Neutral Citation Number: [2016] EWCA Crim 1938
No: 201604795 B3 and 201604798 B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 9 December 2016

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE OPENSHAW

HIS HONOUR JUDGE MOSS QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

v

R
W

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8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Jonathan Hall QC and **Will Hays** for the Appellant
David Walbank and **Stephan Alfred for W**
Brendan Kelly QC and **Faisal Osman** for R

J U D G M E N T
(Approved)

1. **LORD JUSTICE SIMON:**

Introduction

2. This is the Crown's application for permission to appeal from a decision by Edis J, sitting in the Crown Court at Southwark, in which he dismissed an application for restraint orders in respect of property held by the two respondents and a single third party.

3. In his ruling, made on 28 September 2016, the Judge concluded that the Court had no jurisdiction to make the order because there had been undue delay in continuing the proceedings.

4. Section 43 of the Proceeds of Crime Act 2002 ("POCA") provides for an appeal against the refusal to make such an order.

5. The issue on the appeal is relatively confined; but before addressing it and setting out the Judge's decision, it is necessary to say something about the history of the case and two previous hearings in this Court.

Background

6. On 22 March 2011, this court (Aikens LJ, Irwin J and His Honour Judge Roberts QC), in a decision made but not published under a neutral citation reference [2011] EWCA Crim 647, allowed an appeal by the respondents against the decision by His Honour Judge Stone QC who had refused to discharge restraint orders which had been granted in favour of the Crown on a without notice application by His Honour Judge Beddoe on 9 March 2010. We shall refer to this as the 2011 Appeal Judgment.

7. In summary, the Court found that Judge Stone had not given adequate reasons for finding that there was a risk of dissipation of assets in circumstances where the respondents had shown that they were under investigation for tax fraud since 2007, some years before the restraint orders were applied for.

8. Despite this conclusion, the Court accepted that restraint orders might be appropriate and directed that the effect of its order setting aside the orders should be suspended pending applications by the Crown for fresh restraint orders.

9. The applications were issued promptly, but the hearing was adjourned in circumstances that we will come to later in this judgment.

10. On 29 November 2012, the trial judge, Ramsey J, with the effective consent of all parties including the Prosecution, decided to put off the hearing of the applications until after the Crown had given "primary disclosure" which the parties then understood, wrongly as it turned out, had not yet taken place.

11. The issue of disclosure was to prove problematic and the history is described in a decision of this Court (Sir Brian Leveson PQBD, Gross and Fulford LJJ) made on 18 December 2015 under a neutral citation reference [2015] EWCA Crim 1941. Since the

Court was hearing the Crown's application to appeal a terminating ruling under section 58 of the Criminal Justice Act 2003, the judgment was not published in full and orders were made to preserve the fairness of the trial: see [143]. We refer to this judgment as the section 58 Appeal Judgment.

12. The section 58 Appeal Judgment set out the difficulties in effecting primary disclosure, see [2]:

> "For five years while proceeding in the Crown Court at Southwark, the case has not progressed beyond what has been contended is necessary for primary disclosure. Neither has this state of affairs come about for want of judicial intervention."

13. The matter had come before the Court of Appeal as a result of a ruling by Ramsey J on 1 May 2015 staying the prosecution in relation to all counts of a draft indictment, due to what he found to be the Crown's failure to comply with its obligations to give primary disclosure so as to comply with section 3 of the Criminal Procedure and Investigations Act 1996.

14. The Crown appealed, and the Court allowed that appeal.

15. In summary, it concluded (see [142]) that Ramsey J's ruling was not a reasonable ruling for him to have made within the meaning of section 67(c) of the 2003 Act since he had failed to appreciate that the Crown had complied with the obligation to give primary disclosure long before the date of his ruling.

16. The Court was critical of the delays in the case; and it will be necessary to identify, at least to some extent, how and why they had occurred. It ordered that the stay granted by Ramsey J was to be lifted and made orders for the preparation of the trial. Subsequently, Edis J was appointed as the trial judge.

