Judgment 33/2013

Law Officers of the Crown
v Dean John Hardy
Royal Court
6th November, 2013

Application by the Prosecution for a confiscation order of the alleged proceeds of drug-trafficking under section 2 of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000 as amended

Approved Text
06.11.2013

IN THE ROYAL COURT OF GUERNSEY

Between: **THE LAW OFFICERS OF THE CROWN** **Prosecution**

-v-

DEAN JOHN HARDY **Defendant**

Application under the Drug Trafficking (Bailiwick of Guernsey) Law 2000 (as amended)

Application heard on: 1st October 2013

Decision handed down on: 6th November 2013

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Crown: **Advocate R J Calderwood**

Counsel for the Defendant: **Advocate A M Merrien**

Cases & materials referred to in Decision:

R v Ahmed and Qureshi [2004] EWCA Crim 2599;
R v Benjafield [2002] UKHL 2;
R v Croft (15th June, 2000, Court of Appeal Criminal Division);
R v Dickins (1990) 91 Cr. App. R. 164;
R v Mouldon [2004] EWCA Crim 2715;
R v Walbrook and Glasgow (1994) 15 Cr. App. R. (S) 783;
Elton v United Kingdom (ECHR, 11th September, 1997).
Drug Trafficking Offences (Bailiwick of Guernsey) Law, 2000, as amended. Sections 2, 4 and 11.
Drug Trafficking Rules, 2010, Rule 1(a).
Archbold, para 5-791

Introduction

1. On the 1st October 2013, I heard an application for a confiscation order of the alleged proceeds of drug-trafficking under section 2 of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000 as amended ("the Law"). The application was resisted, and by virtue of Rule 1(a) of the Drug Trafficking Rules, 2010, the Court was constituted by the judge sitting alone. Both counsel made submissions and there was one "live" witness, Customs Officer Gammie, called on behalf of the Crown. D did not give evidence, nor did he call any.

2. The defendant is Dean John Hardy ("D"), who on 21st December, 2012 was convicted by the Royal Court of being knowingly concerned in the fraudulent evasion on importation of the Class B controlled drug known as JWH-122. On 18th February, 2013 D received six and a half years' imprisonment. His application for leave to appeal against conviction and sentence was refused by the Court of Appeal on 11th July, 2013.

3. On 14th March, 2013 a Prosecutor's ("P's") Statement under Section 11 of the Law was produced and in response D filed a Defence Statement dated 23rd July, 2013. A bundle ("the bundle") was produced before the Court with these statements and supporting documentation on financial details relating to D. The Court had to consider whether D had benefited from drug-trafficking; if so, the value of his proceeds there from and to identify his realizable property. The standard of proof is the civil one, by virtue of section 2(7) of the Law. The relevant provisions are to be found in sections 4(1) to 4(4) of the Law:

> "Assessing the proceeds of drug trafficking
>
> 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 –
>
> (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……"

4. It can be said in summary that whilst the burden lies on the Crown in the application, D has to meet the burden in relation to the displacement of the assumption under section 4(4)(a) i.e., the assumption is shown to be incorrect. Helpful guidance on this can be found in the English case of R v Walbrook and Glasgow (1994) 15 Cr. App. R. (S) 783, and R v Dickens (1990) 91 Cr. App R. 164, where the Court of Appeal stated:

> *"Those assumptions can be displaced if they are 'shown to be incorrect in the defendant's case'. In other words, if after the matter has been fully heard the defendant shows on the balance of probabilities that in respect of each item of property and expenditure the assumptions are in his case incorrect, they can no longer be relied upon as evidence that that item of property or expenditure was part of the defendant's proceeds of drug-trafficking. In so far as any of them survive they will, together with any evidence which the judge may accept, assist the judge to decide whether he is satisfied so as to feel sure that the prosecution have made out their case. Thus the initial heavy burden on the prosecution is greatly lightened by the potential assumptions."*

(The burden is now the civil one, of course).

