

Judgment 44/2006

Andrew John Gilbert – Court of Appeal (Criminal Appeal 342) - 19th September 2006

Drug Trafficking (Bailiwick of Guernsey) Law, 2000 - application for leave to appeal against confiscation order – jurisdiction under Part III of the Court of Appeal (Guernsey) Law, 1961 – “Sentence” construed to embrace a confiscation order – approach of the Royal Court in making the relevant assumptions under s.4(3)(a) and (b) of the 2000 Law – leave to appeal granted – appeal dismissed

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

The 19th day of September, 2006 before the Hon Michael J. Beloff, QC, presiding, the Rt. Hon. Sir Charles Mantell, PC and Michael S. Jones, QC.

THE LAW OFFICERS OF THE CROWN

V

ANDREW JOHN GILBERT

Applicant

On the Application of
ANDREW JOHN GILBERT for leave to appeal from a Drug Trafficking
Confiscation Order imposed on him by the Royal Court on 15th March 2006;

THE COURT, having on 18th
September 2006 heard Advocates M. G. A. Dunster and F. Russell for the Applicant
and the Crown respectively, and having GRANTED leave to appeal, this day GAVE
JUDGMENT in the terms attached hereto and DISMISSED the appeal.

K.H.TOUGH

Registrar of the Court of Appeal.

Final Judgment 7.11.06

TUESDAY 19TH SEPTEMBER 2006

COURT OF APPEAL

Before

Michael J. Beloff, Esq., QC; presiding
Sir Charles Mantell
Michael S. Jones, Esq., QC

ANDREW JOHN GILBERT
(Criminal Appeal No.342)

Judgment delivered by Michael J. Beloff, Esq., QC

1. The Appellant pleaded guilty to the possession of Class A drugs with intent to supply, namely, 700 Ecstasy tablets; and was sentenced by the Royal Court of Guernsey on 15th March 2006.
2. The Appellant was sentenced to 5 years and 6 months imprisonment from 28th April 2006. The Appellant takes no issue with the length of his sentence.
3. After a hearing on 13th and 14th March 2006, the Royal Court also made a determination under the Drug Trafficking (Bailiwick of Guernsey) Law 2000, which I shall term hereafter “the Confiscation Law” that, in the Appellant’s case, there had been a benefit of £26,200. The Appellant seeks leave to appeal against that determination on two grounds to which we will refer later.

Jurisdiction:

4. In remitting on 19th August of this year the application to the Plenary Court, the Single Judge, Sir de Vic Carey, raised a preliminary issue as to whether leave was required for an appeal against a Confiscation Order.

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5. The Court of Appeal (Guernsey) Law 1961 (“the Appeal Law”) provides in Part III (Appeals in Criminal Matters) at Section 24 that, so far as is material, a person convicted in the Royal Court may appeal to the Court of Appeal:

“with the leave of the Court of Appeal against the sentence passed on his conviction.”

6. A Confiscation Order (whose genesis post-dated the Appeal Law) is not strictly speaking a sentence in the classic sense; indeed provisions of the Confiscation Law appear to differentiate between such sentence and such an order (e.g. Confiscation Law Sections 2(1), 3(7) etc.): but in substance if not in form, could be so described.
7. It has already been held by this Court in R. v. Hutchinson (16.12.2005) that the proceedings for such an order were criminal and not civil in nature (see paragraph 5 of the Judgment) and in that case jurisdiction to entertain the appeal appears to have been accepted without demur. Indeed, it would be anomalous and unjust if an order with such potentially severe consequences for a defendant could be ring-fenced from appeal.
8. While suggesting that at an appropriate juncture consideration might be given to amending the Appeal Law to refer to confiscation orders expressly, we are content to construe “sentence” in the present text of the Appeal Law as embracing such an order: and on this basis to conclude that (i) this Court has jurisdiction to entertain an appeal against a confiscation order, and (ii) leave is required for such appeal.
9. This conclusion is in harmony with the provisions of the Proceeds of Crime Act 2002 (“POCA”) Section 89, which is engaged on the mainland.
10. We shall grant leave and now accordingly deal with the substantive challenges.

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The Confiscation Law:

11. The Confiscation Law provides, so far as material, as follows:-

“2.(1)(a) if Her Majesty’s Procureur asks the Court to proceed under this section; or

(b) if the Court considers that, even though Her Majesty’s Procureur has not asked it to do so, it is appropriate for it to proceed under this section,

it shall act as follows.

