HIGH COURT OF JUSTICIARY

[2017] HCJ 89
IND 2012/399

OPINION OF SHERIFF THOMAS GEORGE HUGHES

(Sitting as a Temporary Judge)

In the Application by

HER MAJESTY'S ADVOCATE

for a Confiscation Order in terms of the Proceeds of Crime Act 2002

against

COLIN COATES

Respondent;

Crown: Byrne, AD; Crown Agent
Accused: Party

15 November 2017

Introduction

[1] This application called before me for a Determination Hearing commencing on 17 October 2017 and subsequent dates. The history is that the respondent has been convicted of charges of murder and embezzlement. Proceedings had been initiated against him at the High Court of Justiciary in Glasgow and on 8 April 2013 the jury found him

guilty in terms referred to in production 116 which is a copy of the relevant court minutes of the said date. On that date he was sentenced to serve a period of life imprisonment with a minimum period of 33 years to be served in terms of section 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993. In particular it is noted that he was convicted of charges 9 and 10 on the indictment which were offences of extortion. The effect of section 142 of the Proceeds of Crime Act 2002 (hereinafter referred to as" the said Act") is that because such offences are referred to as a lifestyle offence in terms of Schedule 4(9) of the said Act, the respondent is deemed to have a criminal lifestyle. On the date of his said conviction, the Crown lodged with the court a Prosecutors Statement in terms of section 101 of the said Act in respect of the respondent and moved for a Confiscation Order. The Crown's final position at the determination hearing before me, was that the respondent had benefited from his general criminal conduct to the extent of £119,967.34 with an available amount of nil. The Crown therefore moved that the court should make a Confiscation Order for the nominal sum of £1.00. The respondent represented himself at the determination hearing and challenged the Crown's application.

The Evidence at the Determination Hearing

[2] The Crown led evidence from Crown witness (number 15) Jill Yahi. She is a Forensic accountant employed by the Crown Office. She is attached to the Proceeds of Crime Recovery Unit. She was asked to refer to the Statement of Information by the prosecutor (hereinafter referred to as "the blue book"). This was produced by Police Scotland. It was her obligation to check and verify the figures detailed therein and to carry out the appropriate analysis. She worked on the premise that the respondent had a criminal lifestyle as he had been convicted of offences referred to in terms of the said Act. This

allowed the Crown to use assumptions to be made in the case of criminal lifestyle in terms of section 96 of the said Act. Calculations were carried out for the relevant period (six years to 25 May 2012) and as disclosed in schedule one of the blue book she was able to calculate the increase or decrease of the balance of assets less liability for each of the six years to 25 May 2012 and the respondent's total other expenditure as detailed in the said schedule for each of the said six years giving a total expenditure. From that total falls to be deducted the respondent's income so far as ascertained by the prosecutor for each of the said years. This leaves a balance of expenditure funded other than from known sources in respect of each of the six years to the final date.

[3] This calculation originally disclosed that expenditure amounting to £120,676.06 represented the benefit from the respondent's general criminal conduct. This was the recoverable amount in terms of section 93 of the said Act. She indicated that in terms of section 93(2) of the said Act if the available amount is less than that benefit, the recoverable amount is the actual available amount or a nominal amount if the available amount is nil. It was originally considered that in respect of the respondent, the available amount so far as can be ascertained by the prosecutor was £463.16 as specified in schedule seven of the blue book. The witness had since had the opportunity of reviewing and revising the figures. It had now been ascertained that the respondent received an additional sum of £708.72 in benefits and this falls to be deducted from the original recoverable amount calculation. This meant that the final figure for that amounted in total to £119,967.34. The available amount, so far as can be ascertained by the Crown at this time, amounted to nil.

