

ENGLAND AND WALES / JUDGMENT

Clarke v R.

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Neutral Citation Number:

[2009] EWCA Crim 1074 IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL
(CRIMINAL DIVISION) ON APPEAL FROM THE CROWN COURT MANCHESTER HH Judge
Lyon T 20060990 Case No: 2007/04310/C2 Royal Courts of Justice Strand, London, WC2A
2LL Date: 12/06/2009 Before: LORD JUSTICE HOOPER MRS JUSTICE COX and THE
RECORDER OF NOTTINGHAM (HIS HONOUR JUDGE STOKES QC)

- ----- Between: Appellant Respondent Joseph Clarke
- and - The Queen
- ----- (Transcript of the Handed Down Judgment of WordWave
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2DY Tel No: 020 7404 1400, Fax No: 020 7404 1424 Official Shorthand Writers to the Court)
- ----- Mr R Butcher for the Appellant Mr Graham Knowles for the
Respondent Hearing date: 11 July 2008
- -----

Judgment

LORD JUSTICE HOOPER 1. 2. 3. The only issue in the appeal concerns the confiscation order. The appellant submits that a Crown Court has no power to make to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence. The sentencing judge decided that the Crown Court has such a power. He made a confiscation order in the sum of £1500, which the appellant now appeals. The appellant pleaded guilty to concealing criminal property contrary to section 327 of the Proceeds of Crime Act 2002 and was conditionally discharged for a period of two years pursuant to section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 (“the 2000 Act”). On 19 July 2007 he was made subject to a confiscation order in the sum of £1,500.00 pursuant to section 6 of the Proceeds of Crime Act 2002 (“the 2002 Act”). He was ordered to pay within 3 months or to serve three months’ imprisonment in default. Having given leave to appeal and heard argument, we asked counsel to lodge an agreed note of the history of sections 12 and 14 of the 2000 Act within 28 days. In fact Mr Knowles for the respondent shouldered the not inconsiderable burden of preparing the note and we are very grateful to him. The note sets out in great detail the history of sections 12 and 14, a history with which Mr Butcher agrees. For various understandable reasons the note

did not reach the court until November. Relevant statutory provisions 4. Section 12 of the 2000 Act, as amended, provides:

- (1) Where a court by or before which a person is convicted of an offence ... is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, the court may make an order either —
 - (a) discharging him absolutely; or
 - (b) if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified in the order.
- (2) ...
- (3) An order discharging a person subject to such a condition as is mentioned in sub-section (1) (b) above is in this Act referred to as an “order for conditional discharge”; and the period specified in any such order is in this Act referred to as “the period of conditional discharge.
- (4) ...
- (5) If (by virtue of section 13 below) a person conditionally discharged under this section is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect.
- (6) ...
- (7) Nothing in this section shall be construed as preventing a court, on discharging an offender absolutely or conditionally in respect of any offence, from making an order for costs against the offender or imposing any disqualification on him or from making in respect of the offence an order under section 130, 143 or 148 below (compensation orders, deprivation orders and restitution orders). 5. It will be noted that sub-section (7) does not include a reference to confiscation orders, although by the year 2000 there had, since 1986, been provision for making confiscation orders. 6. Section 14 of the 2000 Act provides:
 - (1) Subject to sub-section (2) below, a conviction of an offence for which an order is made under section 12 above discharging the offender absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under section 13 above.
 - (2) Where the offender was aged 18 or over at the time of his conviction of the offence in question and is subsequently sentenced (under section 13 above) for that offence, sub-section
- (1) above shall cease to apply to the conviction.

- (3) Without prejudice to sub-sections (1) and (2) above, the conviction of an offender who is discharged absolutely or conditionally under section 12 above shall in any event be disregarded for the purposes of any enactment or instrument which—
 - (a) imposes any disqualification or disability upon convicted persons; or
 - (b) authorises or requires the imposition of any such disqualification or disability.
 - (4) Sub-sections (1) to (3) above shall not affect—
 - (a) any right of an offender discharged absolutely or conditionally under section 12 above to rely on his conviction in bar of any subsequent proceedings for the same offence;
 - (b) the restoration of any property in consequence of the conviction of any such offender; or
 - (c) the operation, in relation to any such offender, of any enactment or instrument in force on 1st July 1974 which is expressed to extend to persons dealt with under section 1(1) of the Probation of Offenders Act 1907 as well as to convicted persons.
 - (5) In sub-sections (3) and (4) above— “enactment” includes an enactment contained in a local Act; and “instrument” means an instrument having effect by virtue of an Act.
 - (6) Sub-section (1) above has effect subject to section 50(1A) of the Criminal Appeal Act 1968 and section 108(1A) of the Magistrates' Courts Act 1980 (rights of appeal); and this sub-section shall not be taken to prejudice any other enactment that excludes the effect of sub-section (1) or (3) above for particular purposes.
 - (7) Without prejudice to paragraph 1(3) of Schedule 11 to this Act (references to provisions of this Act to be construed as including references to corresponding old enactments), in this section—
 - (a) any reference to an order made under section 12 above discharging an offender absolutely or conditionally includes a reference to an order which was made under any provision of Part I of the Powers of Criminal Courts Act 1973 (whether or not reproduced in this Act) discharging the offender absolutely or conditionally;
 - (b) any reference to an offender who is discharged absolutely or conditionally under section 12 includes a reference to an offender who was discharged absolutely or conditionally under any such provision.
7. Section 6(1) of the 2002 Act, as amended, provides: The Crown Court must proceed under this section if the following two conditions are satisfied. 8. The second condition can be ignored for present purposes. The first condition is set out in sub-section (2), which provides:
- (2) The first condition is that a defendant falls within any of the following paragraphs—
 - (a) he is convicted of an offence or offences in proceedings before the Crown Court;