17. The hearing of the Crown's application for new restraint orders, which had been left in abeyance following the application made in March 2011, was to be heard by Edis J on 28 and 29 September 2016.

18. In the course of preparing for that hearing, he identified a preliminary issue which went to the jurisdiction to make restraint orders and which could be decided without consideration of the lengthy history of the restraint proceedings and the evidence which had been served. The Judge also concluded (with the agreement of both sides) that he should deal only with this threshold jurisdiction point and should not deal with the underlying merits of the application if he found that he had jurisdiction.

The jurisdiction issue

19. The jurisdiction to grant restraint orders under section 41 of POCA exists if any one of the five conditions set out in section 40 are met. The Crown's argument is that the second of these conditions was met:

> "(3) The second condition is that -

(a) proceedings for an offence have been started in England and Wales and not concluded, and

(b) there is reasonable cause to believe that the defendant has benefited from his criminal conduct."

The section also provides a threshold to reliance on the second condition:

"(7) The second condition is not satisfied if the court believes that -

(a) there has been undue delay in continuing the proceedings, or

(b) the prosecutor does not intend to proceed."

20. It is common ground that the word "proceedings" in section 40(7) of POCA refers to the criminal proceedings and not a restraint application. Where the Act deals with restraint applications it does so by specific use of the word "application": see for example section 40(8). This is a similar provision in which undue delay may bar continuing an application.

21. All parties agree (as they did before the Judge) that for the purposes of the threshold jurisdiction appeal, it was to be assumed that the second condition had been met apart from section 40(7)(a). Accordingly, the Judge made no findings as to whether there was any criminal conduct in this case, whether there was any benefit from any such conduct and whether there was ever any evidence of a risk of dissipation of assets. There was also no issue that the prosecutor intended to prosecute: see section 40(7)(b).

22. The issue was, as the Judge expressed it [5]:

"whether the court believes that there has been undue delay in continuing the proceedings. If so, there is no jurisdiction to make an order, however compelling the merits may otherwise be."

The Judge's decision

23. Having considered the parties' submissions, the Judge rejected the Prosecution argument that the words "undue delay" required a finding that there had been delay which rendered a fair trial impossible or which made it unfair to try the defendants. That would be to import abuse of process principles into the statutory restraint regime. This conclusion gives rise to ground one of the Crown's appeal.

24. He found that the word "delay" in the context of legal proceedings, taken by itself, did not refer simply to the passage of time, but imported a passage of time that was more than was necessary and desirable. The Judge regarded the qualifying word "undue" as allowing for a judgment:

"as to whether the period is sufficiently long and sufficiently unjustified as to take it out of the normal exigencies which Parliament may be taken to know very frequently prevent trials from being determined as soon as

they could be."

See [12].

25. The Judge referred to the efforts that had been made to reduce delays by case management and recognised that very complex trials (such as the present case) might involve very long periods of preparation before it came to trial. There were many factors which might result in delay, including the fault of the parties and difficulties in listing.

26. In the Judge's view, the qualifying word, "undue", referred to delay that was wholly beyond the type of delay with which the Court was familiar. The ultimate statutory purpose of POCA was the recovery of proceeds of crime in the public interest. Such purpose was particularly important in complex cases which involved large sums of money and where the delays were "very likely, perhaps almost inevitable". For that reason, the phrase "undue delay" as used in section 40(7) should be construed as requiring "a wholly exceptional set of circumstances".

27. In order to see whether the delay in a particular case could be described as "undue" or "wholly exceptional", the Court did not look at the fairness of the trial. It looked at what has happened against what might reasonably be expected to happen "within the imperfect system which exists for bringing these very difficult cases to trial".

28. Having set out this approach the Judge concluded that the case was "wholly exceptional" and that it would strain language to breaking point to conclude that there had not been undue delay in continuing the proceedings.