2.(2) The Court shall first determine whether the defendant has benefited from drug trafficking.

(3) For the purposes of this Law, a person has benefited from drug trafficking if he has at any time (whether before or after the coming into force of this Law) received any payment or other reward in connection with drug trafficking carried on by him or another person.

(4) If the Court determines that the defendant has so benefited, the Court shall, before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with section 5 the amount to be recovered in his case by virtue of this section.

(5) The Court shall then, in respect of the offence or offences concerned-

(5)(a) order the defendant to pay the amount.

(b)

(c)

(6)

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(7) *The standard of proof required to determine any question arising under this Law as to-*

(a) whether a person has benefited from drug trafficking; or

(b) the amount to be recovered in his case by virtue of this section,

is that applicable in civil proceedings.

3.

4.(1) *For the purposes of this Law-*

(a) any payments or other rewards received by a person at any time (whether before or after the commencement of this Law) in connection with drug trafficking carried on by him or another person are his proceeds of drug trafficking; and

(b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

(2) *Subject to subsections (4) and (5), the Court shall, for the purpose-*

(a) of determining whether the defendant has benefited from drug trafficking, and

(b) if he has, of assessing the value of his proceeds of drug trafficking,

make the required assumptions.

(3) *The required assumptions are-*

(a) that any property appearing to the Court-

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- (i) *to have been held by the defendant at any time since his conviction, or*
 - (ii) *to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the Court to have held it, as a payment or reward in connection with drug trafficking carried on by him;*
 - (b) *that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him; and*
 - (c) *that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.*
- (4) *The Court shall not make any required assumption in relation to any particular property or expenditure if-*
- (a) *that assumption is shown to be incorrect in the defendant's case; or*
 - (b) *the Court is satisfied that there would be a serious risk of injustice in the defendant's case if the assumption were to be made;*

and where, by virtue of this subsection, the Court does not make one or more of the required assumptions, it shall state its reasons.

(5)

5.(1) *Subject to subsection (3), the amount to be recovered in the defendant's case under the confiscation order is the amount the Court assesses to be the value of the defendant's proceeds of drug trafficking."*

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The Challenge:

12. Of the relevant assumptions the appeal takes issue with two in the following distinct ways. As to the assumption under subsection 4(3)(a) that the Appellant had held or received property as a payment or reward in connection with drug trafficking, the Appellant does not take issue with its making, but with the amount of benefit assumed. As to the assumption under subsection 4(3)(b) the Appellant takes issue with the fact that it was made at all. To paraphrase, the former goes to quantum, the latter to liability.
13. As to the first challenge the Crown put to the Court the submission that the Appellant had dealt with a figure of 800 Ecstasy tablets in 2004. This figure was based on the admissions made by the Appellant in his second interview with Customs Officers on 7th June 2005, and on a calculation by the Prosecution that he had been dealing with the tablets for 16 weeks, at 50 tablets per week. Among those admissions was his response to the question:

*“Q. So August to November 2004 you received 50 a week and then you’d get rid of one five-ish, keep some for yourself?
A. Yeah.”*

Elsewhere he said twice that he would get rid of 50 a weekend.

14. Advocate Dunster rightly observes that the Appellant had not been consistent in the interview about how many tablets he had dealt with and over what period. In interviews he had said amongst other things:-
- (i) he delivered about 50 tablets a week;
 - (ii) it was not always 50 tablets;
 - (iii) it was not every week;
 - (iv) it might have been between August and November, the date when he accepted the suggestion [in fact at odds with the documentary evidence] that when he had purchased his

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house with his girlfriend, that he had been dealing in the drugs.

15. Furthermore, in his evidence to the Royal Court the Appellant had said:-

- (i) he thought he had started doing this (dealing) a week before his Birthday, i.e. 20th August.
- (ii) he had stopped doing this when he bought his house at the end of September. [In fact it was bought on 23rd September 2004] i.e. for a period of a couple of months.
- (iii) there were at least three weekends when he had not done this
- (iv) sometimes he delivered 20 or 30 tablets rather than 50.
- (v) it was not for a period of 16 weeks.

16. The Jurats were posed the question 1(a) *“How many tablets do you find that Gilbert (the Appellant) was involved in supplying in 2004?”* Jurat Lowe gave the unanimous decision of the Jurats that the answer was 800.

17. Against that background it was submitted that the Jurats could not fairly and on the totality of the evidence have found it to be more likely than not that the Appellant had dealt with 50 tablets every weekend over a 16 week period.