- (b) he is committed to the Crown Court for sentence in respect of an offence or offences under section 3, 4 or 6 of the [Powers of Criminal Courts (Sentencing)] Act;
- (c) he is committed to the Crown Court in respect of an offence or offences under section 70 below (committal with a view to a confiscation order being considered). 9. In so far as section 2(b) is concerned, section 3 of the 2000 Act gives a magistrates' court the jurisdiction to commit for sentence "where on the summary trial of an offence triable either way a person aged 18 or over is convicted of the offence." Section 4 of the 2000 Act provides for committal for sentence on indication of a guilty plea to offence triable either way. The section envisages the magistrates' court proceeding as if section 9(1) of the Magistrates' Courts Act 1980 were complied with and as if he had pleaded guilty under it and the court had convicted him of the offence. Section 6 of the 2000 Act gives further power to commit to the Crown Court for sentence a person convicted of a summary offence. Section 5 of the 2000 Act provides that where an offender is committed by a magistrates' court for sentence under section 3 or 4 above, the Crown Court shall inquire into the circumstances of the case and may deal with the offender in any way in which it could deal with him if he had just been convicted of the offence on indictment before the court. 10. In so far as section 2 (c) is concerned, section 70 gives the magistrates' court the power to commit the defendant to the Crown Court with a view to a confiscation order being made and, if it does so, the Crown Court will also sentence the defendant (see section 71). The power to commit arises, by virtue of section 70(1) if—
 - (a) a defendant is convicted of an offence by a magistrates' court, and
 - (b) the prosecutor asks the court to commit the defendant to the Crown Court with a view to a confiscation order being considered under section 6. 11. Sub-section (5) of section 6 of the 2002 Act provides: If the court decides under sub-section (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—
 - (a) decide the recoverable amount, and
 - (b) make an order (a confiscation order) requiring him to pay that amount. 12. Section 13 provides:
 - (1) If the court makes a confiscation order it must proceed as mentioned in subsections (2) and (4) in respect of the offence or offences concerned.
 - (2) The court must take account of the confiscation order before—
 - (a) it imposes a fine on the defendant, or
 - (b) it makes an order falling within subsection (3).
 - (3) These orders fall within this subsection—
 - (a) an order involving payment by the defendant, other than an order under section 130 of the Sentencing Act (compensation orders);

- (b) an order under section 27 of the Misuse of Drugs Act 1971 (c 38) (forfeiture orders);
 - (c) an order under section 143 of the Sentencing Act (deprivation orders);
 - (d) an order under section 23 [or 23A] of the Terrorism Act 2000 (c 11) (forfeiture orders).
- (4) Subject to subsection (2), the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant.
- (5) Subsection (6) applies if—
- (a) the Crown Court makes both a confiscation order and an order for the payment of compensation under section 130 of the Sentencing Act against the same person in the same proceedings, and
 - (b) the court believes he will not have sufficient means to satisfy both the orders in full.
- (6) In such a case the court must direct that so much of the compensation as it specifies is to be paid out of any sums recovered under the confiscation order; and the amount it specifies must be the amount it believes will not be recoverable because of the insufficiency of the person's means. 13. Section 14 of the 2002 Act provides:
- (1) The court may—
- (a) proceed under section 6 before it sentences the defendant for the offence (or any of the offences) concerned, or
 - (b) postpone proceedings under section 6 for a specified period.
14. As we have seen, section 6 of the 2002 Act requires the Crown Court to make a confiscation order (the other requirements being satisfied) if the defendant is convicted of an offence in proceedings before the Crown Court or has been committed to the Crown Court for sentence or committed to the Crown Court with a view to a confiscation order being made. In the latter two cases the defendant will have been convicted or is treated as having been convicted. History of the legislation relating to absolute or conditional discharges
15. We take the history of the power to grant an absolute or conditional discharge from the respondent's post appeal hearing written submissions, being a history with which, as we have said, Mr Butcher agrees. The Juvenile Offenders Act of 1847 [first] permitted justices trying juveniles for certain offences to "dismiss the Party charged, on finding Surety or Sureties for his future good behaviour, or without such Sureties" if they found the offence not proved, or if they deemed it "not expedient to inflict any punishment." The Larceny Act 1861 provided for a justice of the peace in cases under that Act to discharge a first "Offender from his conviction, upon his making...satisfaction to the Party aggrieved for Damages and Costs", and in cases on indictment for the court to require a convicted person to enter into his own recognizances or to find sureties, or both, for keeping the peace and being of good behaviour. ... In 1879, the Summary Jurisdiction Act repealed the Juvenile Offenders Act 1847 and gave justices a power of general application in any case where the charge was proved