29. The respondents had been charged in March 2010, but not arraigned until March 2016. In the intervening six years a disclosure process took place which was misconceived. On the findings of the section 58 Appeal Judgment, Defence Statements which were due in 2011 had not been served until 2016. He accepted that "the disclosure hare" had been set running by the Defence, but reminded himself that the responsibility for the conduct of criminal proceedings rested with the Prosecution and the Court, a point which had been made in the section 58 Appeal Judgment. He recognised the duty of parties (including the Defence) to assist in furthering the overriding objective, and that such assistance was particularly required for the disclosure exercise in complex fraud cases. He noted that the Defence had been permitted to delay serving the Defence Statements for nearly five years, but that in the section 58 Appeal Judgment the Court had not criticised the Defence tactics: see [121] to [122] and [138] of the section 58 Appeal Judgment. He considered that where defendants had been the cause of delay they could not be heard to argue that the delay was undue for the purposes of section 40(7)(a), but in the light of the section 58 Appeal Judgment, he could not draw that conclusion.

30. At [16] Edis J set out his conclusion that there had been undue delay in the conduct of the proceedings in the period up to the section 58 hearing in that:

"this unique case has taken much longer than it should have done due to

the faulty approach to the law of disclosure."

At [17] he said he had reached that conclusion "without enthusiasm" but on a plain reading of the words of POCA when applied to the facts of the case.

The issues on the appeal

31. Mr Jonathan Hall QC (for the Crown), having reminded the Court that the purpose of the relevant POCA provisions was to preserve property "for satisfying any confiscation order that has been or may be made against the defendant" (see section 69(2) of POCA), initially advanced three grounds of appeal.

32. First, he submitted that the Judge erred in his interpretation of section 40(7). The provision did not create a freestanding test of delay. Its intent was to prevent restraint orders where there was doubt as to the continuation of the restraint proceedings whether on the grounds of delay (section 40(7)(a)) or because the prosecutor does not intend to proceed (section 40(7)(b)). A restraint order was an ancillary order designed to protect the underlying proceedings and, as such, performed a "holding operation", as it was described by Keene LJ in SFO v Lexi Holdings PLC (in administration) [2008] EWCA Crim 1443 at [75].

33. In this context it was important to bear in mind Parliament's intention as to the consequences of procedural failures: see the opinion of Lord Steyn in R v Soneji and Another [2006] 1 AC 340 at [24]:

> "On behalf of the two accused counsel submitted that, given the criminal law context, a strict approach to construction of section 72A of the 1988 statute should be adopted. Bearing in mind that one is not dealing with the definition of crimes, but with the process of making confiscation orders, I would reject this approach. The context requires a purposive interpretation: Sir Rupert Cross, Statutory Interpretation, 3rd ed (1995), 172-175."

34. On this basis Parliament cannot have intended that the Court should be deprived of its power to make a restraint order on the grounds of delay if there were still a viable prosecution. Since the section 58 Appeal Judgment expressly found that there had not been such delay as to justify a stay of the criminal proceedings, it followed that there had been no "undue delay" for the purposes of section 40(7)(a) and accordingly, there was jurisdiction to make the order.

35. The second ground arose if, contrary to the submissions on ground one, section 40(7) was to be interpreted as providing a freestanding test of "undue delay". On this basis, the Crown submitted that the Judge's conclusion at [16] "that this unique case has taken much longer than it should have done because of the faulty approach to the law of disclosure" was not a sufficient basis for declining jurisdiction.

36. There was nothing wholly exceptional about the Court or the parties erring about the test for disclosure. The grounds of appeal and the Crown's written submissions relied on [18] to [72] of the section 58 Appeal Judgment as showing how the principles

relating to disclosure have emerged and been refined over time. At [116] of the section 58 Appeal Judgment, the Court had made clear that Ramsey J's objectives in making the disclosure orders were entirely laudable and accorded with good case management considerations.

