



Osborne v The Law Officers of the Crown
Royal Court
22nd November 2017

JUDGMENT
56/2017

Leave to appeal a drug trafficking order.

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

ADRIAN ARTHUR OSBORNE

(“the Applicant”)

-v-

THE LAW OFFICERS OF THE CROWN

(“the Respondent”)

LEAVE TO APPEAL – DRUG TRAFFICKING ORDER

Decision of a Single Judge

Sir Richard John Collas, Bailiff

The Applicant was unrepresented

Advocate for the Law Officers of the Crown : Advocate W Giles

1. The Applicant, who is presently acting for himself, seeks to appeal against a drug trafficking order made by the Royal Court (Judge J R Finch OBE) in a decision handed down on 12 September 2017 under the provisions of The Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended (“the Drug Trafficking Law”). The Applicant was found to have benefitted from drug trafficking in an amount assessed as £1,246,025.00. An order for confiscation was made in the sum £17,254.80 with 9 months imprisonment in default, payment to be made in 28 days (the “Drug Trafficking Order”).
2. The Applicant had pleaded guilty to an indictment containing three counts. The first charged him, together with another, in being concerned in the unlawful supplying of the Class B controlled drug cannabis resin in an amount of 11.48kg. Count 2 charged the Applicant alone with possession of the Class B drug cannabis resin with intent to supply in an amount of 38.5kg. Count 3 charged the Applicant alone with unlawful cultivation of a cannabis plant and concerned a quantity of 6.27 grams found at the Applicant’s home.
3. Earlier, on 29 July 2016, the Applicant was sentenced to a total of 10 years imprisonment being 10 years on count 2 with 7 ½ years concurrent on count 1 and 2 months concurrent on

count 3 to take effect from 30 December 2015 the day he was remanded in custody following his apprehension earlier that day.

4. The Court of Appeal has previously held that for appeal purposes, a drug trafficking order is considered to be part of the sentence (see for example Gilbert v Law Officers of the Crown (Criminal Appeal 342 – 19th September 2006) reported as a note at [2005-06 GLR Note 30]. The Applicant has chosen to represent himself in connection with the appeal. He was corresponding with H M Senior Deputy Greffier Ross and struggling to understand the detail required in the Application for Leave and draft Notice of Appeal. In order to make progress, I took the unusual step of hearing the Application for Leave to Appeal at an oral hearing. I am grateful to Advocate Giles for attending on behalf of the Law Officers of the Crown. I reserved my decision.
5. I have decided to grant leave to appeal. In the written judgment handed down by Judge Finch, he said in paragraph 1 that “The issue for determination turned out to be a narrow one” and then proceeded to review the items of realisable property belonging to the Applicant that together represent the value to be confiscated. He did not make a specific finding on the issue of whether the Applicant had “benefited from relevant criminal conduct” which is the first of the questions the court must answer, as identified in the “Endnotes” to the decision of the House of Lords in R v May [2008] AC 1028. His failure to do so may be explained by the fact that the Applicant did not make any detailed submissions on that question. However, as he did not expressly concede the issue the Court was required to make a specific finding.
6. The official transcript of the hearing before Judge Finch shows the following:
 - a. At page 3, Advocate Giles said: *“The defendant has accepted, in correspondence, that the prosecution should only be looking at the value of the drugs, namely £1,246,025 but it’s not clear whether he accepts a principle that this is therefore the sum that can be assessed as his benefit. If that’s not accepted then I will need to address you briefly on the law in relation to property, ownership, value and those issues Sir.”*
 - b. At the foot of page 3 Judge Finch asked the Applicant whether he agreed or disputed the valuation of the drugs as £1,246,025.
 - c. At the top of page 4, the Applicant replied: *“The benefit figure is an amount of property which I do not own but if the court sees it right that it should hold that benefit over me then I have no argument with that but I do not understand how that can be called my property Sir or the benefit figure. I was never to benefit in any way from something which I do not own.”*
 - d. Advocate Giles then made submissions on the question of whether *“the defendant can be classed as having ownership of that property and therefore a value ascribed to it.”* (page 4) before taking the learned Judge through each of the matters set out by the House of Lords in the Endnotes in May.
 - e. At the foot of page 5, Advocate Giles applied the legal test to the facts of the present case. He referred to the Applicant’s explanation *“that, in terms, he pulled into a car park to use his mobile telephone and he noticed these drugs in a holdall or similar which were apparently left by somebody else in the car park, he then took the drugs and after some enquiries he was contacted and that resulted in the transaction with Mr Waterman [his Co-Defendant].”*

