



Neutral Citation Number: [2020] EWCA Crim 768

Case No: 201900464 C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SWANSEA
His Honour Judge Thomas QC
Indictment Number: T20150476

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2020

Before :

THE RT. HON. LORD JUSTICE IRWIN
THE HON. MR JUSTICE HOLGATE

and

THE RECORDER OF LONDON, HIS HONOUR JUDGE LUCRAFT QC,
(sitting as a judge of the Court of Appeal, Criminal Division)

Between :

Paul Joseph Waite

Applicant

- and -
Regina

Respondent

Mr Matthew Paul (instructed on a public access basis) for the Applicant

Hearing date: 4 June 2020

Approved Judgment

The Recorder of London :

1. There are two matters before the court where this applicant seeks to renew his application for leave to appeal and for an extension of time. On June 3, the Court was notified that the applicant had instructed counsel, Matthew Paul, to appear on his behalf at the hearing. Mr Paul submitted a document headed “Amended Grounds of Appeal”. The document makes clear that the applicant relies on all the grounds he has himself set out in relation to both matters before this Court, and the further document seeks to focus the Courts attention to just some of the grounds relied upon.
2. The first of the two matters before the Court dates back to 2008. On April 9, 2008 in the Crown Court at Leicester before His Honour Judge Collis and a jury, the applicant was convicted of conspiracy to defraud. He was sentenced to a term of imprisonment of 5 years. On August 14, 2008 a confiscation order was made in the same court by consent. It was agreed that the applicant’s benefit from his general criminal conduct amounted to £36,572.00. Because the available amount was nil, it was formally assessed at a nominal amount of £1, a sum which he was ordered to pay within 14 days. It has not been paid.
3. The applicant appealed to the Court of Appeal against his sentence but not against the confiscation order. The appeal against sentence was successful in that on 1 October 2008 the Full Court reduced the term from 5 years to 3 years 6 months. The confiscation order remained unaffected.
4. The confiscation order was one based upon a lifestyle category. Therefore, it remained open to the Crown to issue a section 22 notice under the Proceeds of Crime Act 2002, in the event of the applicant coming into assets sufficient to satisfy the order.
5. The applicant was convicted of 7 offences of fraud in July 2016. The prosecution then discovered that he owned 5 properties with equity amounting to £127,716.00. The prosecution therefore applied under section 22 for the available amount in the 2008 confiscation order to be increased from £1 to £36,572.00.
6. In his grounds of appeal, the applicant asserts that he was not properly advised by his barrister in relation to the confiscation order so that he was unaware that it would remain in force until satisfied. In his application for an extension of time of about 10 years 5 months, the applicant says that it was only when he was imprisoned for the further offence in 2016 that he discovered that the confiscation order was still in fact active and that the prosecution wished to recover assets under it. Even then, however, he did not make an application for permission to appeal until 3 February 2019.
7. In summary, the applicant seeks to raises two grounds of appeal. First, he says that the judge erred in imposing a confiscation order against both the applicant and his co-accused for the same amount. He says this would allow for recovery of more than the benefit obtained by the offending and is therefore contrary to the ruling in R v Ahmad and another (Respondents) [2014] UKSC 36. Second, he contends that in its judgment in 2008 the Full Court stated that the applicant and his co-accused had received just 10% of the monies obtained from their fraud. Accordingly, he says that the confiscation order should be amended so as to be based on the figure of £5,137.00 shared between the applicant and the co-accused rather than the larger figure set out in

the order. This is supported by the written and oral submissions of Mr Paul. Mr Paul submitted to this Court that a consideration of the appropriate amount of the order is hampered by the lack of access to contemporaneous documents from the trial.

8. The prosecution has filed a respondent's notice opposing the application. In short, they say that the judge did not make a joint confiscation order and therefore the decision in Ahmad does not apply. On the second point, the prosecution says that the judgment in the Court of Appeal did not decide that only 10% of the proceeds was received by the applicant and/or his co-accused. That was not an issue for determination by the Court of Appeal. That court was only dealing with an appeal against the length of the term of imprisonment imposed.
9. In her reasons for refusing leave to appeal the single judge said as follows:

“His application is more than 10 years out of time. There is no good reason such as to justify this extreme delay. I know that the applicant brought a successful appeal against the custodial sentence imposed, but not the confiscation order. The delay has caused prejudice since the relevant papers were destroyed 6 years after the conclusion of the matter. I therefore refuse the application for an extension of time.

In any event, the confiscation order in 2008 was made by consent. There is no clear evidence that the Court of Appeal ruled (or was in a position to find) explicitly that the applicant received only 10% of the value of the fraudulent transactions. Paragraph 3 of its judgment does not go that far. Nor does it appear that the trial judge made a joint confiscation order against the applicant and his co-conspirator, Mr Archer, for joint amounts, as suggested.”