37. This approach to disclosure, although now recognised to be faulty, was described by Edis J at [14] as "what might reasonably be expected to happen within the imperfect system which exists for bringing these very difficult cases to trial".

38. In short, it was an unusually complex trial conducted by a High Court Judge with whom the Court of Appeal eventually disagreed on the ambit of disclosure. The resulting delay could not be properly be characterised as "wholly exceptional".

39. The third ground of appeal is that Edis J failed to take into account a highly significant, if not determinative, factor: although the restraint applications were made in March 2011, very shortly after judgment was given in the 2011 Appeal, the hearing of the applications was deferred and delayed at the request of the Defence.

40. The Judge had identified the period of delay as the six years between March 2010 and March 2016. However, Mr Hall argued that the delay should have been assessed by reference to the application date and on this basis there was no material delay. He referred in this context to a judgment of Lord Dyson JSC in R v Maxwell [2011] 1 WLR 1837 at [18] to [20] and the interests of justice not being "a hard-edged concept".

41. If the Crown's application for a restraint order had been heard in March 2011 as it wished, there would have been no significant delay. In the absence of a mandatory discharge provision, the restraint orders would have remained in place.

42. Mr Hall points out that the Judge acknowledged the point at [2] of his ruling, but did not take it into account when it came to his reasoning. Had he done so, he should have found that the delay was not undue, or at the very least, might not have done so.

Decision

Ground one

43. In our view, the words "undue delay" in section 40(7) of POCA cannot be confined to cases of delay amounting to an abuse of process which would justify a stay of the criminal proceedings.

44. The section 58 Appeal Judgment makes clear that delay by itself is not a sufficient basis for staying proceedings on the ground of abuse of process or unfairness to a defendant.

45. There is no reference in the provisions of POCA with which we are concerned to either the "prejudice" or the "serious prejudice" which would have to be shown if an abuse argument based on delay were to succeed: see the section 58 Appeal Judgment at [128] to [129].

46. Assistance on this issue of statutory interpretation is to be found in section 40(8), which also uses the words "undue delay". Section 40(8) applies to post-conviction applications and in this context the phrase cannot refer to abusive delay of the kind which would lead to the stay of criminal proceedings. We see no reason to attach a different sense to the same expression in two subsections of a statutory provision and sound conventional reasons for not doing so.

47. Furthermore, as the Judge noted, if the phrase is to be given the meaning for which the Crown contends, the provision becomes close to otiose. This is because if the criminal proceedings have reached the stage of being abusive, there would be no basis for making a restraint order. We do not accept Mr Hall's answer that the provision was designed to allow third parties affected by the order to argue that the delay was such that no order was to be made against them. There is no proper basis for limiting the effect of the provision in such a way.

48. Whether delay is "undue" involves an analysis of the nature of the case, including its complexity; since the more complex it is the greater need for time in which to prepare it and the greater the likelihood of delay in preparation. It is also likely to depend on the extent of the delay and the reasons for it.

49. This was the approach of the Judge. Having accepted that the underlying statutory purpose of POCA is the recovery of the proceeds of crime in the public interest, the Judge said this at [13]:

> "That purpose is probably more important in the kind of complex case involving very large sums of money where some delays are very likely, perhaps inevitable. This is why in my judgment it is appropriate to define the phrase "undue delay" as requiring a wholly exceptional set of circumstances."

50. We doubt that the statutory words "undue delay" call for any additional gloss, but we do not disagree with the Judge when he said that any finding of undue delay, such as to deprive the Court of the power to make a confiscation order, will only be made in exceptional circumstances.

51. For these reasons we reject ground one of the Crown's appeal.

Ground two

52. Mr Hall did not advance this ground in his oral submissions and we can therefore deal with it shortly.

53. The argument proceeds on the basis that the Judge was correct in saying that it would only be in "a wholly exceptional set of circumstances" that section 40(7)(a) would arise, but advances the contention that on the facts of this case the Judge reached a conclusion that was unreasonable in the Wednesbury sense (see Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223), or disproportionate.

