In the matter of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended, and in the matter of Oliver Robert Butler **JUDGMENT 20/2015**
Royal Court
14th May, 2015

Application under Section 2 of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended, for a confiscation order.

Approved Text
14.05.2015

IN THE ROYAL COURT OF GUERNSEY

In the Matter of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended

and

In the Matter of Oliver Robert BUTLER

Application under Section 2 of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended

Date of hearing: 29th April, 2015

Judgment handed down on: 14th May, 2015

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

Counsel for the Law Officers: Crown Advocate F M Russell
Counsel for the Defendant: Advocate R B Eeles

Material referred to in Judgment:

The Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended, Sections 2, 4 and 11.
C.P.S. v Jennings [2008] UKHL 29;
R v Ahmad and Others [2014] UKSC 36;
R v Allpress and Others [2009] EWCA Crim 8
R v George [2011] EWCA Crim 1777;
R v May [2008] UKHL 28;
R v Sivaraman [2008] EWCA 1736

JUDGMENT

Introduction

1. This is an application under Section 2 of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as Amended ("the Law") for a confiscation order in respect of Oliver Robert Butler ("D"). On 26th January, 2015, D was sentenced to 6 years' imprisonment, having been convicted of an offence of being concerned with another (Craig Alan Dodd) in the fraudulent evasion of the prohibition on importation of Cannabis Resin, a controlled drug of Class B. This followed a fully-contested trial, from 10th – 18th November, 2014. At the confiscation hearing, the Section 11 Statement of Customs Officer Gammie was accepted. There was no other evidence and the hearing was made up of legal submissions, based on the skeleton arguments produced on behalf of D and the Prosecution ("P").

2. The Court, which was constituted by the judge sitting alone, was asked to make a finding that D had benefited by his drug trafficking to the amount of £177,471.93 in total. This figure is based on adding together the mid-range price of the cannabis resin seized (£172,125.00) and cash deposits identified in D's bank account to the tune of £5,346.93. The confiscation order sought is in the sums held by D, £235 and €130. On behalf of D no issue was taken with how these figures are made up. It should also be noted that D and his co-accused are presently appealing their convictions.

3. In relation to what was described as the "side-issue" on the bank account amount, it was conceded on behalf of D that no argument could be mounted against the use of the statutory assumptions set out in Section 4(3) of the Law, so no more need be said in relation to that. The main issue is considered a narrow one, D argues that P has not shown that he "obtained" the cannabis, so as to found a basis for a drug-trafficking Order. Section (2(3)) uses the words "acquired or received any payment or other reward …. in connection with drug trafficking carried on by him or another person …..". The present English legislation uses the phrase "obtains property". Both Advocates have looked at this and agree that there is no real difference in the meaning of the wording. Both Advocates were also in harmony as to the applicable legislation and the relevant case law, which is based on English authorities on similarly-worded provisions.

Legal Submissions

4. The nub of D's approach is that before a person can be deemed to have benefited from drug trafficking he must be deemed to have obtained the property. P cannot prove that the drugs belonged to D. In addition, it cannot be proved that D had any power or disposition or control of the drugs equivalent to ownership (paragraph 30 of D's skeleton). It is suggested that the Royal Court in convicting D "may well have concluded that the defendant's role in the importation was that of a mere courier". D's conviction is not sufficient to show D obtained the drugs. D refers to the words of Lord Bingham in R v May [2008] UKHL 28 at 48(6):

> "*…. mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property ….*"

5. Further, support is gathered from the case of C.P.S. v Jennings [2008] UKHL 29 from the Appellate Committee. At paragraph 13 it is stated:

> "*… The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he have never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether a loan or jointly, which will ordinarily connote a power of disposition or control …..*"

D also relied on the decision in R v Sivaraman [2008] EWCA 1736, which is also appended in the skeleton argument. Furthermore, the case of R v Allpress & Others (2009) EWCA Crim 8 was mentioned. At paragraph 80 Toulson LJ said:

