

ENGLAND AND WALES / JUDGMENT

Parker, R v

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Neutral Citation Number: [2018] EWCA Crim 1057 IN THE COURT OF APPEAL CRIMINAL DIVISION No: 201702837 C5 Royal Courts of Justice Strand London, WC2A 2LL Tuesday, 1 May 2018 B e f o r e: LORD JUSTICE FLAUX MR JUSTICE JEREMY BAKER THE RECORDER OF CARDIFF (HER HONOUR JUDGE REES)

- ----- Prosecution Appeal Re: Confiscation Decision s.31 PQCA 2002 R E G I N A v JOHN ALEXANDER PARKER
- ----- Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd 165 Street London EC4A 2DY, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)
- ----- MR STEPHEN REQUENA appeared on behalf of the Appellant MR HUNTER GRAY appeared on behalf of the Respondent
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 1. On 30th June 2016 in the Crown Court at Luton the respondent, John Parker, pleaded guilty to a count of dealing with goods chargeable with a duty which had not been paid with intent to defraud Her Majesty of the duty payable thereon by virtue of the Tobacco Products Duty Act 1979 contrary section 170(1)(b) and (3) of the Customs and Excise Management Act 1979; a count of harbouring, keeping concealing, or dealing with goods chargeable with a duty which had not been paid with intent to defraud Her Majesty of the duty payable thereon under the same statutory regime; and a count of possessing criminal property contrary to section 329 of the Proceeds of Crime Act 2002. The respondent did not tender a basis of plea and thus is taken to have pleaded on a 'full facts' basis.

2. On 19th July 2016 he was sentenced by His Honour Judge Kay QC to a total of four years' imprisonment. 3. On 30th May 2017 a confiscation hearing took place before His Honour Judge Kay QC, at the end of which he ordered the respondent to pay £17,072 under section 6 of the Proceeds of Crime Act within 28 days with six months' imprisonment in default. The prosecution now appeals against that order with the leave of the single judge.
4. The facts of the offences are as follows. The offending in count 1 related to three importations of hand rolling tobacco ("HRT"). The first two consignments were in early 2016. Their value was estimated from a note found wrapped round £205,645 in cash which was handed by the respondent to Dukic, a driver, on about 15th February 2016. That cash was seized by HMRC when Dukic was stopped at Dover, but no hand rolling tobacco was seized on that occasion. In interview at a later date in April 2016, the respondent admitted that he had previously collected two loads of HRT from foreign lorry drivers. The note indicated that those two importations were of 2,458 kg of HRT. The duty evaded was £456,548.92. 5. The respondent was under surveillance by HMRC officers when he hired a van in Warrington on 25th April 2016. That van was driven to an industrial estate in Biggleswade at about 12.45 am on 26th April 2016, being led there by the respondent in his own car. At the industrial estate was a DAF articulated lorry with Italian registration plates being driven by the co-defendant Jovanovic, which had entered the United Kingdom via Dover earlier the previous evening. The three vehicles parked on waste ground on the edge of the estate. At 1 am the group was challenged by HMRC officers. The respondent was at the side of the trailer wearing work gloves. The side curtain was open but nothing had been unloaded. All three men were arrested on suspicion of evasion of excise duty.
6. The respondent admitted that there was a quantity of cash in his vehicle, which was then seized by the HMRC officers. There was a bin liner in the vehicle containing cash with a separate bag containing £16,200. The total cash seized by the officers was £141,160. The possession of that cash was the offence of money laundering in count 3. With the cash was a handwritten note referring to brands of HRT. The officers searched the lorry and found 1,837 kg of HRT of various brands, which would have given rise to a liability to pay duty of £363,909.70.
7. On the respondent's mobile phone was found a text from a Luxembourg number on 24th April 2016 referring to a breakdown of tobacco products similar to those seized; the address of the industrial estate; and the words "for driver 16,200 separate plus 150,114". In the respondent's car were further notes containing references to quantities of tobacco and money; the location of the estate; and the registration number of the lorry. 8. The officers searched the respondent's home and found 54,000 illegal cigarettes, and a large number of dealer books and records appearing to relate to the purchase, sale and movement of large quantities of tobacco products. The duty evaded on the cigarettes was £12,821.52. 9. In interview, the respondent admitted that he had been at the estate to meet the lorry driver and take control of the HRT in the vehicle. He said the bag of £16,200 was payment for the driver, and the other £125,000 was payment for the tobacco. Once he had taken possession of

the tobacco, he would have sold it for a profit. He claimed that he would have made £8,500 profit from the three importations. As already noted, he had admitted having collected two previous consignments of 200 boxes each from foreign lorry drivers that year. He had not paid the driver of the tobacco on either of those earlier occasions as they were not trusted, but he had subsequently driven to Queensferry in Flintshire and paid Dukic, who was a trusted driver, over £200,000 for the two previous consignments. Dukic was stopped by UK Border Force officers outbound from the United Kingdom at Dover on 15th February 2016; and it was then that the £205,645 in cash was found in his cab, in a bag with the note wrapped around the cash to which we have already referred.

