

JERSEY / JUDGMENT

AG v Simon [2019] JRC 050 (27 March 2019)

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JUDGMENT

THE COMMISSIONER: 1. On 20 th February, 2019, the defendant challenged the Attorney General's Statement as to the calculation of benefit to him from various drug offences. Following argument the Court made orders under the Proceeds of Crime (Jersey) Law 1999 ("the Proceeds of Crime Law") that the defendant had benefited from relevant criminal conduct to the extent of £559,388.72 and that the amount to be recovered from the defendant was £113,084.98, a confiscation order being made in the latter sum. 2. The defendant was sentenced on 25 th April, 2018, (reported at AG v Simon

[2018] JRC 076A) to two years' imprisonment for various drug offences, namely:- (i) Possession of 5.48 kilos of cannabis with intent to supply. (ii) Being knowingly concerned in the supply of 7.27 kilos of cannabis. (iii) Possession of a substantial quantity of MDMA, equivalent to 1,730 tablets. (iv) Possession of small quantities of cocaine and N-ethylpentylone. 3. The States of Jersey Police expert witness gave his opinion as to the potential range of street values for the drugs, the lowest of these being £170,355 for the cannabis, £26,270 for the MDMA, £80 for the cocaine and £50 for the N-ethylpentylone, giving a total minimum street value of all of the drugs concerned of £196,755. 4. In addition to the drugs, cash was seized from the defendant's home of £51,636.44, together with a boat and a number of vehicles, and he had £10,922.06 in bank accounts, all of which were made the subject of a saisie judiciaire. 5. In sentencing, Sir Michael Birt, Commissioner, said this:- "1. You have been using and selling cannabis resin for a number of years. The prosecution accept that you have been selling to people of mature years who often, but not always, have a medical condition that they believed was assisted by the drug. But the fact remains that you've been in flagrant breach of the law for some time. 2. The amounts involved in connection with your possession with intent to supply, namely Counts 2, 5 and 6, come to 5.45 kilos. On a separate indictment, there is a charge of being concerned in supply which relates to 7.27 kilos. However, the facts of that are extremely unusual, and we sentence on the basis of the facts as put forward by you, and that is that you did not know that the cannabis had been left on your premises and you only happened to find it there when you went to the out-building in question and saw a holdall you did not recognise. You realised it was cannabis but you did nothing about it and did not tell the police or destroy it. That is the nature of your involvement in that count. 3. You have also pleaded guilty to possession of a substantial quantity of MDMA. We are told that it is the equivalent of 1,730 tablets,

although they had deteriorated through age and a lot of it was now in powder form such that the drug was no longer usable. Again your version of events, upon which we must sentence, are that they had been left there by somebody else and you only became aware they had been left well after the event, by which time they had already deteriorated. So again your involvement there was not to do anything about it." 6. The benefit figure put forward in the Attorney General's Statement was calculated as follows:- (i) Value of controlled drugs seized from the defendant £196,755.00 (ii) Cash found in the defendant's home £51,636.44 (iii) Unexplained cash deposits into bank accounts £19,440.00 (iv) Unexplained deposits into bank accounts £66,233.72 (v) Purchase of boat (per interview) £4,000.00 (vi) Purchase of Renault car (per interview) £2,000.00 (vii) Purchase of white pickup (per interview) £7,000.00 (viii) Purchase of Land Rover (per interview) £6,500.00 (ix) Proceeds from 6 years cannabis sales £205,823.56 (the latter figure is £296,400.00 minus (ii), (iii), (v), (vi), (vii) and (viii) to avoid possible double accounting) Total benefit £559,388.72p 7. The Attorney General's Statement explained the proceeds from six years of cannabis sales in this way:- " SIMON stated during interview that he had been selling cannabis for eight years for the equivalent of £950.00 per 100 gram bar. SIMON also states, when asked how many bars of cannabis he sells each week, 'two at the most' and 'sometimes one, sometimes none, and then somebody will come and like, have three in a week' to friends or people he knows. He stated that he occasionally sold cannabis in kilogram amounts. The assumptions allow property held or transferred within the last six years to be taken into consideration. Therefore, if, conservatively, SIMON were to have sold an average of only 1 x 100g bar of cannabis each week for six years at a value of £950.00 per bar, as he describes in interview, he would have sold £296,400.00 of cannabis. If he had sold an average of 3 x 100g bars of cannabis each week this would be a total of £889,200.00 of cannabis. It is therefore suggested that £296,400.00 would be the proceeds of crime and account should be taken of this amount in the calculation of benefit. The Court is respectfully requested to assume that this was the amount derived from the proceeds of crime and criminal conduct." The cash found in the defendant's home, the unexplained cash deposits in bank accounts, the boat and the value of the vehicles were all deducted from this figure to avoid possible double accounting, giving net proceeds from six years' cannabis sales of £205,823.56p. The unexplained deposits were not in cash and had therefore remained in the benefit calculation. The law 8. Confiscation orders are made under the Proceeds of Crime Law. Under Article 3, the Court may determine the benefit to a defendant (' the benefit figure '), the amount to be recovered (' the amount recoverable') and make a confiscation order to that effect. The standard to be applied is that of civil proceedings (Article 3(8)). 9. The relevant time period for such an order, where there is a course of relevant criminal conduct, is six years prior to proceedings being instituted against a defendant (Article 5(3)). Under article 5(5) the Court may make the following assumptions for the purposes of determining whether the defendant has benefitted from relevant criminal conduct and, if so, the value of that benefit namely:- (i) that any property held or transferred to the defendant during that six-year period was received as a result of or in connection with the charged offences; (ii) that any of the