but “the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment” to dismiss the information and (optionally) order the payment of damages or costs rather than convicting, or, if the court preferred to convict, to “discharge [the offender] conditionally on his giving security, with or without sureties, to appear for sentence when called upon, or to be of good behaviour,” with or without damages and costs. ... [The] Youthful Offenders Act of [1901 provided] that a conviction of a child or young person of felony which led to his being “discharged in accordance with” the Summary Jurisdiction Act or the 1887 Act or otherwise, or was punished with whipping only, should not be regarded as conviction of felony for the purposes of the Industrial Schools Act, a precursor of Borstal training, or of any disqualification attaching to felony.

16. As Mr Knowles points out: It appears that the difficulty in ascertaining the precise implications of a discharge dates back more than a century.
17. As Mr Knowles also points out, in addition to these statutory powers, the courts also had the ancient power to bind over convicted persons to come up for judgment and to bind over any person to keep the peace, powers which they still have (see Archbold, 2009, paras. 5-118 and following).
18. The Probation of First Offenders Act 1887 introduced the concept of probation, albeit in a very different form to the concept of probation as known to us today. In the words of Mr Knowles: Both the Summary Jurisdiction Act and the [Probation of First Offenders] Act of 1887 Act were repealed by the Probation of Offenders Act 1907. Under the 1907 provisions a court of summary jurisdiction which thought it inexpedient to inflict any, or any more than a nominal, punishment, or thought it expedient to release an offender on probation, could, without proceeding to conviction, either dismiss the charge or make an order “discharging the offender conditionally or on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time” during a period specified by the court of up to three years. ... the 1907 Act made similar provision for persons tried on indictment but modified so as to refer to persons convicted on indictment, and to recognizances to be of good behaviour and to appear for sentence, rather than to be of good behaviour and to appear for conviction and sentence.
19. Mr Knowles summarises the effect of this Act in the following way: In short, a discharge (whether conditional, or with recognizances, or with recognizances incorporating probation) was an alternative to conviction in summary proceedings, and an alternative to sentence in proceedings on indictment. In either case, if the defendant did not keep to the terms set he could find himself back before the court for (conviction and) sentence.
20. The Criminal Justice Act of 1948 repealed the 1907 Act. Section 3 provided that following conviction a probation order could be made “instead of sentencing” the offender. By virtue of section 7(1) where a court thought it was inexpedient to inflict punishment on a convicted offender but that a probation order was not appropriate it had power to make an order

discharging him “absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified”. In the words of Mr Knowles: Quite unlike the position in summary proceedings under the 1907 Act, a conviction of an offence was now a prerequisite to a probation order or an order of conditional or absolute discharge. 21. Section 12(1) provided that “a conviction of an offence for which an order is made ... discharging [the offender] absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions”. The conviction was also to be “disregarded for the purposes of any enactment which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability” (section 12(2)). 22. In *Taylor and another v. Saycell* [1950] 2 All ER 887, Lord Goddard CJ, giving the judgment of the Divisional Court said, at page 889: Considering also that s 12(2) of the Act of 1948 provides that the conviction of an offender who is discharged absolutely or conditionally shall in any event be disregarded for the purposes of any enactment which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability, and that no reference is made to the Road Traffic Act, 1930, so that convictions under that Act are in no way excluded from the provisions of s 12(2), there can be no doubt that there is jurisdiction in the court to discharge conditionally and thereby to avoid the necessity of disqualification.

23. This part of the judgment is obiter because the case was sent back to quarter sessions below because the order of conditional discharge should not, on the facts of the case, have been made.
24. Lord Goddard did not refer to the words of section 12(1), which provided that the conviction was to be regarded as a conviction for the purposes of the proceedings in which the order is made. Mr Knowles casts doubt on the decision in *Taylor*. It is certainly arguable that section 12(2) was concerned with proceedings in the future in which the conviction might, but for section 12(2), be relevant. The reference to “convicted persons” in section 12(2) does tend to support that. Section 12(1), on the other hand, was concerned with the proceedings in which the order for absolute or conditional discharge is made and does not prevent an order of disqualification. However, even if *Taylor* is wrong on this point, that is not an end of the matter. As we shall show in a moment, punitive orders have been held to be inconsistent with the decision that it is inexpedient to inflict punishment. 25. In so far as section 12(2) is concerned Mr Knowles writes: Statutory disqualifications and disabilities of the kind ... referred to [in s. 12(2)] included, amongst others, deportation, loss of citizenship, loss of certain offices, incapacity to hold office under the Crown, incapacity to hold an ecclesiastical benefice, incapacity to be a member of parliament, and disqualification from the management of companies, and from voting (see *Halsbury's Laws of England*, Third Edition (Lord Simonds), 1955, volume 10, page 518).