> "*We conclude that if D's only role in relation to property connected with his criminal conduct, whether in the form of cash or otherwise was to act as a courier on behalf of another, such property does not amount …. To 'payment or other reward' within the meaning of DTA 1994 S.2(3).*"

6. P submits that the word "ownership" may not always be appropriate to describe the required relationship with property envisaged by the legislation. The recent case of R v Ahmad and Others [2014] UKSC 36 was referred to. In paragraph 36 the Court indicated that "*there will be obvious difficulties in applying established legal principles to the allocation of liability under the 2002 Act, as the rules … have been developed by the courts over the centuries by reference to assets which were lawfully acquired and owned*". This was preceded by an observation on the difficulties of assessing the question of the proceeds of crime and how they were to be distributed between co-conspirators. Paragraph 47 stresses:

> "*…when a Defendant has been convicted of an offence which involved several conspirators, and resulted in the obtaining of property, the Court has to decide on the basis of the evidence, often relying on common sense inferences, whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it, either because he received it or because he was to have some sort of share in it or its proceeds …*"

7. The case of R v George [2011] EWCA Crim 1777 was also appended to P's skeleton. Attention was drawn to the observation at paragraph [17]:

> *"Mr Ganeson accepted that a trial judge in such a case is entitled to make inferences from the evidence he has heard which he considers found proved, consistent with the verdict of the jury. These can be and often are robust inferences in cases of this class."*

It would seem that the observations in paragraph [20] are very relevant to the present case:

> *"Absent a plea of guilty on a specified and agreed basis, or compelling evidence given by the Defendant (neither of which applied here) there will seldom be direct evidence of the precise terms of a drugs conspiracy such as this and in particular whether the conspirators agreed a particular division of the spoils. As Mr Ganeson accepted the court's frequent response to such conspiracies is to find by inference that all the main conspirators are jointly in possession of the fruits of their agreement in the sense defined in the case of May."*

8. The argument on behalf of P is summarized in paragraph 12 of the skeleton:

> "*In this case the Royal Court heard a considerable amount of evidence over several days and convicted both defendants of being involved in the importation of the cannabis. There was no material before the Court indicating their respective roles and they were both sentenced on the basis that they were principals in the offence. The Prosecution submit that in the absence of any reliable evidence to the contrary, the Court is entitled to infer that D1 and D2 were jointly in possession of the drugs, and to find that each of them benefited by its total value ….."*

Application of the Law to the Facts

9. Drug-smuggling is seldom undertaken on the basis of a written contract detailing the division of the profits. It is right in such circumstances, as is recognized perhaps most plainly in George (supra), that robust and common-sense inferences are drawn. In the present case, as is

their right, neither Defendant gave evidence. In relation to the cannabis importation charge, they were sentenced alike and on the same basis, having been caught together landing from the sea. There is not even a scintilla of evidence that D's role was that of a 'mere' courier. The Prosecution case was to the effect that he and his co-accused were caught in the act, having just stashed the drugs before proceeding from the shore up the cliffs. That is the evidence and guilty verdicts were returned. In the absence of anything indicating to the contrary it is a plainly justifiable inference to make that both persons played a principal part in this unlawful activity. This is in harmony with the extract from paragraph [20] of George cited above.

10. It is also worthy of note that the case of Sivaraman, relied upon by D, was where a guilty plea was entered in an identified basis that that set out in writing – see paragraph 5 of the judgment. In that case the appellant had received a reward of £15,000 from his employer in a petrol excise duty fraud. The duty evaded came to £128,520. It was held that the Confiscation Order should be limited to the lesser amount set out in the written basis of plea. These facts are far removed from the present case.

Conclusion

11. The Royal Court in these proceedings, in the absence of any evidence to the contrary, and on a common sense process of inference, rejects D's submissions and upholds the application by P. Accordingly, the Order sought is granted. The benefit figure is therefore £177,471.93. The realizable amounts of £235 and €130 are agreed.

12. The case and that pending against the co-accused will go to the next Plea and Directions Court on 28th May, 2015. Relevant Statutory time-limits are extended to 1st June, 2015.

J R Finch
Judge of the Royal Court