18. We disagree. We consider that (1) the Appellant would obviously tend to downplay his involvement; (2) that in any event his recollection in June 2005 (the time of the interviews) would have been more firm than in March 2006 (the time of his trial); (3) his answers in interview may not have been entirely consistent but on several occasions (already referred to) he made admissions which were precisely to the effect found by the Jurats; (4) it would have been open to the Jurats to find that the period to extend from August to December 2004 in the light of answers

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he gave elsewhere during the interviews; (5) the interviews were conducted fairly- it is not indeed submitted otherwise.

19. The relevant assumption in subsection 4(3)(b) of the Confiscation Law is we repeat “*that any expenditure of his ... was met out of payments received by him in connection with drug trafficking carried on by him.*” The Jurats found the Appellant’s expenditure on the tablets of Ecstasy in 2004 to have been £12,000 (See also the Prosecutor’s statement made under Section 11 of the Confiscation Law, para 6, page 9).
20. Although the Law requires that an assumption be made as to the source of any expenditure, it is properly submitted that the initial burden of proof, on the civil standard of the balance of probabilities- see Section 10 subsection 2(7)- lies on the Crown to show that there has in fact been expenditure by the defendant so as to trigger the assumption. As set out in the fourth edition of the *Misuse of Drugs and Drug Trafficking Offences*, R. v. Fortson, para 13-193, page 571:-

“It should ... be remembered that although the Court is required to assume that any expenditure made by the defendant during the six year period represents the proceeds of drug trafficking, it is for the prosecution to prove to the civil standard of proof that the defendant did in fact make the relevant expenditure. Only when the judge is satisfied that there was an expenditure can the assumption under section 4(3)(b) [of the English Act, which is identical in terms to the Guernsey Law] have any application.”

The passage is not referred to in the 5th edition, but we do not doubt its correctness.

21. No issue is taken with the Lieutenant Bailiff’s direction to this effect which was made twice. The Appellant’s argument is rather that there was no evidence of expenditure of £12,000 and the Jurats were wrong to find otherwise.
22. A List of Questions was put to the Jurats. The question of whether the Appellant had expended monies out of payments

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received by him in connection with drug trafficking was Question 3. He asked “*Do you make the required assumption that Gilbert met the cost of acquiring the tablets in 2004 out of payments received by him in connection with drug trafficking carried on by him?*” Jurat Lowe gave the unanimous answer that they did. The Lieutenant Bailiff asked “*How much do you find his expenditure to be?*” and Jurat Lowe replied “*£12,000.*”

23. It was, in our view, common ground that “*any*” expenditure in the subsection was not restricted to expenditure on drugs, but embraced virtuous expenditure. It was, however, explained by the Crown that the Appellant’s expenditure on the mortgage repayments for the house, household bills, and maintenance to support his daughter had not been taken into account since the Appellant could easily have established that such expenditure was the fruit of legitimate income. The Appellant had earned a gross income of between approximately £8,000 and £22,000 a year between 1999 and 2004 (See the States of Guernsey Income Tax letter of 15th July 2005).
24. Advocate Dunster submitted that the Court saw and heard evidence that the Appellant had admitted being involved in the supply of Ecstasy tablets in 2004, but that the Crown produced no evidence to counter the Appellant’s assertion that he was merely a middleman and did not expend money on the drugs.
25. In a textbook on the POCA by Mr. Gumpert and Others at page 32 in a footnote, the authors observe “*where a defendant has been in possession of drugs, the Court is entitled to find that he has incurred expenditure equal to the price of those drugs..*” and they cite *R. v. Satchell* (1996) 2 Cr. App. R (S) p. 258 and *R. v. Dore* (1997) in the same series at page 152. In the latter case judgment was given by no less a figure than Lord Bingham, LCJ, and it is stated:

“When he was arrested the Appellant was found to be in possession of a quantity of cocaine from which it was inferred that he must have paid £10,800.”

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26. We respectfully agree with this analysis and this authority. The possession of a quantity of drugs with a street value itself can give rise to the inference that the drugs were paid for; and there is no obligation on the Tribunal of fact (here the Jurats) to accept a contrary statement from a defendant whose demeanour they have been able to see and whose testimony they have been able to evaluate.

 27. We therefore reject both grounds of appeal and are relieved of the obligation to indulge in any complex calculation of an amount different from that which (we find) the Royal Court correctly computed.
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