693 at [40].

15. In the Recorder's view the application proceeded properly and, making due allowance for the inevitable time taken up by investigation and bringing the matter to court, there was no unreasonable delay.

16. So far as consideration (iii) was concerned (the additional amount that might be available), the Recorder identified an issue as to whether the free equity in the property (£185,000) was entirely an asset of the appellant or whether he had only a half interest, shared with his wife. He concluded that it was unnecessary to decide this issue because, even if the appellant had only a half interest (£92,500) he had other assets that were available. If the whole equity figure on the property were used, the available amount was £300,999.28. If half of the equity figure were taken, the available amount was £208,499.28.

17. The lower sum substantially exceeded the outstanding benefit figure of £181,071.36; and therefore, the appellant had available assets sufficient to discharge the confiscation order.

18. So far as consideration (iv) was concerned, the Recorder considered two countervailing arguments. First, the argument that an offender should not be required to disgorge legitimately acquired assets since that would be to undermine the undoubted value of rehabilitating offenders. Second, the argument that the legislative policy of POCA 2002 was in favour of maximising the proceeds of crime.

19. The Recorder held, as he was bound to, that the latter consideration prevailed, even where the assets were legitimately acquired between the time of the original order and the time of the application. He referred to the case of *Padda* (above) at [47]. The case of *John* (above) was a stark example of the underlying principle: a case where general damages for personal injuries awarded after the original confiscation order was held to be susceptible to a subsequent order under s.22.

20. However, the Recorder also found that, although the appellant had built up a successful business through hard work since leaving prison, in his business dealings 'he sailed very close to the wind', living a life-style beyond his means and with a casual approach to regulations (in particular planning rules):

> 'In evidence the defendant was often unable to account fully for transactions he was asked about, despite these being matters relevant to the confiscation process. Often, he relies on his ability to blag his way out of a difficult question.'

21. He then turned to the assistance the appellant had provided to the police on which he relied on. He had heard evidence from the appellant and his police handlers, and he made a number of findings whose effect can be summarised:

(1) The appellant had operated as a Covert Human Intelligence Source (CHIS) from 2007 to 2014, during which he had provided valuable assistance to the police. The appellant had agreed to act as a CHIS both because he felt it was the right thing to do, but also because he was in a bad financial

position at the time and anticipated receiving payment for acting as a CHIS.

(2) The Recorder referred to a sensitive schedule giving a full account of the appellant's dealings with the police. The contacts were initiated in both directions, and the intelligence he provided covered a wide range of criminal activities, including crimes relating to firearms and drugs. He had been tasked with meeting suspects, and on one occasion travelled abroad to do so. On another occasion he returned with luggage belonging to persons of interest enabling the police to examine the contents without arousing suspicion.

(3) During this time, he had undoubtedly put himself and his family in danger, giving rise to a long-term risk if his role were discovered. There were also occasions when he had been at risk with no possibility of the police being able to intervene to avert the consequences. As the Recorder put it:

> 'The risks of reprisal continue today and will continue to exist into the future for an unknowable period of time.'

(4) Between 2007 and 2011, he had received sums amounting to £27,000 by way of payment. This had been used to establish his businesses.

(5) He had received no further payment since 2011; but in relation to further information his assistance was regarded by him as 'banked', in the sense that it might be of benefit to him in the future. The Prosecution indicated that if it had not been 'banked' it would have paid a further £11,000. In so far as the banking of these sums amounted to a promise of a 'text' should the appellant commit a further offence, the Recorder expressed misgivings as to the propriety of such an approach, and so do we.

(6) Although his activities as a CHIS came to an end in 2014, the police enquiries in relation to the confiscation order had not been related to the ending of the relationship, as he had suggested.

22. As the Recorder noted, none of the authorities addressed whether, or to what extent, assistance to the police should affect a prosecution application under s.22. He approached this question by reference to the requirement to make an order which was 'just' in all the circumstances.

23. He then referred to public interest in assistance being given to the police and the allowance for that assistance that was given statutory effect in the Serious Organised Crime and Police Act 2005 (SOCPA 2005).

24. He referred to the sort of discount from sentence that a defendant might expect for assistance to the police, which would depend on the quality, quantity, accuracy and timeliness of the information and the extent to which a defendant had put himself or his family at risk. The discount would be set at a level to show offenders that it was worth their while to assist the authorities. However, the Recorder also noted that the position was somewhat different in the case of a confiscation order, which was not designed as punishment, but to remove the

benefit of offending. Nevertheless, he concluded that it was 'just' to take into account the appellant's assistance in recalculating the available sum:

> 'Given the duration, nature and scale of the assistance given by the defendant, I find that the adjustment should be by way of a proportionate reduction in the sum now to be paid, and that the proportionate reduction should be substantial. The total adjustment should also take account of the issue of lapse of time since the making of the original confiscation order, resulting in a total reduction of 40 per cent.'