10. The prosecution case was that the respondent played a leading role as an organiser and financier of the importations, who would then distribute the tobacco products in the United Kingdom.
11. In sentencing him, the judge said that the offences involved an element of significant planning and sophistication; that there was certainly an element of considerable profit for the respondent; that he was highly trusted and running the operation in this country; and that he had played a leading role in it.
12. In their statements under section 16 of the Proceeds of Crime Act the prosecution stated that the benefit derived by the respondent from the offences was in total £846,276.77, comprising the total of the duty evaded on the tobacco imported in the three consignments and the cigarettes seized at the respondent's house, adjusted to take account of changes in the value of money.
13. Before the judge, as before this court, the prosecution case on benefit was that the respondent was personally liable for the duty in accordance with *R v May* [2008] 1 AC 1028; [2008] UKHL 28. We deal with the basis for this submission in more detail later in the judgment.
14. At the confiscation hearing, the respondent and his wife both gave evidence. Notwithstanding his earlier admissions in interview and that he had pleaded guilty on what was a full facts basis, in his evidence the respondent sought to assert that he had merely been a delivery driver, deriving a limited fixed fee, and that he had been under pressure. He said that he had received communications as to what he was to do by mobile phone, but he had no idea who he was dealing with. The judge disbelieved this explanation, saying in his ruling that it did not bear any sensible or logical examination. The respondent had chosen not to name the men he said had pressurised him into acting for them, nor to give any real detail about them. His account that he transported large sums of cash and very valuable amounts of tobacco in return for relatively small sums of £2,000 or £3,000 at a time lacked all credibility. The judge was satisfied that he was not a mere courier. On the basis of those findings, the judge was expressly rejecting the respondent's account that the only profit that he received from these consignments was in the region of £8,500 and clearly considered that the respondent had received much more profit than that, albeit that the respondent was not

prepared to indicate how much profit he actually received.

15. As to what his role was, the judge said that he could not be sure that the respondent was at the top of this particular criminal organisation, but he was sure that the respondent was enjoying the profits of this arrangement in a consortium with others. It may be that it was a minor profit share, but the judge was convinced that he was enjoying some share. The judge said that as a partner (perhaps a junior partner) in an illegal business, the respondent was jointly and severally liable. The judge said that he found it difficult to say, if this was an illegal partnership, who might have been liable to pay the duty. It might be said that it was the partnership as a whole, but the judge said he was not prepared to reach that conclusion here due to the paucity of the evidence as to the arrangement between the respondent and the others involved and what their respective roles were. He said the safer course was to assess the value of the tobacco as being the benefit as there was reasonably good evidence of the value of the tobacco. The judge did not have the full picture, but it appeared that the appropriate way of valuing the benefit was the amount that was to be paid for the tobacco: ie £205,000 odd in relation to the consignments prior to 25th April and £141,000 in relation to the consignment on 25th April. The judge noted that it would be unjust not to take into account the fact that this money had already been forfeited to the state, so he assessed the total benefit at £205,645.
 16. In relation to available assets, there was an issue as to whether the respondent had an interest in a property in Warrington purchased in 2007 for £355,000, with him paying £190,000 and his then partner (now wife) contributing around £175,000. There was no mortgage on the property. The prosecution case was that he had a 50% beneficial interest in the property. The judge accepted this, disbelieving the evidence of the respondent and his wife that the £190,000 had been a gift. However, from that 50% (which represented some £158,232) the judge deducted the £141,160 cash seized by HMRC from the respondent's vehicle, to arrive at an asset figure of £17,072, which was the amount of the order the judge made.
 17. The prosecution appeal relates to the judge's assessment of the figures for both the benefit and the available assets. Their case is that the judge erred in law in not concluding that the respondent was liable to pay the duty on the HRT and the cigarettes, and it turns upon Regulation 13 of The Excise Goods (Holding, Movement and Duty Point) Regulations
2010. The relevant part of that provides: "13.—(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
- (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
 - (a) making the delivery of the goods;