26. The position established by Lord Goddard in *Taylor* was eventually “reversed” by the Road Traffic Act 1972, section 102 which made provision for disqualification “notwithstanding anything in section 12(2) of the Criminal Justice Act 1948”. Similar provision is now to be found in section 46 of the Road Traffic Offenders Act 1988, which provides as amended by a number of Acts including the 2000 Act:
- (1) Notwithstanding anything in section 14(3) of the Powers of Criminal Courts (Sentencing) Act 2000 (conviction of offender . . . discharged to be disregarded for the purposes of enactments relating to disqualification), a court in England and Wales which on convicting a person of an offence involving obligatory or discretionary disqualification makes—
 - (a) . . .
 - (b) an order discharging him absolutely or conditionally, may on that occasion also exercise any power conferred, and must also discharge any duty imposed, on the court by sections 34, 35, 36, 44 or 44A of this Act [provisions regarding disqualification and endorsement].
27. The Powers of Criminal Courts Act 1973 repealed the 1948 Act but made provision for probation orders and orders for conditional and absolute discharge similar (in the present context) to that made by the 1948 Act. Section 2 was in similar terms to section 7 of the 1948 Act and section 13 was in similar terms to section 12 of the 1948 Act. Section 12(4) of the 1973 Act provided that a court discharging an offender absolutely or conditionally may order him to pay costs and compensation. 28. In *Savage* (1983) 5 Cr. App. R. (S.) 216, the Court quashed a deprivation order made against a defendant who had been conditionally discharged. The Court said: On March 28, 1983 at the Crown Court in Manchester, the appellant pleaded guilty to three counts of handling stolen goods and was sentenced to a conditional discharge for 12 months in respect of each count. The learned trial judge then made a deprivation order under section 43 of the Powers of Criminal Courts Act 1973 in respect of her Vauxhall Viva motor car. ... The point taken on this appeal is that the learned judge was wrong in law to make a deprivation order under section 43 in respect of her motor car. The submission is based upon an authority of this Court, *Hunt*, which is unreported other than in
- [1978] Crim. L. R. 697, though we have a transcript. That case was heard by a Division of this Court, and the judgment of the Court was given by Kenneth Jones J. on July 27, 1978. In that case the applicant had pleaded guilty to stealing five calculators, and an order of absolute discharge was made, coupled with an order to deprive him of his rights in his motor car. The Court there held, having referred to other unreported cases of *Menocal* and *Lidster*, that an order under section 43 of the Powers of Criminal Courts Act involved an order punishing the offender by depriving him of his rights in his motor car, and, by reason of the wording of section 7(1) of the Powers of Criminal Courts Act under which the order of absolute discharge was made, such an order could not be coupled with an order of absolute discharge. The learned judge, having referred to the unreported cases, finally concluded the judgment with these words: “This Court takes exactly the same view and

has therefore come to the conclusion that an order under section 43 of the Act is a punitive order. The making of such an order amounts to the infliction of a punishment. It follows therefore that the making of such an order is quite inconsistent with the making of an order of absolute discharge. Such an order under the provisions of section 7 of the 1977 Act can only be made after the Court has found that it is inexpedient to inflict punishment.” The relevant words of section 7(1) are: “Where a court ... is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified therein.” There can therefore be no distinction whatsoever between an order of absolute discharge and an order of conditional discharge. In those circumstances it is wrong to couple such an order of conditional discharge with an order of deprivation in respect of a motor car, as it was in the case of an absolute discharge as found by this Court in *Hunt*. Therefore the result is that this appeal must be allowed insofar as the deprivation order is concerned. It is important to note that the Court held that it was wrong in law to couple an order for conditional discharge with an order of deprivation: cf *Hunt* [1978] Crim. L. R. 697 and the commentary thereon.

29. A similar conclusion (albeit without reference to *Savage*) was reached in *Young* (1990-1991) 12 Cr App R (S) 262, in so far as orders for disqualification under the Companies Directors Disqualification Act 1986 were concerned. Brooke J, as he then was, said: It appears to the Court that as the order for disqualification under section 2 of the Act is unquestionably a punishment, it would be quite inappropriate for a punishment of this kind to be linked with a conditional discharge in a case under the Companies Act in which the sentencing court thought that a punishment was inexpedient. Cf. *Akan* [1973] QB 491; [1972] 3 All ER 285 in which it was held that a recommendation for deportation was not a disqualification or disability within the meaning of section 12(2) of the 1948 Act.
30. The Court in *Savage* and *Young* thus held that the making of punitive orders was inconsistent with the decision that it was inexpedient to inflict punishment. As we shall see, the legislation was later amended in 1998 to permit such orders.
31. But assuming *Savage* and *Young* still to be good law, it follows that no punitive order may be made except those listed in what is now section 12(7) and in any enactment which expressly or impliedly provides for the making of a punitive order notwithstanding what is now section 12(7).
32. The respondent referred us to *R v Secretary of State for the Home Department, ex parte Thornton* [1986] 2 All ER 641 where the Court of Appeal held that a police officer for the purposes of disciplinary proceedings had been “found guilty by a court of law of a criminal offence” following a plea of guilty to an offence of wasting police time, albeit that he was