25. Mr Whitehurst, who appears for the appellant, developed his argument under three headings. First, he argued that the Recorder should have refused to make any order under s.22 of POCA 2002, on the grounds that it was contrary to public policy to pursue the application against the appellant when he had given considerable assistance to the police since his release from prison. In addition to the matters referred to by the Recorder, he had assisted the police enquiries into a corrupt police officer. Alternatively, he should have given very much more credit than 40% to reflect that assistance. Secondly, he submitted that the Recorder should have refused to have made any order in the light of the delay, or alternatively should have applied an additional and further discount to take into account delay. Thirdly, he argued that insufficient weight was given to the principle of rehabilitation when determining the level of discount so as to reflect the lawful life that the appellant had been leading since the original order.

26. He submitted that taking all these factors into account the discount should have been of the order of 75-80%.

27. Mr McNeill responded to these points in a respondent's notice to which we have had regard.

28. Before coming to the particular circumstances of this case, we would make the following observations which are relevant to the present appeal.

29. First, when considering an application under s.22 of POCA 2002, the Court has a broad discretion. This is clear from the provisions of subsection (4) and the use of the word 'may' and the phrase, 'believes to be just'.

30. Second, although, like the Recorder, we are not aware of any case in which assistance to the authorities after a proceeds of crime order has been relied on in answer to a prosecution application under s.22 of POCA 2002, we see no reason in principle why it should not be deployed where the facts justify it. However, the Court will bear in mind that a reduction in the amount ordered will have the effect of allowing the offender to benefit to that extent from his crime or crimes.

31. Third, it is clear that assistance to the prosecuting authorities and to the police or HM Revenue & Customs is treated as a matter that should be taken into account in a defendant's favour when it comes to consideration of sentence. The assistance may be in statutory form under sections 71-75 of SOCPA 2005,

or outside the statutory regime in a form which is reflected in a 'text' put before a sentencing judge, see *R v. P*; and *R v. Blackburn* [2008] 2 Cr App R (S) 5 at [34].

32. Fourth, no certain rules apply as to the extent to which the assistance will be reflected in the adjustment of sentence. As in so many aspects of the sentencing process, the decision will be fact specific, see *R v. P* (above) at [38] and *R v. Bevens* [2010] 2 Cr App R (S) 31 at [16] in the context of SOCPA 2005.

33. Fifth, it will be necessary for the Court to form a view as to the quality and quantity of the material provided by a defendant in the investigation and subsequent prosecution of crime. In general, this will be assessed by reference to the value conferred to the administration of justice by the defendant's assistance. Particular value will be attached to those cases where a defendant provides evidence in the form of a witness statement, or is prepared to give evidence at a subsequent trial, and does so, with added force where the information either produces convictions for the most serious offences, including terrorism and murder, or prevents them, or which leads to disruption to or indeed the break-up of major criminal gangs. Considerations like these have to be put into the context of the nature and extent of the personal risks to and potential consequences faced by the defendant and the members of his family, see *R v. P* above at [39].

34. However, sixth, the Court will take into account not only the nature of the assistance, but also the terms on which it has been given: whether, for example, the offender has been paid for such assistance and, if so, how much.

35. The weight to be attached to such matters as delay in bringing an application and assistance to the prosecution is for the Crown Court; and this Court will not interfere with such findings unless a decision either involves an error of law or principle; or falls outside the judge's discretion, in that no Court properly directing itself in accordance with the law could have come to such a conclusion; or is fundamentally lacking in any underlying reasoning.

36. None of these applies in the present case.

37. The Recorder carefully analysed the issue of delay, finding no relevant delay occurred after the application was made, giving clear and compelling reasons for that conclusion, which are in our view unassailable. Nevertheless, he appears to have made some allowance for pre-application delay when assessing the 'just' amount, in accordance with s.22(4).

38. He fully set out the nature of the appellant's assistance to the police, its value, the risks involved at the time and in the future from providing such assistance, and the rewards he had received for it. He concluded that the matters relied on by the appellant, viewed overall (taking into account an element to reflect the passing of time), merited a 40% deduction to the available sum. In our view, he was fully entitled to come to that conclusion. His reasoning was clear and compelling, it involved no error of law or principle, and it resulted in the reasonable assessment of a 'just' sum.

39. He also considered the desirability of encouraging rehabilitation. He properly directed himself that this consideration had necessarily to cede to the important principle that criminals should be deprived of the proceeds of their crimes, although ultimately the Court was required to make an order that was 'just' in all the circumstances. It was in this context that he found that the appellant fell short of someone who was entirely rehabilitated. In our view there is no merit in the argument that the Recorder failed to give proper weight to this matter.

40. For these reasons, the appeal will be dismissed.