We agree and would add that the applicant has not put forward any proper explanation, let alone justification, for the delay in this appeal. Mr Paul submits that it is in the interests of justice that an extension be granted considering the reach of section 22 of the 2002 Act. If that was right, it would potentially apply to every confiscation order of this type.

10. Despite the submissions of Mr Paul on behalf of the applicant in our judgment there is no merit at all in the application for permission to appeal and it is dismissed.
11. The second matter before this Court relates to the applicant's conviction in 2016. On 21st July 2016, in the Crown Court at Swansea before HHJ Thomas QC and a jury, the applicant was convicted of seven counts of fraud contrary to section 1 of the Fraud Act 2006. On the same date he was sentenced to a total of 30 months imprisonment. He was also disqualified under section 2 of the Company Directors Disqualification Act 1986 from serving as a company director for a period of 5 years.
12. Confiscation proceedings followed the conviction. On 17th October 2018, the applicant was ordered to pay a Confiscation Order under the Proceeds of Crime Act 2002 for £55,049.36 within 3 months or in default to serve a period of 12 months imprisonment consecutive to his substantive sentence. He was ordered to pay a

compensation order of £37,653.32 within 3 months or in default to serve 18 months imprisonment. He was also ordered to pay £6,218.87 towards the costs of the prosecution and a victim surcharge order of £120 within 3 months. A renewed application for leave to appeal against conviction was refused by the Full Court on 6th June 2019.

13. In the applicant's own grounds of appeal on the Confiscation Order he sets out eight points to seek to demonstrate that the order was unjust. Those eight points are in summary as follows:
- a) counsel originally instructed to deal with his case was not available when a new date was set, and alternative counsel had to be instructed. He states that the Judge refused to accede to the application for an adjournment and counsel subsequently stepped down as she was professionally embarrassed. This was extremely unfair and detrimental to his case particularly because the case was subject to subsequent adjournments following an amended confiscation statement being lodged by the Crown;
 - b) a large proportion of the evidence demonstrated that the money obtained was in fact used by the applicant's companies and that he had not personally gained from the offending. The Judge therefore erred in ruling that it was appropriate to pierce the corporate veil. He should not have concluded that the applicant's evidence was vague and dishonest and should not have concluded that the companies were operations under the direct control of the applicant who used the funds for his own personal gain;
 - c) the Judge erred in extending the 2-year deadline pursuant to section 14 of the Proceeds of Crime Act 2002. There were no exceptional circumstances which justified such a course of action;
 - d) the applicant had produced evidence to demonstrate that four of the properties listed as assets were in fact owned by a company and that the shareholdings of the company were held by him on trust for his children. The Judge's earlier incorrect ruling in relation to the corporate veil impacted upon his decision to include these properties as part of the applicant's available assets;
 - e) it was unfair to allow the Crown to change their position and argue that the applicant had a criminal lifestyle. There was insufficient evidence to justify this change in position which was highly prejudicial to the applicant;
 - f) the Judge was inconsistent in relation to his position regarding the applicant's companies. He initially ruled that the corporate veil had been pierced but then commented that there had never been any legitimate income from the companies before finally stating that there was legitimate income but that this had not been sufficient to purchase the property at 9 Ropewalk Road;
 - g) the Judge erred in ruling that the applicant had a criminal lifestyle and that his benefit amounted to around £55,000 on the basis of his income and the finding that the applicant had hidden assets. The final order made was clearly disproportionate to the circumstances of the applicant and the offending;

- h) the Judge erred in relying upon the prosecutor's figures in relation to the available amount. He did not afford sufficient weight to the valuation provided by a chartered surveyor instructed on behalf of the applicant.

The points at (b) and (c) above are further supported by the written and oral submissions made on the applicant's behalf by Mr Paul.

14. Mr Paul takes issue with the approach of the Judge to the applicant and the companies he operated as a 'one man' business and submits that a broad-brush approach to each of them was not the right approach. Treating them all in the same way and indiscriminately piercing the corporate veil was not warranted.
15. The Prosecution lodged a Respondent's Notice and Grounds of Opposition in which they set out responses to each of these points made by the applicant. In summary they say:
 - a) The Judge did not err in refusing the application to adjourn the hearing of 17th May 2018 so that the applicant could have counsel of his choice. He did however agree to move the hearing until 22nd May 2018 so that newly instructed counsel had time to prepare and take instructions. This did not result in any unfairness to the applicant;
 - b) the Judge did not err when deciding to pierce the corporate veil. He had the benefit of considering the reports from the financial investigator and the evidence from the applicant at the confiscation hearing. He considered the relevant legal principles and correctly decided that the companies were the alter ego for the applicant. It was therefore entirely appropriate for the veil of incorporation to be torn away for the purposes of the confiscation proceedings;
 - c) The Judge considered that the applicant had employed a deliberate tactic of delaying the proceedings and that it was appropriate to extend the two year time period. As it transpired, the case came to an end around 3 and a half months beyond the end of the period. The Judge did not err when making this ruling;
 - d) The Judge did not err in permitting the prosecution to change its position with regard to the calculation of the applicant's benefit. It is submitted that the prosecution had not sought to change their position. The Court was required to consider whether the applicant had a criminal lifestyle and if so whether he had benefitted from it and in error this had not been raised by the prosecution sooner. In lodging an amended section 16 statement the prosecution were simply correcting their earlier error and assisting the Court to comply with its statutory duty. The fact that the Judge permitted the defence further time to consider the amended statement meant that the applicant was not prejudiced in the preparation of his case;
 - e) The Judge did not alter his ruling in relation to the corporate veil. The applicant has incorrectly interpreted the Judge's comments at later hearings. The Judge clearly ruled that the companies were set up by the applicant as "his own personal fiefdoms" and were "his alter ego from the word go.";