subsequently conditionally discharged by the court before which he had pleaded guilty. Reference was made to cases in which it had been said that the word "conviction" was equivocal, sometimes being used as meaning the verdict of the jury and at other times being used in a more strictly legal sense for the sentence of the court. We do not think that this case helps to resolve the issue in this appeal.

33. The provisions of the 1973 Act dealing with absolute and conditional discharges were replaced by the Criminal Justice Act 1991. A new section 1A was inserted into the 1973 Act. Sub-section (1) provided:
 - (1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, the court may make an order either—
 - (a) discharging him absolutely; or
 - (b) if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified in the order.
34. By virtue of the new section 1C and subject to a number of exceptions a conviction of an offence for which an order is made discharging the offender absolutely or conditionally was deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the following provisions of this Act. By now there were a number of statutory provisions which specifically authorised the imposition of orders even though an offender had been absolutely or conditionally discharged.
35. As Mr Knowles points out, the working of the 1991 Act was remarkably complex and led to difficulties: see *R v Moore* [1995] 16 Cr App R (S) 748.
36. The Crime and Disorder Act 1998 amended section 12(4) of the 1973 Act (as amended by the 1991 Act) so that it now read: Nothing in section 1A of this Act shall be construed as preventing a court, on discharging an offender absolutely or conditionally in respect of any offence, from making an order for costs against the offender or imposing any disqualification on him or from making in respect of the offence an order under section 35 or 43 of this Act [compensation orders and deprivation orders] or section 28 of the Theft Act 1968 [restitution]. 37. Section 12(4) of the 1973 Act had given the court, having discharged the defendant absolutely or conditionally, the power to order the offender to pay costs or compensation. The 1998 amendment gave the courts power, in the light of the decisions in *Savage and Young*, to make these other punitive orders. Although the power to make confiscation orders had first been granted in 1986 for drugs offences (Drug Trafficking Offences Act) and in 1988 for other offences (Criminal Justice Act 1988), no reference was made to confiscation orders, although the draftsman must have had *Savage and Young* in

mind. It is also worth noting that section 83 of the Crime and Disorder Act provided for the making of confiscation orders on committal for sentence. Thus the draftsman was at the same time making amendments to the regime of confiscation orders.

38. The Powers of Criminal Courts (Sentencing) Act 2000 repealed the Powers of Criminal Courts Act 1973 and replaced it, in so far as relevant to this appeal, with the provisions which we have already set out. Section 12 of the 2000 Act remains relatively unchanged from its predecessor, section 1A. Section 12(4) of the 1973 Act is now to be found in an updated form in section 12(7) of the 2000 Act. Section 14 of the 2000 Act largely mirrors section 1C of the 1973 Act.
39. There a number of statutory provisions which provide that various orders may be made even though an order for an absolute or conditional discharge is being made. These provisions have been amended by the 2000 Act to reflect the fact that the regime for absolute and conditional discharges is now to be found in that Act. We have already looked at the relevant section in the Road Traffic Offenders Act. 40. Section 1 of the Licensed Premises (Exclusion of Certain Persons) Act 1980, as amended, provided:
- (1) Where a court by or before which a person is convicted of an offence committed on licensed premises is satisfied that in committing that offence he resorted to violence or offered or threatened to resort to violence, the court may, subject to sub- section (2) below, make an order (in this Act referred to as an “exclusion order”) prohibiting him from entering those premises or any other specified premises, without the express consent of the licensee of the premises or his servant or agent.
 - (2) An exclusion order may be made either—
 - (a) in addition to any sentence which is imposed in respect of the offence of which the person is convicted; or
 - (b) where the offence was committed in England and Wales, notwithstanding the provisions of sections 12 and 14 of the Powers of Criminal Courts (Sentencing) Act 2000 ... ;
41. The whole of that Act has now been repealed by the Violent Crime Reduction Act 2006 (Schedule 5) although (as we understand) the repeal has not yet been brought into force. Section 7(3) of the 2006 Act, not yet in force, provides that
- 3) A drinking banning order under section 6 must not be made except—
 - (a) in addition to a sentence imposed in respect of the offence; or
 - (b) in addition to an order discharging the offender conditionally. (*Italics added*)
42. A drinking banning order therefore cannot be made if the offender is discharged absolutely.

