



**The Law Officers of the Crown v Robilliard**  
Royal Court  
2<sup>nd</sup> October 2017

**JUDGMENT**  
**45/2017**

In the Matter of Confiscation Proceedings under the Drug Trafficking (Bailiwick of Guernsey) Law, 2000.

**IN THE ROYAL COURT OF GUERNSEY**

**In the Matter of Confiscation Proceedings under the  
Drug Trafficking (Bailiwick of Guernsey) Law, 2000  
(as amended) (“The Law”)**

**THE LAW OFFICERS OF THE CROWN**

**Between:**

**Prosecution (“P”)**

**-v-**

**JOSEPH ROBIN DENNIS ROBILLIARD**

**Defendant (“D”)**

**Case heard on: 11<sup>th</sup> September, 2017**

**Decision handed down on: 2<sup>nd</sup> October, 2017**

**Before: John Russell Finch, Esq., O.B.E., Judge of the Royal Court**

**Counsel for the Prosecution: Advocate W L Giles**

**Counsel for the Defendant: Advocate P Lockwood**

**Cases and Materials referred to in Decision:**

R v Clark [2011] EWCA 15;

R v Islam [2009] UKHL 30;

Jennings v C.P.S. [2008] UKHL 29;

R v May [2008] UKHL 28

R Fortson: *Misuse of Drugs and Drug Trafficking Offences* (6<sup>th</sup> Edition) paragraphs 13-088 to 13-094  
The Drug Trafficking (Bailiwick of Guernsey) Law, 2000 (as amended), Sections 2(3), 4, 9, 11, 68(1)  
and 68(3);

The Powers of Criminal Courts Act, 2007, Section 84(2)

**DECISION**

1. This case involves an application on behalf of P for a confiscation order under the Law, with one question requiring determination. Both counsel are thanked for agreeing most of the facts

and concentrating on the relevant issue. It is accepted that the total of D's realisable assets under the Law now amounts to £10,749.79. The question is whether D benefited from the whole 2.995 kg of Cannabis resin, which was the subject of criminal proceedings against him, or merely from the 96.49 grams (valued at £2,412.25) he claimed was his reward for "minding" the larger amount.

2. On 23<sup>rd</sup> December, 2016, D pleaded guilty to an offence of being concerned in the supplying of a controlled drug, namely Cannabis resin. This charge related to the whole amount. D was sentenced to 3 years and 6 months' imprisonment. He mitigated on the basis that he had stored the Cannabis for around a month in a locked metal cabinet in his workshop. The smaller amount was separated and in a holdall inside the cabinet. The larger amount was in a cardboard box. In sentencing the Royal Court stated that: "Your explanation, of course, even if it were wholly accepted, would not help you on the guidelines." D mitigated on the basis put forward in the present application and imparted this version to the Probation Officer. For the purposes of the confiscation hearing it is not disputed by P. At the hearing the Prosecutors Statement under Section 11 of the Law was substantiated by the investigating officer, no questions were asked of her and D did not give evidence.
3. The nub of D's submissions can be found in paragraph 3 of his response to the Section 11 Statement (tab B of the agreed bundle). Only the separate block of 96.49 grams was his property. The remaining greater part of the 2.995 kg was not his property and he had no right to it, merely physical possession. P submitted that if he had control of the full amount for at least one month, he has benefited under Section 4 of the Law. If someone is in possession of drugs in a locked safe or, as here cabinet, it is under his disposition or control. He certainly at least must have had "control".
4. There are a number of English cases, many of the House of Lords and Supreme Court that deal with confiscation, both for drugs and other criminal proceeds. In the absence of any binding Guernsey cases on the point these will normally be followed in Guernsey. They show a very complex situation where the legislation has thrown up numerous difficulties. It is clear from R v Islam [2009] UKHL 30 that the value of the drug obtained by a defendant at market price is a "benefit obtained" under the legislation. The matter is handily referred to in Fortson's '*Misuse of Drugs and Drug Trafficking Offences*' (6<sup>th</sup> Edition) at paragraphs 13-088 to 13-094. The first case to consider is the House of Lords decision in R v May [2008] UKHL 28. In the words of Fortson at paragraph 13-088:

"Recent jurisprudence on the meaning of "benefit" begins with the decision of the House of Lords in *R. v May*, which largely endorses the reasoning of the Court of Appeal in that case. However, the 'landmark' quality of *R. v May* appears in the "Endnotes" to that case, especially at para. (6) [author's emphasis added].

"(1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.

- (2) The court should proceed by asking the three questions posed above:
  - (i) Has the defendant (D) benefited from relevant criminal conduct?
  - (ii) If so, what is the value of the benefit D has so obtained?
  - (iii)

What sum is recoverable from D? Where issues of criminal life style arise the questions must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.