- (b) holding the goods intended for delivery; or
 - (c) to whom the goods are delivered."
18. On behalf of the prosecution Mr Requena submits that, in light of the facts and in particular the admissions in interview and the judge's findings in his sentencing remarks and his confiscation ruling, the respondent was clearly the person to whom the HRT was delivered in the case of the first two consignments and was being delivered at the industrial estate in the case of the third consignment, and/or he was the person constructively, at the duty point or actually at the time that he took possession, holding the goods intended for delivery.
19. On behalf of the respondent Mr Gray resists that conclusion, submitting essentially that the judge was engaged in a fact-finding exercise, that he found the facts as he was entitled to, and that he applied the law correctly. In our judgment that suggestion that, on the facts, the judge applied the law correctly is misconceived. The respondent had admitted in interview that he was at the industrial estate to take delivery of the consignment, which he was going to sell at a profit, and that he had taken delivery of two previous consignments on the same basis earlier that year. He did not suggest that his possession of the cigarettes found at his house was on a different basis. The judge rejected his assertion in evidence at the confiscation hearing that he was, in effect, just a courier or delivery driver, receiving a small £2,000 or £3,000 fee per consignment. He had been sentenced on the basis that he had played a leading role in this country in this unlawful business, and whilst the judge felt unable in the confiscation ruling to determine precisely what his role was, he found he was a partner in this illegal business, sharing in the profit. The judge actually said that he was jointly and severally liable, and, in our judgment, having done so, he should have gone on to find that the respondent was a person liable for the duty evaded.
20. In that context, and contrary to Mr Gray's submissions, we agree with Mr Requena that, in principle, there is no distinction between the position of this respondent and that of the appellant in *R v Tatham*
- [2014] EWCA Crim 226. Like the respondent, Tatham was involved in taking delivery of the smuggled tobacco and cigarettes, and in their distribution in the United Kingdom. This Court inferred that Tatham was not remunerated by a fixed fee but, like this respondent, by the proceeds of trading the tobacco, on the basis of which the court was satisfied that he had a beneficial interest in the tobacco. We too are satisfied that the respondent here had a beneficial interest in these tobacco products when imported and that he also financed the purchases.
21. At paragraph 23 of the judgment of the Court given by Sir Brian Leveson P, the principles applicable to "holding" within the meaning of the predecessor 2001 regulations were succinctly stated as follows: "(d) By way of contrast, 'holding' for the purposes of Regulation 13(1) can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising de jure and/or de facto control over the goods, whether temporarily or

permanently, either directly or by acting through an agent (see Taylor & Wood [28-40].

- (e) There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder' (or indeed to have 'caused' their importation). A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the 'holder' within Regulation 13(1) - Taylor & Wood, [30-31],[35]."
22. At paragraphs 36 and 37 of the judgment the Court went on to consider the questions as to whether or not the appellant in that case had 'caused' the goods to reach the excise duty in paragraph 36; alternatively, whether or not he was a 'holder' within paragraph 37 where this was said: "Alternatively, even if (contrary to our assessment of the facts) the appellant contributed no money to the enterprise, and was a mere courier of the cash discovered at Manchester Airport, in our judgment, he falls within the definition of a 'holder' of the goods at excise point, pursuant to Regulation 13(1), where legal, rather than physical, possession is sufficient (see Taylor & Wood and Bajwa). This condition can be satisfied by the appellant being the ordinary consignee of deliveries to the UK; in our assessment, in this case, it is."
23. It is true that Tatham concerned the predecessor regulations to the 2010 regulations, but, as Mr Requena submitted, the law on 'holding' within the 2010 regulations has been interpreted by reference to Tatham and the earlier case of R v White
- [2010] EWCA Crim 978: see the decision of the Upper Tribunal in McKeown v HMRC [2016] UKUT 0479 (TCC).
24. In our judgment, given the admissions made by the respondent and the findings made by the judge, the respondent was, as a matter of law, liable for the evaded duty on the HRT, either as the person to whom the HRT was 'delivered or was being delivered' within regulation (2)(c), or as the person who was 'holding the goods intended for delivery' within regulation (2)(b). He was actually 'holding' the HRT in each case, which he was going to sell for profit, and in any event as the person who was exercising de facto or de jure control over the HRT and (for that matter) the cigarettes found at his house because he was going to sell both for a profit. He was holding them within the test in Tatham. The judge erred in law in concluding that the respondent was not liable for the duty.
25. It was suggested on behalf of the respondent at one point that the conclusion that the benefit equated to the amount of the unpaid duty would be disproportionate and a breach of Article 1 of the Protocol to the European Convention on Human Rights, in reliance on R v Waya
- [2012] UKSC 51; [2013] 1 AC 294. This point was not pressed by Mr Gray in his oral submissions - in our judgment wisely, since there is nothing in the point in the circumstances of the present case. Once it is concluded that the respondent was the person liable to pay the duty which has been evaded, there is nothing disproportionate in the conclusion that the financial benefit gained by the respondent is the amount of duty which he has evaded. There is no question here of some deemed benefit under the Proceeds of Crime Act which

exceeds the real benefit to the respondent: see per Lord Phillips and Lord Reed at paragraph 84 in that case.