[4] The witness was asked to break down the benefit figure and indicated that she had fixed the original figure of £120,676 from four different amounts. They were:

(i) £13,603.19 of mortgage payments made from an unknown source and towards the holders of the security over the property at 8 Kilmaurs Street, Glasgow. The payments for this were shown on the document marked Tab 1 (Schedule 2)

(ii) £11,033.65 of mortgage payments made from an unknown source and towards the holders of the security over the property at 8 Kirkwood Street in Glasgow. The payments are shown on the document marked Tab 1 (Schedule 2)

(iii) £81,839.22 of bank credits made from an unknown source. The payments are shown on the document marked Tab 2 (Schedule 2.3)

(iv) £14,200 the total sum from extortion calculated in respect of charges 9 and 10 which reflected the charge in respect of which Mr Coates was convicted.

[5] The witness was referred in particular to an entry on Tab 2 (Schedule 2.3) dated 30 June 2008. This was a deposit with description 737195VALEESVV. Therein it was disclosed that the sum of £70,500 was lodged into a bank account in favour of Colin Coates. The witness was asked to identify where this sum had come from. She was referred to a statement of a Crown witness which had been lodged as a production at the respondent's trial. That witness was Angela Wotherspoon. Her statement is contained in Crown production 115. Ms Wotherspoon is the ex-wife of the respondent. The witness Wotherspoon was quoted on page 8 of the said statement as saying:

> "I was aware due to opening some of my mail that Colin was doing stuff with properties we had bought, changing deeds etc and committing fraud. He was changing properties from my name into his own name. My signature had been forged on the paperwork. As a result of this he was able to re-mortgage two properties for a total of £120,000 and he put it into a known associate, John Wilson's, bank account. It then got transferred into our joint Spanish account. I only met John a couple of times…

> I tried to put a hold on this money so I could return it to the indemnity insurers for the two properties (Royal & Sun Alliance). When I phoned the bank they could only freeze half the money which they agreed to and I froze £70,500. I assumed at that point that the banks would sort all this out. I never touched the money at all. I had to phone to release this money to Royal & Sun Alliance and whilst on the phone with Banco de Valencia, I spoke with Adam Smith who told me that Mr Coates and myself had been into the bank and the money had been released to us. I told them I hadn't been into the bank at all. He seemed to remember the couple being in the bank and I assured him that I hadn't been in the country.
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> He told me he had video footage and would release it to the appropriate authorities. The money had been released on 26 June 2008. I was told that the money was transferred by myself and Colin into account – GB28BARC, XXXXX0, XXXXXXX0. This is the only information that I know about this transaction."

[6] The witness Wotherspoon reported the matter to her divorce solicitors and a handwriting expert was instructed. The handwriting expert confirmed that the signature contained in dispositions allegedly signed by Mrs Wotherspoon were forgeries. Further investigations were carried out into the matters and to Mr Coates' dealings and as a result he was eventually sequestrated.

[7] The witness Yahi was then referred to Crown production number 106 which contains copies of the conveyancing files for the transfer of the relevant properties. At page 169 there is a letter dated 30 April 2007 from the witness Wotherspoon's solicitors to Royal & Sun Alliance, (the respondent's solicitors' professional indemnity insurers), confirming that the alleged signatures of Ms Wotherspoon contained on the relevant deeds were not authentic. Further on page 182 of the said production there is a letter dated 16 April 2007 from the witness Wotherspoon's solicitors to the respondent's solicitors indicating at paragraph 2:

> "You are holding title deeds in relation to the flats at 20 Elizabeth Street and 10 Langshot Street. You will be aware that it is our client's position that she has never instructed transfer of title in relation to these flats, to her husband's name, and yet a transfer of title appears to have happened, along with a mortgage application to which our client has not been party. We requested copies of the dispositions purportedly signed by Mrs Coates. These have not been forthcoming. We must now

> call upon you to insist upon delivery of the entire title deeds for both of these properties to ourselves as agents for Mrs Coates."

[8] The witness was referred to page 266 of the said production which contained the report from a consultant forensic document examiner. He had concluded that the signature marked "a" (allegedly the signatures of Ms Wotherspoon) on disposition, in regard to Flat 2/1 10 Langshot Street, Glasgow and disposition in regard to Flat 2/1 20 Elizabeth Street, Glasgow were written by some other person and intended to appear similar to a genuine signature by the witness Wotherspoon.