5. Section 4(4)(b) is the "*serious risk of injustice"* point. There have been a number of English cases in this area. Perhaps the best way of expressing the approach the Court has to take is found in Archbold at 5-791, which deals with the English legislation and says: "*In respect of the second exemption, no burden of proof being provided for, it is submitted that it is a matter for the court to determine in the exercise of its discretion whether there is a serious risk of injustice"*. This observation is consistent with R v Benjafield [2002] UKHL2, an English drug-trafficking case. One common example is where there is double-counting or some accounting error (R v Mouldon [2004] EWCA Crim 2715), or "*where no true benefit could sensibly be said to have been obtained by the offender"* (R v Ahmed and Qureshi [2004] EWCA Crim 2599).

Evidence and Submissions

6. Officer Gammie had not prepared the Section 11 statement/report. The original investigator had left the GBA, which is a matter of regret. Although the witness did her best to help, it would have been better, of course, if the original person had still been employed, but we had to make do. Although, of course, D is under no obligation to give evidence, it did not assist his case to be deprived of any explanations he may have had, particularly in relation to the

burden he is under in Section 4(4)(a). There was D's statement in response at pages 35-40 of the bundle, which sought to deal with the rather more detailed Prosecution section 11 Statement. D's case rested on that document, the cross-examination of Officer Gammie and Advocate Merrien's typically painstaking oral submissions.

7. P's case rested on three pillars:

   (i) payments into D's bank accounts;
   (ii) cash found at the address; and
   (iii) the value of the drugs.

   In summary, these relate to:

   (i) £9,010, i.e. £600 more than the amount shown in the figures provided originally by P (see para 4.8 of the Statement). The £600 error is explained by £500 (page 56 in the bundle) and £100 (page 185) paid-in figures omitted from the lists;

   (ii) D was arrested on 10th August, 2011. £6,179 cash was found at his house, an agreed fact; and

   (iii) the value of the drug seized is given as £589.56, which figure D actually paid on 14th June, 2011 for the importation.

8. In relation to the bank payments P put the question as whether D has established on the balance of probabilities that the total referred to is not drug-trafficking money? The Prosecution, it was said, do not have to prove a thing. It should be noted that legitimate sources of income such as wages and capital, viz a car loan (pages 259-260) and an insurance pay-out (page 202 - £10,550) have been taken note of in the calculations. The totals of "*unexplained cash"* deposited by D into his bank are at paras 4.6 and 4.7 of P's statement (plus, as stated £600). It is suggested that earlier account movements do not show this frequency of payments (the Crown's allegations relate to the period 1st January, 2010 to D's arrest on 11th August, 2011). D was a drug-dealer on the civil standard, on the civil standard on the case put forward by P. Reference was made to parts of the long interviews with D. At page 345 "*loads of growing equipment"* was found in the back of his van including fertilizers for cannabis plants. It was for a "*friend*" D would not name. Also located were a swordstick and a knuckleduster (pages 351 – 354). Such items allegedly go to show D was involved in some sort of criminal activity; drug-dealers often do have weapons to protect themselves and their wares. D's explanations as to his "*recycling"* of cash apply here and also in relation to the cash found in his house. One point which was stressed is that on his Supplementary Benefit application form dated 12th July, 2011, D, at part 7, declared £7,000 cash, which he would not have done if it were the proceeds of drug-trafficking it was submitted. P's rejoinder is that D did not know he would be under investigation and did not wish to be proceeded against for benefit fraud.