defendant's expenditure during that six-year period was met out of payments received by the defendant as a result of or in connection with the charged offences; and (iii) the defendant received the property free of any other interests in it. 10. Under Article 5(6) these assumptions are rebuttable if shown to be incorrect or if the defendant's benefit has been the subject of a previous confiscation order or if making the assumption risks serious injustice. 11. As Sir Christopher Pitchers, Commissioner, said in *AG v Norris*

[2015] JRC 174 at paragraph 9:- "There is no doubt that this is a severe regime. It was intended by the legislature to be so. The purpose of the legislation is plainly to impose upon convicted defendants a severe regime for removing from them their proceeds of crime." Defence contentions 12. Advocate Steenson argued that the benefit figure should not include the value of the controlled drugs seized from the defendant. In this respect he said the Court should not follow the House of Lords judgment *R v Islam*

[2009] UKHL 30 in which it was held (by a majority):- "....that, although the 2002 Act [Proceeds of Crime Act 2002] refrained from defining precisely what was meant by 'market value' of goods for the purposes of making a confiscation order, it did not provide that the market in which the price of the goods had to be determined had to be a legitimate one; that the nature of the goods and the context in which the assessment was to be made would determine the nature of the market to which the court should look to determine their market value; that when determining the benefit which the defendant had gained from his conduct it was right to look at the market in which he expected to dispose of the goods in question; that where there was a legitimate market in which the market value of such goods could be determined that was the market to which the court should look when calculating the value of the benefit to the defendant for the purposes of a confiscation order; but that, if the property obtained by the defendant, because of its nature, condition or quality, had no value at all in a legitimate market and the only market in which a transaction for its sale could take place was an illegitimate one, the court, in calculating that benefit, could have regard to the price which a willing buyer would pay to a willing seller in that illegitimate market; and that, accordingly, it was consistent with both the language and spirit of the statutory scheme relating to confiscation proceedings to take account of the black market, value of the consignments of heroin when valuing the benefit obtained by the defendant at the time of their illegal importation, even though they would have a nil value in a legitimate market after their seizure when the court had to assess the amount available for confiscation." 13. The view of the minority, which Advocate Steenson said we should prefer, was that a similar approach to valuations should be taken when assessing both the benefit figure and the amount recoverable, and therefore any drugs seized by the authorities cannot be given a market value for the purposes of determining both the benefit figure and the amount recoverable, as there was no legitimate market for them. 14. The Proceeds of Crime Law makes reference simply to "value", as opposed to "market value", but the substantive point is the same. Whilst the decision in *R v Islam* is not binding on this Court, it is of the highest persuasive authority and has been followed both in England and Jersey ever since. The most cogent arguments