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43. The Football (Disorder) Act 2000 repealed various provisions in the Football Spectators Act and inserted in that Act new sections 14 to 14J. Section 14A(5) provides that: A banning order may be made ... in spite of anything in sections 12 and 14 of the Powers of Criminal Courts (Sentencing) Act (which relates to orders discharging a person absolutely or conditionally and their effect).
44. Under the Sexual Offences Act 2003 a person convicted of a relevant sexual offence and made the subject of a conditional discharge order is subject to a notification requirement for three years (see Longworth [2006] UKHL 1; [2006] 2 Cr. App. R. (S.) 62, below in which the relevant provisions are considered). The issue
45. Having set out the relevant provisions and their legislative history, we turn to the issue which we have to resolve: does a Crown Court have the power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence.
46. We make two preliminary points. It follows from section 14(1)(a) of the 2002 Act that a Court may proceed to make a confiscation order before passing sentence. Mr Knowles submits that this provides a strong argument in support of the proposition that, under the 2002 Act, an order of absolute or conditional discharge would not prevent the making of a confiscation order. If it did, then a confiscation order made before sentence was passed would (presumably) have to be quashed if, subsequently, an order of absolute or conditional discharge was made and yet there is no express power to do that. On the other hand it is not likely to be very often that the Crown Court will be contemplating a conditional or absolute discharge and a confiscation order.
47. There is another pointer towards the correctness of the respondent's submissions (albeit not relied on in argument before us). Section 28 of the 2002 Act requires the court to proceed under section 6 in circumstances where a defendant absconds having neither been acquitted nor convicted. 48. If the 2002 Act is read on its own then there can be no doubt that the court has jurisdiction to make a confiscation order. The first condition (para. 8 above) which triggers a requirement to proceed under section 2 has clearly been satisfied. The appellant has been convicted.
49. Turning then to section 14 of the 2000 Act, sub-section (6) does not help the respondent. Sub-section (6) provides:
- (6) Sub-section (1) above has effect subject to section 50(1A) of the Criminal Appeal Act 1968 and section 108(1A) of the Magistrates' Courts Act 1980 (rights of appeal); and this sub-section shall not be taken to prejudice any other enactment that excludes the effect of sub-section (1) or (3) above for particular purposes. (Emphasis added)
50. No provision of the 2002 Act is, in our view, an "enactment that excludes the effect of sub-section (1) or (3) above for particular purposes". 51. Section 46 of the Road Traffic Offenders Act 1988, section 14A of the Football Spectators Act 2000 and section 1 of the Licensed

Premises (Exclusion of Certain Persons) Act 1980 are such enactments. 52. Section 46 of the Road Traffic Offenders Act 1988 provides, as we have seen, that “notwithstanding anything in section 14(3) of the Powers of Criminal Courts (Sentencing) Act 2000 ... a court in England and Wales which on convicting a person of an offence involving obligatory or discretionary disqualification makes ... an order discharging him absolutely or conditionally” may or must disqualify/endorse. The reference to section 14(3) must have been included because of Taylor, in which the Court decided, albeit obiter, that what is now section 14(3) prevented the imposition of an order of disqualification. It follows from the reference to section 14(3) in section 46 of the Road Traffic Offenders Act that the draftsman was “accepting” Lord Goddard’s interpretation of what is now section 14(3), namely that it prevented the imposition of any disqualification or disability in the proceedings for the offence for which the conditional discharge had been granted, subject to any contrary enactment.

53. When drafting the amendments to the Road Traffic Offenders Act it was not apparently thought necessary to add a reference to section 12 as well as section 14(3) to deal with disqualification because section 12(4) had been amended to give the court power to impose a disqualification. It is perhaps surprising that it was not thought necessary to add a reference to section 12 so as to make it clear that the court had power to endorse a licence notwithstanding the decisions in Savage and Young that no punitive order could be made, such an order being inconsistent with a decision that it was inexpedient to inflict punishment upon the offender. 54. Section 14A of the Football Spectators Act provides that a banning order may be made in spite of anything in sections 12 and 14 of the 2000 Act. A banning order is being seen as punitive and, not being within section 12(4), it (presumably) needs to be made clear that section 12 (as interpreted in Savage and Young) does not prevent the imposition of a banning order. Section 14 (presumably) needs to be referred to in case it be thought that a banning order is a form of disqualification or disability.
55. Turning then to section 14(1), it provides, as we have seen: Subject to sub-section (2) below [which deals with offenders aged under 18 at the time of conviction], a conviction of an offence for which an order is made under section 12 above discharging the offender absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under section 13 above [commission of further offence by a person conditionally discharged].
56. Mr Knowles submits that the appellant’s conviction is a conviction for the purposes of the proceedings in which the order is made.
57. Mr Butcher submits that it is not. He relies on Longworth, a decision which HH Judge Lyon in the instant case distinguished. Lord Mance gave the leading speech with which the other members of the Committee agreed. 58. In Longworth the appellant had pleaded guilty to counts of making indecent photographs of children, contrary to s.1(1)(a) of the Protection of Children Act 1978 and of possessing indecent photographs of children, contrary to s.160(1) of the Criminal Justice Act 1988, for which the judge imposed conditional discharges under

section 12 of the 2000 Act. The judge also made orders under the Sex Offenders Act 1997 that Longworth be subject to the notifying provisions for five years. That order was made under the Sex Offenders Act 1997. The trigger to enable such an order to be made under that Act was (under section 1(1) (a) of the Act) that “(the offender) is convicted of a sexual offence to which this Part applies.”