[9] On page 32 of the said production file there is a state for settlement by his solicitors to Colin Coates. This discloses that a balance was due to him of £58,842.37 in respect of the transfer of title and re-mortgage of 2/1 10 Langshot Street, Glasgow. The balance due was £58,842.37. This was to be remitted by CHAPS to an account for Mr J Wilson at the Royal Bank of Scotland, Milngavie XXXXX5, account number – XXXXXXX3 in terms of a mandate provided to the solicitors by Colin Coates. The said mandate is contained in page 33 of the said production.

[10] Page 35 of the said production refers to the state for settlement in respect of the transfer of title and re-mortgage of 2/1 20 Elizabeth Street, Glasgow. This discloses that the sum due to Mr Coates amounted to £52,432.62 and this was transferred to the account of Mr Wilson in terms of a mandate held by the solicitors from Mr Coates to transfer the funds to Mr Wilson's account with the Royal Bank of Scotland, Milngavie XXXXX5, account number – XXXXXXX3. Mr Wilson had therefore received a total of £121,504.99 transferred by the respondent's solicitors to him in terms of mandates signed by the respondent. Crown production 111 discloses the bank statements for Mr John Wilson which confirms his receipt of the said funds and a transfer on 12 April 2007 by CHAPS/International for the sum of

£121,000 to go to INT XFER RBSLVLXXXXXXXX7 in the name of Colin Coates Royworld Euro.

[11] The witness Yahi was finally asked to look at the sequestration report for the respondent which is contained in production 112. This makes reference on page 10 to the possibility of mortgage fraud on the part of the respondent. On page 12 there is confirmation that he had failed to provide reasons for his insolvency. His fraudulent transfer dealings had indeed sparked the sequestration proceedings against him.

[12] The witness was cross-examined by the respondent. She was asked to look at the statement of information by the prosecutor and in particular to refer to the sum now available which she now calculated as nil. She was asked to account for the discrepancy from the original statement. She indicated that this could change on a daily basis. She was asked to confirm that some of the properties had been held in the name of companies owned by the respondent. These had since been sold. She confirmed that that was in fact the case. She was asked to look through the figures set out for household expenditure on Schedule 1 and indicated that allowances were made for day to day payments such as utility bills, mortgage payments, telephone, shopping, petrol etc. She confirmed that this would in fact have been disclosed in the bank statements referred to in Schedule 2. She was questioned about the two alleged mortgage frauds and was asked whether or not the respondent had ever been prosecuted in respect of these. She indicated that he had not but that the information came from the statement of his ex-wife and the trail of bank statements.

[13] Following the conclusion of the cross-examination of the witness there was no further evidence led for the Crown. The respondent declined to give evidence in respect of this case.

Submissions for the Crown

[14] In terms of section 101(2) the Crown believe that the accused has a criminal lifestyle as the accused has now been convicted of an offence defined as criminal lifestyle under section 142 of the Proceeds of Crime Act 2002. In particular I was referred to charges 9 and 10 on the indictment which were offences for extortion. Schedule 4(9) included offences of blackmail or extortion. The respondent had been convicted of these offences. The Crown sought to apply the assumptions set out in paragraph 96.1 and 5 of the said Act. The relevant date was to start from the commencement of the criminal proceedings and the date for this particular case was for the previous six years from 25 May 2012. The Crown had produced detailed and accurate accounts for the relevant period and as a result the court could accept the evidence of the Crown witness in this case, namely the Crown forensic accountant Ms Yahi.