would have to be advanced for this jurisdiction not to follow *R v Islam* and none has been put forward, other than that we should prefer the view of the minority. We decline to do so. The Attorney General was right to attribute the lowest street value to the drugs seized from the defendant. 15. If that argument failed, Advocate Steenson submitted that the value of the 7.2 kilos of cannabis should not constitute a benefit to the defendant, because of the unusual facts referred to in the sentencing judgment, as set out above, in essence that the defendant had no intention of using or selling them. Advocate Steenson made a similar argument in relation to the MDMA. 16. The judgment of the sentencing court made reference to the MDMA being "no longer usable". That is not what was said to the sentencing court in the Attorney General's conclusions, which merely referred to the tablets having been there so long that they had disintegrated to powder. The States of Jersey drug expert stated that the powder itself had a high value in a region commensurate with the valuation of the tablets it represented. It follows from this that the MDMA was usable in powder form and had a commensurate street value. 17. Advocate Pedley submitted that it is easy for a defendant in these cases to declare that the drugs were being minded for another; such a claim is as hard to disprove, as it is to prove. The Crown in moving for sentence proceeded on the basis that the defendant was knowingly concerned in the supply of this cannabis and that he was simply in possession of the MDMA powder, having regard to the criminal standard of proof, but we were concerned here with confiscation, which not only applies the civil standard, but allows assumptions to be applied, assumptions which in our view were not rebutted. The fact of the matter is that, notwithstanding the basis of plea, all of these drugs at the time of the defendant's arrest constituted property held by him in connection with the offences charged and the Court determined that he benefitted to the extent of their street value. 18. Advocate Steenson then argued that in assessing the proceeds from the defendant's six years of cannabis sales, the Court should have regard to the profit he made on each sale, as opposed to the turnover. The defendant, who gave evidence, calculated that the profit he made on each sale of a one 100 gram bar of cannabis was £150, and assuming an average of one sale a week, that would produce proceeds of £46,800 over six years, as opposed to the net figure of £205,823.56p assessed under the Attorney General's Statement. 19. Advocate Steenson referred to the judgment of Sir Christopher Pitchers, Commissioner, in *AG v Warren*

- [2013] JRC 224 . In that case, Warren had been convicted of conspiracy to import cannabis into Jersey, and in assessing the benefit figure, the Court heard evidence as to the profit he had made on various importations. The Court was satisfied from that evidence that Warren had laundered £10 million on ten occasions which "was a considerable under-estimate of the amount of his benefit, within the meaning of that term in the Law" (paragraph 22). The Court found Warren's benefit from drug trafficking was at least £198 million. That judgment, however, does not support the contention that in assessing the benefit figure, the Court should have regard to profit rather than turnover, an issue that was addressed directly by Sir Christopher Pitchers in the later case of *AG v Norris* , where he says at

paragraph 6:- "6 Valuing the proceeds of previous drug deals:- (i) Proceeds means gross receipts i.e. turnover not profit; (ii) If there is a series of transactions, the sale price of each may be aggregated but it would be double counting to include both the purchase and the sale price; (iii) Where a transaction has not been completed, the value of the drugs unsold may be included in the benefit figure." 20. In our view, this states the position correctly, and that in valuing the proceeds of previous drug deals proceeds means gross receipts, i.e. turnover, not profit, with the sale price of each deal being aggregated. 21. Advocate Steenson submitted that valuing the proceeds of previous drugs deals by turnover and not profit was unfair, if not draconian. An initial purchase would have been made from legitimate sources, the proceeds being re-invested back in further acquisitions, in what would be a rolling turnover, the benefit being the profit. However this is how the regime under the Proceeds of Crime Law operates, and, as Sir Christopher Pitchers said in AG v Norris, it was intended to be a severe regime. The Court is given a discretion as to whether or not to carry out the steps involved and can disapply the assumptions, if there would be a serious risk of injustice. As Sir Christopher Pitchers said at paragraph 9 of AG v Norris, any order made must be proportionate and the purpose of the discretion given by the Proceeds of Crime Law is to protect a defendant from unjust confiscation. We were satisfied that the orders we were asked to make were proportionate, and, given the nature of the regime, just. 22. Finally the defendant said he kept his illicit earnings from drugs and his legitimate income separate, that legitimate income being derived from rental income on flats and storage containers at his home, and other legitimate projects in which he dealt in cash. He estimated his legitimate income at some £18,000 to £20,000 a year. He kept a separate kitty of cash for his drug dealing, and his legitimate earnings were banked, explaining all the deposits, which he said constituted legitimate income untainted by his drug dealing. The boat and motor vehicles would also have been acquired from that legitimate income. Items (ii) to (viii) of the benefit figure put forward in the Attorney General's Statement were therefore incorrect. 23. The defendant's evidence in this respect was entirely at odds with the chaotic state of affairs found by the police when the defendant's home was searched, with drugs and cash in various quantities and amounts being found in numerous locations. In our view, the assumption that all of this property was received as a result of or in connection with the charged offences was not shown to be incorrect by his evidence. 24. Accordingly and in summary, the Court determined that the defendant had benefited from drug trafficking in the sum of £559,388.72p. Confiscation Order 25. There was no dispute as to the amount of the confiscation order, in that the amount to be realised comprised the cash seized and held in bank accounts, totalling £68,684.98p and the estimated value of the boat and vehicles, totalling £44,400. Accordingly, a confiscation order was made in the sum of £113,084.98. Authorities Proceeds of Crime (Jersey) Law 1999. AG v Simon

[2018] JRC 076A . AG v Norris

[2015] JRC 174 . R v Islam

[2009] UKHL 30 . AG v Warren

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