59. The point of law of general public importance was: Do the provisions of section 14(1) Powers of Criminal Courts (Sentencing) Act 2000 have the effect of preventing an order for conditional discharge made on conviction for an offence other than under the Sex Offenders Act 1997 from being classed as a conviction for the purposes of the 1997 Act and thus avoiding the notification requirements under the 1997 Act?”
60. The House held that the judge had no power “to determine whether any and what notification requirements arose under the 1997 Act consequent upon the orders of conditional discharge which he made” because “if there was any requirement to notify under section 1 of the Sex Offenders Act 1997 in consequence of the appellant’s convictions in the proceedings under the 1978 and 1988 Acts, it arose independently of anything provided in those Acts and of any order which was or could be made by the court in the proceedings or on the convictions under those Acts; and further that the only statutory sanction for failure to register was to be found in s.3 of the 1997 Act” (paragraph 14).
61. Lord Mance said (paragraph 20): It follows that on the present further appeal to this House, the order that is appropriate is an order setting aside that part of the judge’s sentencing remarks and ruling which purported to order the appellant to register for five years under the 1997 Act, without any determination whether or not the appellant was under any such obligation under that Act.
62. Lord Mance continued: 21 It would nonetheless be unhelpful if the House, having heard full argument, did not itself take this opportunity of indicating its own view on the point of law certified by the Court of Appeal. In my view the correct answer is in the affirmative: the effect of s.14(1) of the 2000 Act is to deem there to be no conviction for the purposes of s.1(1) (a) of the 1997 Act. I start by observing that the language of s.14(1) states a general principle - not limited by the specific provisions in s.14(3) , which are expressly stated to be “without prejudice” to subs.(1) and to apply “in any event”. Section 14(3)(b) must itself be read bearing in mind the previous provision in s.12(7) that nothing in s.12 should be construed as preventing a court, on discharging an offender absolutely or conditionally, from inter alia imposing any disqualification on him. But it is unnecessary in this case to consider how far s.14(3)(b) qualifies, or has a separate subject-matter from, s.12(7) . 22 The purposes of the proceedings in which the conditional discharges were ordered were, first, to establish the appellant’s guilt or innocence in respect of the offences charged under the 1978 and 1988 Acts, and, secondly, in the event of his guilt, to determine whether any and if so what punishment should be inflicted. The focus of the phrase “the purposes of the proceedings” in s.14(1) of the 2000 Act is in my view narrow. It is on the legal proceedings actually before the court and the significance that may attach in them to any conviction. ...

63. This is an important passage and the fact that the focus of the phrase “the purposes of the proceedings” is said to be narrow, seems to help the appellant. But on a closer analysis we do not think it does.
64. By virtue of section 14(1), a conviction for an offence for which the offender receives an absolute or conditional discharge “shall be deemed not to be a conviction for any purposes other than the purposes of the proceedings in which the order is made ...” Lord Mance tells us that the “purposes of the proceedings” are to determine whether he is guilty and what punishment is appropriate. The sub-section only comes into play after the decision has been made to discharge the offender absolutely or conditionally because it is thought to be inexpedient to inflict punishment. The draftsman must be including the words “the purposes of the proceedings in which the order is made” to make it clear that certain associated punitive orders may be made against a person who has been absolutely or conditionally discharged. The draftsman needed to do this because, as we have seen, section 12(7) permits the court to disqualify a person who has been absolutely or conditionally discharged and to make compensation orders, deprivation orders and restitution orders, all or some of which are clearly “punishment”. 65. It is now well established (albeit in the context of the European Convention of Human Rights) that confiscation proceedings fall to be treated as part of the process of sentencing and that a confiscation order is a penalty: see e.g. *R. v Briggs-Price* [2009] UKHL 19, paras. 30, 63, 112, 113, 115 and 134.
66. Given that Lord Mance had decided that the judge had no power “to determine whether any and what notification requirements arose under the 1997 Act consequent upon the orders of conditional discharge which he made”, it followed that the order requiring the appellant to make the required notification was not made “for the purposes of the proceedings”.
67. Lord Mance however also said in support of the conclusion that the order requiring the appellant to make the required notification was not made “for the purposes of the proceedings”, that the “duty to register and the statutory sanction for failure to register were both imposed independently by the 1997 Act itself ...” (paragraph 22). Our problem with this passage is that the orders referred to in section 12(7) are also “imposed independently”, that is by statutes other than the statute creating the offence and yet the draftsman must have had them in mind when drafting section 14(1). 68. In our view the procedures under section 6 of the 2002 Act are within “the purposes of the proceedings in which the order is made”.
69. We turn briefly to section 14(3). On the assumption that sub-section (3) of section 14 applies to the proceedings in which the order of absolute or conditional discharge is made, a confiscation order is not a disqualification or disability.
70. Thus, in our view, there is nothing in section 14 of the 2000 Act which prevents a Crown Court judge from making both a confiscation order and an absolute or conditional discharge order.