- (3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.
- (4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.
- (5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.
- (6) *D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. 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. It may be otherwise with money launderers.”*

Very similar wording to endnote (6) appears at para. 13 in the opinion of the Appellate Committee in *CPS v Jennings* [author’s emphasis added]:

“It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. 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 has 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 alone or jointly, which will ordinarily connote a power of disposition or control, as to where a person directs a payment or conveyance of property to someone else.”*

Fortson concludes (at 13-092, 6)) that:

“The question of whether the value of a controlled drug constitutes a “benefit” in the defendant’s hands now depends on whether the drugs “belong” to him.”

The issue, from the English cases, hinges on whether a defendant had “a power of disposition or control”. That question, of course, has to be determined in the present case on the facts, as accepted by P for the purposes of the application.

5. It is helpful at this stage to consider the provisions of the Law in two areas: how a person is to be taken as having “benefited” from drug trafficking (Section 2(3)); and the definitions of “property” and “interest” (Section 68(1) and (3)). The former is:

- (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 and whether directly or indirectly) acquired or received any payment or other reward (including, for the avoidance of doubt, any interest, dividend or other form of income or accrued value deriving directly, or indirectly, from that payment or reward) in connection with drug trafficking carried on by him or another person and if he has derived a pecuniary advantage as a result of or in connection with criminal conduct, he is to be treated as if he had obtained instead a sum of money equal to the value of the pecuniary advantage.

The latter is:

**Meaning of “property” and related expressions.**

- 68.** (1) In this Law, “**property**” includes money and all other property, real or personal, immovable or movable, including things in action and other intangible or incorporeal property.
- (2) This Law applies to property whether it is situated in the Bailiwick or elsewhere.
- (3) In this Law, “**interest**”, in relation to property, includes right.

6. In the English legislation Section 84(2) of the Powers of Criminal Courts Act, 2002 states that “Property is obtained by a person if he obtains an interest in it” and refers to an interest in property “include references to a right (including a right to possession)”. The question of property comes in under section 4 of the Law on the statutory assumptions in assessing the proceeds of drug-trafficking. Section 4(3) states:

- “(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.”

For the purposes of this application, in particular considering the leading English cases, there is no material difference in the legislation. It is noted that “including a right to possession” is added in the English Act of 2002, but that simply makes clear what is implicit in the general word “right”.

7. As Advocate Giles pointed out in his oral submissions, none of the cited cases fit into the present circumstances. There are then two competing considerations: firstly the consistently made observation that “mere couriers or custodians ... rewarded by a specific fee and having no interest in the property bought with the proceeds of sale, are unlikely to be found to have obtained that property” (para 48(6) of May); and the proposition that if D must have had “disposition or control” as he had all the drugs stored for at least one month in his locked cabinet. If someone is in possession of drugs in a locked cabinet or safe it is under their “disposition or control.” Finding that in the present case D had some sort of debt or liability to another, Advocate Giles suggested, requires a leap of faith. The situation was discussed further in R v Clark [2011] EWCA Crim 15 (tab F of bundle) at paragraph 30 where Rix LJ stated:

“... In truth, however, talk of “mere” couriers or custodians is not, or not only, a reference to the possibility that the roles of such conspirators are generally of a more minor nature, but rather, as a matter of principle, that such persons who are paid a fee or salary for their involvement are not conspirators or participants of such a nature as to make it likely, or to suggest the inference, that the property concerned is in their joint ownership. That after all is the ultimate question to which the trilogy of cases in the House of Lords directs attention ...”

8. The Law Officers were rather generous in not disputing D’s version, on which he mitigated. The Royal Court in sentencing made it clear that it “even if it were wholly accepted” did not help D, in view of the binding Guernsey Court of Appeal guidelines. But that is the basis on which the present application has to be decided. Put quite bluntly, it can be argued either way. Recourse has to be made to the particular facts, rather than a rigid application of dicta. The possession of illegal drugs by a courier is an ephemeral thing; in Guernsey terms a trip by aeroplane or ferry with a parcel, often concealed on the person, frequently accompanied by a minder, who has nothing with them that would cause suspicion. A person with a stash of drugs as a custodian will see them hived off pretty quickly to lower wholesalers, who will then feed them down the chain to street dealers and users. The length of time D had these drugs in his locked cabinet at his work premises is much longer than would be expected by a normal custodian. Looking at the question from another angle, if D did not in this significant period have, in the commonly understood sense, power of disposition or actual control - what did he have? Who else had it to that degree? This lengthy period is quite inconsistent with the bit-part of a mere custodian.
9. Accordingly, without seeking to derogate in any way from the highly persuasive line of English cases, P’s application succeeds on the particular facts of this case. There will be other circumstances where the role of a courier or custodian falls on the opposite side of the line. The total agreed benefit here is now £60,500.00 and the realisable assets £10,749.79. P’s application accordingly succeeds in these amounts. Under section 9 of the Law the period in default is fixed at 8 months consecutive to any other sentence D is subject to and the amount ordered payable within 28 days (which can be extended by the parties’ agreement).

**J R Finch, O.B.E.**  
**Judge of the Royal Court**