54. In our view Mr Hall was right not to press this ground. One might expect the relevant operative words to be "the court is satisfied" (the words of section 25(2) of the Drug Trafficking Act 1994, an earlier statutory formulation of section 40(7)), or perhaps "the court finds". But the words "the court believes" makes it abundantly clear that the decision is one for the Judge hearing the application to make and can only be successfully appealed if there is an error of law or the Judge reaches a conclusion which is not reasonable.

55. The defendants had been arrested in 2007; yet, as at October 2015, the Court of Appeal found in the section 58 Appeal Judgment at [17]:

> "Because of the remaining issues surrounding initial disclosure, applications have not yet been made to dismiss, the indictment has not been preferred, defence case statements have not been lodged: in short the case has been stuck to the grave disadvantage to the respondents (who have not had the opportunity to move on with their lives), but also the public interest."

56. In our view the Judge's conclusion was very plainly within the proper ambit of a judgment on the application of section 40(7)(a) to the facts of the case.

57. Accordingly, we reject ground two.

Ground three

58. There are three potentially relevant periods to be considered in relation to ground three.

59. The first, from the original grant of the restraint orders in March 2010 until March 2011. That delay was due to the Crown's failure to advance adequate reasons to support a finding of risk of dissipation of assets: see the 2011 Appeal Judgment. The second potentially relevant period is from March 2011 until November 2012. On 15 March 2011 the Prosecution wrote to the respondents saying that they were renewing their application for restraint orders. There was then correspondence and hearings in which the respondents applied for the restraint proceedings to be adjourned pending compliance with the outstanding disclosure requests. Finally, from November 2012, the Crown consented to, and the Court ordered, an adjournment of the restraint proceedings pending completion of its primary disclosure obligations in the underlying proceedings.

60. There are a number of difficulties with the Crown's argument. First, it requires the Court to attribute fault for the delay in hearing the application to the respondents. However, the Court in the section 58 Appeal Judgment made no such findings. It found that the delay in the proceedings was due to the misunderstanding by the Crown and the Court of the Prosecution's obligation to give primary disclosure. At [138] the Court described the position of the respondents as follows:

> "We emphasise that we are not suggesting that the respondents to this appeal have deliberately set about to undermine the prosecution and, indeed, [Ramsey J] was emphatic that they had done all they could to

assist the speedier resolution of the claim albeit that they did so in the context what we consider to have been a flawed submission in relation to primary disclosure which the Judge then adopted."

61. In our judgment, this point fails on the facts. It is not a case in which a defendant has set out deliberately to frustrate the application of the POCA regime, where a different approach may be called for. The provision of proper and adequate disclosure is the responsibility of the Prosecution. Here the flawed disclosure process was devised by the Prosecution and it was undertaken by the Prosecution. It was for them to drive the case forward and they failed to do so. It was these failings in these circumstances that caused the delay, and the delay was for so long that it was plainly undue delay. Moreover, it does not, in our judgment, cease to be an undue delay simply because the defence -- and indeed the Court -- acquiesced in that delay.

62. Further, as Mr Walbank submitted, section 40(7), unlike section 40(8), is concerned with the delay in continuing the proceedings and not delay in continuing the application. In order to answer this point, the Crown had to argue that the section 40(7)(a) issue must be decided at the time the application should or might have been heard. We see no warrant for such an approach in the language of the subsection. The Court has to consider the question of delay in the proceedings at the time it hears the application and not some notional earlier date.

63. We should add that we have not overlooked Mr Hall's further invocation of the equitable doctrine of laches. We do not, however, consider that that assists this argument on the point.

64. For these reasons, we reject the Crown's appeal on ground three and in these circumstances, its appeal is dismissed, and we confirm the Judge’s decision.