9. £6,179.00 cash was found, as stated upon arrest. D claimed in interview that this originated from his savings and cash he had withdrawn from the bank that had originated with an insurance pay-out of £10,550.00 on 17th February, 2011. It is P's case that D used his insurance money to live over a six-month period in 2011 coinciding with becoming unemployed, i.e. from 21st March 2011; some of it also went towards obtaining drugs. D claimed that he was careful with money and "*recycled"* cash in and out of his accounts so as to appear still employed and preserve his credit rating. P rejects this, querying how he has accumulated this large sum during a period when he was out of work, in debt and having a loan. D refers to this, e.g. at his interview at page 454. It is pointed out by the investigator that the cash found is not crisp notes from a cash-point (page 455). When it was put to D that they were "*shabby notes"* (page 457) he responded:

> "*Well, I'll tell you what, eh, I'm a chronic er one of these people, I constantly sit there and play with them constantly and they're all, you know what I mean, all due* (sic)*, it's a bit stupid eh thing to ask eh?"*

10. P also suggests that an earlier package contained controlled drugs. It is conceded that this assertion is not susceptible to proof to the criminal standard. The payment of £131.97 via PayPal to DH Gate is shown on the bank statement at page 234. It was never intercepted by the authorities. If this was indeed an illegal substance the profit could have amounted to thousands of pounds. (See Officer Falla's statement, at page 32). D submitted that no evidence to support this proposition was put forward, it was just inference. D's explanation in interview is found at pages 431-432. D suggests that he co-operated fully and the inferences are not tested, what was ordered earlier was fertilizer, not drugs. The earlier package was not from the same supplier, but was from the same site.

11. D obtained the drugs in respect of which he was convicted by post, having paid £589.56 to an internet based organization via PayPal. The fact of this payment was agreed by D. On behalf of D the alleged danger of double-counting was referred to. The money came, it was suggested, from the "*unexplained"* cash in D's bank accounts. On behalf of P it was suggested that the money could have come from a "*legitimate"* source, i.e. the insurance payment. In considering this aspect, indeed many other aspects, of the application, D is handicapped by not giving evidence to rebut the suggestions made on behalf of P. The case of R v Croft (15th June, 2000, Court of Appeal, Criminal Division) was cited by P. Paragraph 35 of Wright J's judgment is apposite:

> "*In our judgment, the approach taken by the Learned Recorder, and the conclusion to which he came, is entirely correct. The Drug Trafficking Offences Act legislation is often regarded as draconian in nature and intentionally so. It is intended to strip drug-traffickers of the profits of their appalling trade. In our judgment, bearing in mind that the burden of proof, albeit at the lesser level of the balance of probabilities, shifts to a defendant in any case to displace the assumptions which the court is required to make by the Act, the Recorder was absolutely right in pointing out that in order to discharge that burden, some evidence must be adduced before the court, not merely bald and unsupported assertions by the defendant himself."*

That observation, with respect, seems entirely logical and convincing and should be followed in Guernsey.

Injustice

12. This has already been mentioned in paragraph 5 above. Advocate Merrien in his submissions indicated that in this case it was wrong to make the statutory assumptions and therefore, in terms of the legislation, "*a serious risk of injustice"*. On the English authorities it seems that it is the court's obligation to stand back and make an independent assessment of the risk of injustice. Examples of where this was the situation were touched upon in paragraph 5 above. The exception, it should be noted, is pretty limited in extent; it does not give the court discretion to leave property out of account on the grounds of e.g. personal hardship – Elton v United Kingdom (ECHR, 11th September, 1997). On the facts of the present case it is wholly impossible to see any risk of injustice, let alone a "*serious"* risk.

Conclusions

13. Even if D had given evidence consistent with the written statement and the case put forward by Advocate Merrien, the structure would have been very ramshackle, especially the central plank of allegedly "*recycling"* money. In the absence of any evidence and in the light of the statutory assumptions that this Court is required to make, P's application cannot be resisted.

Hence D is found to have benefitted from drug-trafficking in the (revised) amount totalling £15,678.56. It is accepted that the realizable amount is £6,179.00. The orders sought on behalf of the Law Officers are made. HM Sheriff is appointed as Receiver and the realizable amount will be paid over in 7 days from the date this judgment is issued. In default D will serve six months' imprisonment consecutively to the total he is presently serving. Advocate Calderwood is requested to please draw up the requisite Order.

J R Finch
Judge of the Royal Court