[15] The Crown submitted that the standard proof in this case was on the balance of probabilities. In respect of evidential issues the court was concerned with obtaining "information" and as a result hearsay evidence was admissible in confiscation proceedings. I was referred to the case of *R* v *Vincent Clipston* [2011] 2 Cr App R (S) 101 as authority for the proposition that a statement not made in oral evidence was admissible if the court was satisfied that it was in the interests of justice for it to be admissible. It was therefore submitted that the police statement evidence of the witness Wotherspoon was therefore relevant. The Crown had clearly proved that the respondent had benefited from his criminal activities and there was therefore a burden on the respondent to prove that the Crown's position was incorrect. In terms of section 102 of the 2002 Act there was a requirement on the respondent to provide a response to the statement of information from the Crown. The respondent had failed to give particulars of any matters he could easily

have answered. I was also referred to the case of *R* v *Jhalman Singh* [2008] 2 Cr App R (S) 69 as authority for the proposition that where the respondent was deemed by virtue of his convictions to have a " criminal lifestyle" the court should be entitled to expect clear and cogent evidence on behalf of the respondent to displace those assumptions. It was submitted to be that the respondent did not provide clear and cogent evidence to do so in this particular case. In view of his failure to provide detailed information he should be held as confessed. I was therefore asked to hold that there was a benefit figure in this case of £119,967.34 and that I should make an order for a nominal amount of £1.00 at this time.

Respondent's Submissions

[16] The respondent submitted that he had not received adequate disclosure from the Crown and there was therefore a breach of Article 6 of his rights in terms of the European Convention on Human Rights. At previous Preliminary Hearings he had intimated that he had been unable to cite witnesses and the Crown productions had not been properly disclosed to him. Nothing was done to assist him. As a result he intended to appeal the previous decisions of the court and he had been denied a fair hearing. He had attempted to recover the bank records from his accounts with the Banco de Valencia and the Banco de Bilbao and had been unable to do so. He denied that he had received any unaccounted rental for properties and he did not accept the evidence of Ms Wotherspoon as she had not come into court to give evidence. He accepted that he had been sequestrated and took the view that he was now being punished twice for the same crimes. As a result he considered that he was being treated unjustly by the courts.

Discussion

The Standard and Mode of Proof and the Statutory Assumptions

[17] The standard of proof in deciding whether the respondent has benefited from his general criminal conduct and on the recoverable amount is on the balance of probabilities (section 92(9) of the Act). Section 96 of the Act provides that the court must make certain assumptions where, as here, the respondent has a criminal lifestyle. So far as relevant for the purpose of the present case these assumptions are that any property transferred to the respondent during the six year period was obtained by him as a result of his general criminal conduct and that any expenditure he incurred during that time was met from property he obtained as a result of his general criminal conduct. The court must not make any of the assumptions in terms of section 96(6) of the Act if it is shown that they are incorrect or that there would be serious risk of injustice if they were made. In view of the respondent's said convictions the burden of proving that any of the assumptions should not be made, lay on the respondent. The respondent was convicted in respect of charges 9 and 10 on the indictment and these are convictions referred to in Schedule 4(9) of the said Act. The respondent therefore has a criminal lifestyle as set out in terms of section 142 of the said Act. Section 92(6) provides that where the court decides that an accused person has benefited from criminal conduct it must decide the recoverable amount and it must make a Confiscation Order requiring him to pay that amount. The recoverable amount is defined in section 93(1) as being an amount equal to the accused's benefit from the conduct concerned. But according to section 93(2), if the accused shows, or it is proved, that the available amount is less than that benefit the recoverable amount is either the actual available amount or a nominal amount if the available amount is nil.