- f. After Advocate Giles had reminded the judge that that account was not accepted by the sentencing court, he quoted from the Court's sentencing remarks: *"We are bound to note your interviews which we have already referred to plus the explanations also recorded in the probation reports and put before us. These insult our intelligence and without wasting more words we take the view on the plain facts that you were, to use a colloquialism both well at it, heavily involved and for profit."*
 - g. Advocate Giles then said: *"Sir, it's not for this tribunal or indeed for myself to address you as to whether those comments need any scrutiny, that was a finding of the court in the sentencing exercise Sir, so the defendant's explanation was roundly rejected, the court's finding was that the defendant was, to use a phrase, well at it, and dealing with these very large amounts of drugs for profit."*
 - h. Advocate Giles concluded his submissions on the issue by saying: *"if you're satisfied and that's subject to what the defendant addresses you on, that the defendant has benefitted because he's had ownership of these drugs, what is the value?"*
7. It is clear from the passages quoted above that Advocate Giles had understood that the Applicant had not accepted that he had benefited from criminal conduct through ownership of the drugs or otherwise. Regrettably, the Applicant did not make any submission on that issue to the Judge. Instead the Applicant addressed the items that constituted the realisable value claimed by the Law Officers and it was on those items that Judge Finch concentrated in his written judgment.
 8. Even though the Applicant did not make submissions on the issue, he had not conceded that he had benefited. Indeed, his remark quoted at the top of page 4 of the transcript was sufficient to put the matter in issue. In his oral submissions before me, the Applicant was much clearer, saying that he disputed having had ownership or control over the drugs. He sought to claim the benefit of the penultimate sentence in the Endnotes in May: *"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 have obtained that property."* Evidence would be required to show that the Applicant was only a mere courier or custodian and so far he has declined to give any evidence, having pleaded guilty at this trial and having elected not to do so during the drug trafficking hearing. The sentencing court made clear in the sentencing remarks that it had dismissed his claim that he had merely found the drugs. It is however wrong to say that, as Advocate Giles tried to claim, the court made "a finding" on the criminal standard of proof that the two co-defendants were *"both well at it, heavily involved and for profit"*.
 9. In granting leave to appeal, I also grant legal aid to enable the Applicant to obtain representation. I note in passing that if he had been represented at the drug trafficking hearing, the Applicant's submissions might have been presented more clearly and the issue identified above would have been addressed by the Judge of the Royal Court in his judgment. The Applicant is articulate and extremely respectful of the Court. Even if he were to choose to appear on his own behalf at the appeal hearing, I would strongly encourage him to instruct an Advocate, on legal aid, to assist him in preparing all the documentation required by the Court, including a skeleton argument setting out clearly his submissions.
 10. Having obtained leave to appeal, the Applicant is free to pursue all his grounds of appeal and, with the one exception set out below he has legal aid to do so. His grounds of appeal may include his submission that he had retained income tax and social security deductions from the salary of his son who he employed and which therefore were not liable to forfeiture under section 6(4)(b) of the Drug Trafficking Law. However I am not persuaded that there is any merit in the human rights issues the Applicant seeks to raise and I refuse to allow legal aid to

be granted in respect of such issues. If an Advocate instructed by the Applicant wishes to contend that there is any merit in those issues, a further application for legal aid must be made.