26. Turning to the judge's assessment of the relevant available assets, Mr Requena submitted that the judge had again erred in law in deducting from the available assets (in the form of the 50% beneficial interest in the property) the £141,000-odd forfeited to the Crown. As he points out, the judge did not spell out the legal basis upon which he was making that deduction. But, in any event, we agree that the judge's approach is inconsistent with the principles established by this court in *R v Crisp & Berry*

[2010] EWCA Crim 355;

- [2010] 2 Cr App R (S) 77. There, cash seized from each appellant's house was seized by the Crown and forfeited under section 298 of the Proceeds of Crime Act, as in the present case. This Court held that it did not matter whether the money had come from the specific transaction or from other unlawful dealing. In the present case, it is evident that £141,000 was to be paid over to the co-defendant by the respondent as the price for the HRT. Although the respondent said that it was a loan for working capital, that seems extremely implausible, and we agree with Mr Requena that it is highly probable that in fact this money came from previous unlawful dealing in the HRT.

27. In his submissions to this Court, Mr Gray accepted that, if the court found in favour of the prosecution in relation to the first issue - that the benefit was in fact the amount of duty that was evaded - the judge had erred in making the deduction of the £141,000 from the amount of available assets, so that it is not necessary to consider this matter further. We simply note that, at paragraphs 26 to 27 of the judgment in *Crisp & Berry*, this Court set out an analysis as to why the deduction of the money seized was incorrect as a matter of law, which analysis we consider is equally applicable in the present case. Either the money in question had nothing to do with any of the earlier tobacco smuggling to which the respondent pleaded guilty or, to the extent it did (which we consider is highly probable), it was an additional benefit from that offending. Either way, its recovery did not diminish the loss suffered by HMRC from the evasion of the duty, and there was no basis upon which the judge should have deducted the recovered cash from either the benefit or the recoverable amount.
28. In the circumstances, the appeal is allowed. The order made by the judge is quashed. In its place we make an order that the amount of the benefit was £846,276.77 and that the recoverable amount was £158,232. I think I have those figures right, Mr Requena? MR REQUENA: In fact the learned judge in the court below deducted both of the seized cash figures from the benefit figure, but in any event the available amount on the learned judge's findings in fact came to £304,694.49. LORD JUSTICE FLAUX: I could not quite work that out from the ruling. MR REQUENA: It is actually quite difficult to work it out. LORD JUSTICE FLAUX: Yes. MR REQUENA: There was a certain amounts of assets which were available and then the argument about the 50% share in the house. LORD JUSTICE FLAUX: Give me that figure again. MR REQUENA: The total available should be £304,694.49. LORD JUSTICE

FLAUX: Very well. So the order that we will make is that the amount of the benefit was the figure of £846,276.77 and the recoverable amount is £304,694.49. MR REQUENA: Indeed. One final consideration is the amount that was ordered and has actually been paid, the £17,702. LORD JUSTICE FLAUX: So that has to be deducted. MR REQUENA: That ought to be deducted from the amount of the order. Given that the original order has been quashed rather than varied, I think it ought to be taken into account in the new figure. LORD JUSTICE FLAUX: That must be right. So, somebody can give the court the calculation. Do you want to make any submissions about the time for payment? MR GRAY: I would invite the maximum allowed - three months. There does need to be a period in default for non-payment. LORD JUSTICE FLAUX: Mr Requena, do you want to say anything about the time? It seems to us that three months is fair. MR REQUENA: Yes. I do not think I want to make any submissions about that, my Lord. The period in default for an amount over £500,000/no more than £1 million is up to seven years, the category beneath that being up to five years. LORD JUSTICE FLAUX: It is five years, is it not? MR REQUENA: It is in the 'up to five year' band. LORD JUSTICE FLAUX: This is going to be £287,000 broadly, so it is five years. MR REQUENA: Up to five years. LORD JUSTICE FLAUX: Up to five years. (The court conferred for a short time.) LORD JUSTICE FLAUX: Four years. Do you want to say anything about that Mr Gray? MR GRAY: Only this, my Lord: the sentence he received was four years. I do not have the table in front of me. LORD JUSTICE FLAUX: But it is a period in default, though, is it not? MR GRAY: It is a period in default. (Table handed to Mr Gray.) So between £10,000 and £500,000 up to five years. It is perhaps in the midpoint there. And perhaps a sentence in default would be slightly lower than the one the court has so far indicated. (The court again conferred for a short time.) LORD JUSTICE FLAUX: Four years, Mr Gray. So we need somebody to provide us with the net amount. MR REQUENA: It is £287,622.49. LORD JUSTICE FLAUX: So that is the net amount? MR REQUENA: That is the available assets minus the amount already paid. MR GRAY: Yes. LORD JUSTICE FLAUX: Thank you both very much. THE CLERK OF THE COURT: My Lord, the confiscation is made in the amount of the available assets? LORD JUSTICE FLAUX: Yes. Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof. 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk

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