- f) The defence conceded that the applicant had a criminal lifestyle and therefore the sole issue was whether or not it was just for the section 10 assumptions to be made. The Judge was quite satisfied that there was no good reason to displace the assumptions and there is no error of law that can be discerned from that ruling;
 - g) The Judge did not err in discounting the Deeds of Trust when forming a view as to the extent of his available assets. His ruling that there was no intention on the part of those named in the deeds to create a genuine relationship of trustee and beneficiary was entirely appropriate considering the facts of the case; and
 - h) The order imposed was neither wrong in law nor disproportionate. The Judge assessed the applicant's case in a fair and measured way and made appropriate findings of facts. There are no arguable grounds to challenge the imposition of the confiscation order.
16. In her reasons for refusing leave to appeal the single judge set out that she did not: *“consider it to be arguable that the confiscation order made on 17 October 2018 (“the confiscation order”) was “wholly unjust”. The proceedings were not arguably unfair; nor can it be said that the confiscation order was either wrong in principle as a matter of law or produced a result that was manifestly excessive”.*
17. The single judge then goes through the applicant's points and summarised her reasons for refusing leave.

“As a preliminary and overarching point, the applicant seeks essentially to appeal the Judge's case management decisions and/or findings of fact. There is no real prospect of an appellate court interfering with those decisions or findings.

a) Refusal of adjournment due to unavailability of Counsel: the Judge's decision not to adjourn for a full 2 weeks but rather for a few days only in order to allow fresh Counsel to be instructed was entirely reasonable. There is no suggestion that fresh Counsel provided anything other than adequate representation. There was no unfairness;

(b) Piercing of the corporate veil: the Judge correctly identified the relevant legal principles. He was then entitled to make the findings of fact that he did. They turn on his evaluation of the evidence overall, including the applicant's demeanour and performance in the witness box. There is no prospect of an appellate court overturning the material findings;

(c) Extension of the 2 year deadline: it is by no means clear that an extension was needed (on the basis that the proceedings had in fact already started). But in any event the Judge was entitled to find that there were exceptional circumstances justifying an extension for the reasons that he gave, including the fact that the applicant had in the past sought multiple

adjournments for no good reason and produced new documents late in the day;

(d) Trusts: the applicant's complaints here rely on his complaints as to the Judge's finding that the corporate veil should be pierced. Those complaints are without merit, as already identified. The Judge was entitled to disregard the deeds of trust as complete shams when deciding the quantum of the applicant's assets, based on his findings of fact;

(e) CPS changing position at 11th hour: there was no unfair prejudice to the applicant arising out of the service by the prosecution of an updated s. 16 statement (to address the question of criminal lifestyle as required by the legislation). The Judge allowed the applicant 4 weeks to respond to the amended statement;

(f) The Judge changing position on companies: on a proper understanding there was no change of position as suggested. In response to the defence request, the Judge merely confirmed that his view was that the applicant's companies were his alter ego from inception;

(g) Criminal lifestyle: the defence conceded that the applicant had a criminal lifestyle. The Judge was entitled to conclude that it was not incorrect or unjust to assume that the money expended on 9 Ropewalk Road represented benefit from his general criminal conduct - for the reasons that he gave;

(h) Available amount: the Judge arrived at the final orders after careful consideration of all the evidence and bearing in mind the question of proportionality. His approach to the question of the deeds of trust when considering the available amount cannot be impugned."

18. The single judge then concludes with this statement. *"In the absence of any merit in the appeal, given the length of the delay and the absence of any good reason for it, I am not prepared to grant the necessary extension of time."*
19. We too have read through the extensive material in this case including the grounds set out by this applicant, the recent addition submissions ably made by Mr Paul, the transcripts of the various rulings made by the learned Judge in the course of the confiscation process as well as the final ruling and order and we agree with the conclusions of the single judge on the eight key matters set out above and also with the concluding statement. In our judgment there is no merit to the points made in this application for leave to appeal and it is dismissed.
20. We have said this is a renewed application without any merit in respect of both matters and we make a costs order in the sum of £353.60.