



10 October 2012

## PRESS SUMMARY

**R v Varma (Respondent) [2012] UKSC 42**  
*On appeal from: [2010] EWCA Crim 1575*

### JUSTICES:

Lord Phillips, Lord Mance, Lord Clarke, Lord Dyson and Lord Reed

### BACKGROUND TO THE APPEALS

On 24 October 2007 and again on both 3 and 13 April 2008 the Respondent, Mr Varma, was stopped at Gatwick Airport and found to be in possession of a quantity of tobacco which he had brought into the United Kingdom without having made payment of the relevant import duties. On 27 November Mr Varma was convicted in the Crown Court of being knowingly concerned in fraudulently evading duty chargeable on goods, contrary to section 170(2)(a) of the Customs and Excise Management Act 1979.

Following this, on 15 January 2009 the judge made Mr Varma subject to a conditional discharge under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 (“the 2000 Act”), the condition being that he did not commit any further offence for a two year period from the date of the order. Confiscation proceedings under Part 2 of the Proceeds of Crime Act 2002 (“the 2002 Act”) were postponed until 3 April 2009. On that date the judge made a confiscation order depriving Mr Varma of the profits of his crimes to the extent of the amount available for recovery. The judge valued that sum at £1,500 and made a confiscation order in that amount. On 13 July 2009 Mr Varma sought leave to appeal out of time against the confiscation order on the basis that there was Court of Appeal authority (*R v Clarke* [2009] EWCA Crim 1074) to the effect that the Crown Court has no power to impose a confiscation order against an offender following conviction for an offence in respect of which the offender has been absolutely or conditionally discharged. This reflected the fact that the Court could only discharge an offender where it was of the opinion that it would be inexpedient to inflict punishment; this is subject to a number of specified exceptions listed in section 12(7) of the 2000 Act which the Court would not be prevented from imposing on an offender subject to a discharge. Given that section 12(7) made no reference to confiscation orders the Court in *Clarke* held that confiscation proceedings could not be brought where an offender is absolutely or conditionally discharged. The Court of Appeal granted permission to appeal, allowed Mr Varma’s appeal and quashed the confiscation order, holding that it was bound by the decision in *Clarke*. However, the Court made clear that, but for the decision in *Clarke*, it would have reached the contrary conclusion and allowed the confiscation order to be made. The Court of Appeal certified the following point of law of general public importance for consideration by the Supreme Court of the United Kingdom: “Does the Crown Court have power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence?” The Supreme Court of the United Kingdom granted permission to appeal.

### JUDGMENT

The Supreme Court unanimously allows the appeal; the Crown Court has the power and, where the criteria in section 6 of the 2002 Act are satisfied, the duty to make a confiscation order against an offender following conviction for an offence in respect of which the offender has been absolutely or conditionally discharged.

Lord Clarke gives the lead judgment with which Lord Dyson and Lord Reed agree. Lord Phillips and Lord Mance give short concurring judgments.

## REASONS FOR THE JUDGMENT

Where the criteria in section 6 of the 2002 Act are satisfied the Crown Court is not only empowered to make a confiscation order but, unless it believes the victim of the conduct has started or intends to start civil proceedings against the offender for loss, injury or damage arising from that conduct, is under a duty to make such an order against the offender even where the offender has been absolutely or conditionally discharged following conviction for that offence [58].

The criteria in section 6 of the 2002 Act are satisfied in this case; (a) Mr Varma has been convicted of offences in proceedings before the Crown Court; (b) the prosecutor has requested that the court proceed under section 6 of the 2002 Act; (c) the Crown Court held Mr Varma benefited to the tune of £7,257.86; and, (d) the Court has decided upon the recoverable amount which it valued at £1,500. Consequently, the Court was under a duty to make a confiscation order to the extent of that amount; even where an offender is absolutely or conditionally discharged there is nothing in the Act which gives the Court the power to decline to exercise its duty to make a confiscation order where the criteria in section 6 of the 2002 Act are satisfied.

The Court found that the purpose of section 13(4) of the 2002 Act was neither to prohibit nor to limit the scope of a confiscation order [17]. The reference in section 13(4) of the 2002 Act to “deciding the appropriate sentence for the defendant” referred to the sentencing process during which the court considers how the defendant should be dealt with. It is unnecessary to decide whether an absolute or conditional discharge constitutes a sentence for these purposes; it is sufficient that an absolute or conditional discharge is an order made as a result of “deciding the appropriate sentence” within the meaning of section 13(4) of the 2002 Act [17].

Sections 14 and 15 of the 2002 Act contemplate circumstances in which confiscation proceedings may be postponed until after sentence is imposed. The Court holds that such a postponement of confiscation proceedings in no way nullifies the court’s duty to return to those proceedings after deciding upon the appropriate sentence [20].

The Court acknowledges that there is no express reference to confiscation orders amongst the measures the courts are not prevented from imposing under section 12(7) of the 2000 Act where an offender is absolutely or conditionally discharged. Nonetheless, the Court holds that the lack of any express reference to a confiscation order in section 12(7) in no way nullifies the duty upon the court to make such an order where the criteria in section 6 of the 2002 Act are satisfied [29-31].

Lord Phillips gives a short concurring judgment in which he questions whether it is legitimate for the Revenue and Customs Prosecution Office (“Customs”), as the prosecuting authority in this case, to seek a confiscation order rather than seeking to exact the duty payable on the goods [59-60]. Lord Phillips questions whether, in confiscation proceedings, it is legitimate to treat a defendant as having evaded duty where the only reason he has done so is that Customs have chosen not to exact it.

Lord Mance gives a short concurring judgment in which he contends that Lord Phillips’s suggestion would render it impossible to treat any smuggler as having evaded duty payable on goods, unless and until it is clear that Customs could not pursue and recover the duty. Lord Mance expresses some doubt as to whether that position accurately reflects the ingredients of the criminal offence created by section 170(2) of the Customs and Excise Management Act 1979 [61-63].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)