[18] The Crown sought to rely on the evidence of the Crown accountant, Jill Yahi, and on the statement of Angela Wotherspoon, Crown production 115. In the case of *R* v *Vincent Clipston* [2011] 2 Cr App R (S) 101 it was held that hearsay evidence is admissible. The proceedings were criminal but were not proceedings to which the strict rules of evidence applied. It was a matter of fairness. A starting point of a sentencing process generally was the offender's guilty plea or conviction after a trial. The demanding evidential requirements for the proof of guilt were not transposed to such post-conviction proceedings. The strict rules of evidence would not invariably be applied in the sentencing process. In deciding the factual situation for the purpose of confiscation proceedings, the sentencing judge was not bound by the rules of admissibility which would be applicable to the trial or the issue of guilt or innocence. He could take into account the contents of witness's statements or depositions and evidence heard at the trial in confiscation proceedings the procedure must be both flexible and fair. In many instances there would or should be no realistic issue as to the admissibility of the evidence given the focus of the Proceeds of Crime Act on "information". The real issue would be the weight rather than the admissibility of the evidence or information in question. Care would have to be taken to ensure that the defendant had a proper opportunity to be heard. The judge would not be limited to information concerning the offence or offences of which the defendant had been convicted. Whilst there was undoubtedly the need in confiscation proceedings for very considerable flexibility, conversely they would be areas where strictness was appropriate. A fair outcome to all parties did not require a statutory straight jacket, more suitable for a trial, governing the admissibility of hearsay at that stage of confiscation proceedings.

[19] I took the view that the reference to the Clipston case was of limited benefit to the present action. This was an English decision from the Criminal Court of Appeal and

involved considerable consideration of whether or not the English criminal or civil evidence legislation applied. In my view the appropriate starting point for the present application is to consider the evidence of the witness Yahi. She was asked to illustrate her evidence and confirmed the deductions she reached by using the statement of the witness Wotherspoon. I therefore allowed the evidence of Angela Wotherspoon to that limited extent as it was a useful piece of information taken in conjunction with the additional information contained from the conveyancing files in respect of the transfer of title and re-mortgage of the two properties and also reference to the bank accounts for the witness Wilson which confirmed the transfer of funds from Mr Coates to him and thereafter the transfer back of the funds from Wilson to Coates by an international funds transfer. All of this information was used by the witness Yahi to confirm her calculations. In terms of section 102 of the said Act there was a requirement on the respondent to provide an adequate response to the statement of information from the Crown. He had failed to respond appropriately. He failed to give particulars of any matters he could easily have answered. As referred to in the case of Singh he was deemed by virtue of his convictions to have a "criminal lifestyle" and as such the court was entitled to expect a clear and cogent account from him to displace those assumptions. He did not do so and that fact taken along with the evidence of the witness Yahi would be sufficient to establish the case for the Crown

Human Rights Issues

[20] The respondent submitted that he had been denied a fair hearing in this case in breach of Article 6 of the European Convention on Human Rights. He had indicated that he had previously requested that witnesses be cited on his behalf at Preliminary Hearings. An examination of the list of witnesses referred to would suggest that their inclusion was either

frivolous or indeed vexatious. With regard to the question of disclosure it is clear that disclosure had indeed been made to his former solicitors and his instructed Counsel. Thereafter they had withdrawn from acting on his behalf. Provision had been made for the documents to be delivered to him for examination whilst he was in prison. He declined that opportunity. In view of his difficulties I allowed him court time on 17 and 18 October to examine all the lodged documents whilst he was allowed to remain in the court room with security staff whilst I attended to other court business on those days. In view of all of these circumstances I took the view that he had in fact had an opportunity of examining all of the relevant documents which had been disclosed and therefore in all the circumstances there had been no breach of his Article 6 rights.

Decision

[21] I accept that it was established that the respondent has a criminal lifestyle as defined in terms of section 142(1)(a) of the said Act. As a result of that, various assumptions in terms of section 96 of the said Act apply. The respondent has failed to adequately challenge this. The relevant date in this case, commences from 25 May 2006 and includes his financial dealings for a period of six years from that date. I accept the Crown evidence regarding his total expenditure over the relevant period following the deduction of his ascertainable income from known sources. I take the view that the amended Crown's statement of information with the calculations of the Benefit Amount and the Available amounts are accurate. I find that he has benefited to the extent of £119,967.34. I have been asked to make a nominal award for the recoverable amount at this time of £1 in terms of section 93(2)(b) of the said Act. This obviously permits the court, at a later date, to operate sections 104 to 109 of the said Act which permit

variations of the order for a re-calculation of the available amount as and when additional information becomes available.