71. The much more difficult issue is whether section 12 prevents a Crown Court judge from making a confiscation order and an absolute or conditional discharge order. Mr Butcher submits that a confiscation order is punishment and therefore it is not possible to make a confiscation order having found that it is inexpedient to inflict punishment. He submits that section 12(7) does not help the respondent in that it does not include confiscation orders, whilst including costs orders, disqualification orders, compensation orders, deprivation orders and restitution orders, some or all of which are punishment. 72. Section 12(7), as we have seen, provides: Nothing in this section shall be construed as preventing a court, on discharging an offender absolutely or conditionally in respect of any offence, from making an order for costs against the offender or imposing any disqualification on him or from making in respect of the offence an order under section 130, 143 or 148 below (compensation orders, deprivation orders and restitution orders).
73. As we have already noted (para. 37 above), the predecessor to this sub-section (or at least the large part of it) appears to have been included in the light of the decisions in *Savage and Young*.
74. There can be no doubt that confiscation orders constitute punishment. The regime under what is now the 2002 Act is aptly described as “Draconian”. The use of the offender’s realisable assets to recover any benefit (not merely profit), including benefits from criminal activity unassociated with the index offence with a maximum of ten years in default must constitute punishment. Thus applying these cases, the making of a confiscation order is inconsistent with a finding that it is inexpedient to inflict punishment.
75. A passage in the speech of Lord Mance in *Longworth* assists the appellant:
23. The statute book contains a number of enactments in which Parliament has been careful to exclude the effect of subs.(1) and/or (3) of s.14 as contemplated by s.14(6) of the 2000 Act. Yet there is no such exclusion in the 1997 Act. To take some examples, under s.46(1) of the Road Traffic Offenders Act 1988, a court on convicting a person of an offence involving obligatory or discretionary disqualification and making an order discharging him absolutely or conditionally may, s.46(2) notwithstanding s.14(3), also exercise any power conferred, and must discharge any duty imposed, on it by ss.34, 35, 36 or 44 of that Act, being provisions dealing with disqualification, while under a prior conviction involving disqualification or endorsement of licence is to be taken into account, notwithstanding s.14(1), in determining the same offender’s liability to punishment or disqualification for any offence involving obligatory or discretionary disqualification committed subsequently. Under s.1 of the Licensed Premises (Exclusion of Certain Persons) Act 1980, where a person is convicted of “an offence committed on licensed premises” and the court is satisfied that in committing that offence he resorted to violence or offered or threatened to resort to violence, the court may make an exclusion order prohibiting him from entering those or other specified premises without certain consents, and s.1(2) is careful to provide that such an order may, notwithstanding s.14 of the 2000 Act, be made in addition to an order discharging him absolutely or conditionally. A similar exclusion appears in s.14A of the Football Spectators

Act 1989, which provides that a court before which a person was convicted of certain specified offences must make a banning order, if satisfied that there are reasonable grounds to believe that this would help to prevent violence or disorder at or in connection with any regulated football matches. Section 14A(5) carefully provides that such an order may be made in spite of anything in s.14 of the 2000 Act. What is noticeable about the 1997 Act is the absence of any similar exclusion, although that Act introduces a notification requirement which does not depend on any order by the court by or before which the relevant sex offender was convicted. 76. In section 12(7) there is no reference to confiscation proceedings and in the 2002 Act there is no reference to absolute or conditionally discharges. What Lord Mance makes clear is that the legislature has had well in mind the need to make provision for the consequences of making orders of absolute and conditional discharge, sometimes distinguishing between them. As we have seen, the 2000 Act amended a number of other Acts to make reference to sections 12 and 14 of the 2000 Act. The absence of any reference to confiscation proceedings in section 12(7) is, in our view, telling.

77. The fact that the 2002 Act imposes a mandatory regime is obviously a powerful argument for saying that the court must proceed under section 6 even though the defendant is being absolutely or conditionally discharged. However, in the light of *Savage and Young*, section 12(7) and of the history of section 12(7), we have reached the conclusion that the Crown Court has no power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence. If Parliament had wanted to include confiscation orders within the 1973 predecessor to section 12 (see para. 37 above) or in the 2000 Act, it could easily have done so. We are mindful of the fact that the orders which had been made in *Savage and Young* were made under legislation which gave the power to make the order but did not require the making of an order, but we do not think that this affects the conclusion which we have reached.
78. Given that a confiscation order can, at least in theory, be made before passing sentence, it would obviously be prudent in those very rare cases where an absolute or conditional discharge is a possibility, to decide upon sentence first. We do not think that offends section 13 of the 2002 Act (see above, para. 12). 79. For these reasons the appeal is allowed and the confiscation order quashed.

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Prepared on 27 October 2026 · Esheria