

JERSEY / JUDGMENT

AG -v- Warren [2013] JRC 205 (21 October 2013)

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JUDGMENT

THE commissioner: 1. This is an application by Advocate Baker on behalf of Mr Warren for me to stay these proceedings as an abuse of process. 2. I start with the Article under which this application is brought. It is Article 3 of the Drug Trafficking Offences (Jersey) Law 1988 and it reads as follows:- "(1) Where a person appears before the Court to be sentenced in respect of one or more drug trafficking offences

- (a) if the Attorney General asks the Court to proceed under this Article; or
 - (b) if the Court considers that, even though the Attorney General has not asked it to do so, it is appropriate for it to proceed under this Article it may act as follows.
 - (2) The Court may first determine whether the person has benefitted from drug trafficking.
 - (4) If the Court determines that the person has so benefitted, the Court may, before sentencing or otherwise dealing with the defendant in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with Article 8 the amount to be recovered in the person's case by virtue of this Article.
 - (5) the Court may then, in respect of the offence or offences concerned -
 - (a) order the person to pay that amount;
 - (b) take account of the order before -
 - (i) imposing any fine on the person, (ii) making any order involving any payment by the person, or (iii) making any order under Article 29 of the Misuse of Drugs (Jersey) Law 1988, and
 - (c) subject to sub-paragraph (b), leave the order out of account in determining the appropriate sentence or other manner of dealing with the defendant."
3. Two points arising from that Article at this stage. It is clear, as Advocate Baker rightly points out, that there is a discretion at the different stages of the procedure which existed in earlier UK legislation but does not now, as to whether the Court will proceed or not. Secondly, there is the power in the Court under Article 1(b) to proceed whether or not the Attorney General has asked it to do so. This,

as I say, can be contrasted with the UK legislation which under the Proceeds of Crime Act 2002, Section 6 says this:- "(1) The Crown Court must proceed under this section if the following two conditions are satisfied.

- (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;
- (3) The second condition is that -
 - (a) the prosecutor or the Director asks the court to proceed under this section, or
 - (b) the court believes it is appropriate for it to do so And the procedure that then follows is obligatory, the Court 'must' do x, y and z as opposed to 'may', in the Jersey legislation. 4. The approach to be taken in respect of these cases where there is an application to stay because of an abuse of process was helpfully summarised in the English case of CPS (Durham)-v-Nelson reported at [2010] 2 WLR page 788. That was an application under the UK legislation which, of course as I say, does not have the element of discretion in the Court at the different stages. At paragraph 34 of the judgment of the then Lord Chief Justice Lord Judge he said this:- "34 One of the problems illustrated in these cases and in a number of other cases to which our attention was drawn, is that Crown Courts up and down the country are concerned about the possible consequences of the draconian legislation provided by the developing confiscation regime set out in the Criminal Justice Act 1988 as amended, the Drug Trafficking Act 1994, and the Proceeds of Crime Act 2002. Indeed we detect that orders staying confiscation proceedings are perhaps too readily being made in Crown Courts. 35 Abuses of the confiscation process may occur and, when they do, the appropriate remedy will normally be a stay of proceedings. However an abuse of process argument cannot be founded on the basis that the consequences of the proper application of the legislative structure may produce an "oppressive" result with which the judge may be unhappy. Although the court may, of its initiative, invoke the confiscation process, the responsibility for deciding whether properly to seek a confiscation order is effectively vested in the Crown. When it does so, the court lacks any corresponding discretion to interfere with that decision if it has been made in accordance with the statute. The just result of these proceedings is the result produced by the proper application of the statutory provisions as interpreted in the House of Lords and in this court. However to conclude that proceedings properly taken in accordance with statutory provisions constitute an abuse of process is tantamount to asserting a power in the court to dispense with the statute." 5. A number of points to be made in respect of that citation from Nelson. Firstly, although it is an authority under the more mandatory provisions of the UK legislation it does provide, in my judgement, general guidance in this sort of case. Secondly, although it is true that the UK legislation greatly restricts, indeed removes altogether the discretion of the Court, it does not remove the discretion of the Prosecution. The rest of the judgment underlines the fact that the Prosecution has a discretion whether to proceed or not and hence the same sort of application as is made here could be made if that decision to proceed was made on an

abusive basis. Thirdly, it underlines the argument that an abuse of process application should only be sparingly allowed and that it should not be allowed where what is happening is simply the working out of the processes that the legislature has decreed. 6. It also reinforces later in the judgment the point that the abuse argument must relate to the confiscation proceedings themselves and not to other proceedings that have led to the confiscation particularly in relation to the conviction. That last point is important here because a number of the arguments deployed by Advocate Baker on behalf of Mr Warren in truth relate to complaints about disclosure, not in respect of confiscation, but in respect of the original trial or the judicial review proceedings that are underway at the moment in respect of the disclosure in those judicial review proceedings and, as I say, are not relevant to this application. I turn then to the arguments that are advanced in this case. 7. The overarching argument advanced by Advocate Baker is that the sole purpose of these proceedings by the Prosecution is to ensure that Mr Warren gets a longer prison sentence and that the application, they say, has nothing to do with any desire to recover the proceeds of crime from the defendant. That argument, in my judgement, goes too far on analysis. It involves a proposition, which at one time was expressly set out by Advocate Baker in argument, that the Prosecution know that he never profited from drug trafficking but intend to try and prove that he did in order to ensure that he gets a prison sentence for not paying up. In fact, that cannot be so. The Prosecution's case, whether it is accepted or not of course, by the Jurats, will be for determination during the course of the proceedings, is that he profited extensively from drug trafficking and he has hidden away substantial assets. Where Advocate Baker's argument has more force, is when it comes to the question of their belief as to whether he will admit that he had such proceeds of drug trafficking and will pay up. If the Prosecution bring these proceedings and are able to establish on the evidence that he profited substantially from drug trafficking and must have hidden assets because he profited much too much for those assets simply to have been dissipated, even though he has been in custody for so many years, then any prison sentence that later follows in default comes not from any prosecutorial decision, but from the operation of the Law, this assuming that he has not taken to opportunity of demonstrating by his evidence that he profited much less than is alleged against him, and that he has assets which he will now hand over in satisfaction of any order made against him. In my judgement the general argument fails in that any sentence in default that he might have to serve would be brought about by the operation of the Law and not by the Prosecution bringing confiscation proceedings which they know to be completely unfounded. 8. Dealing now with the particulars of the application that Advocate Baker makes. Some of the complaints relate to the time that has elapsed since the profiting is alleged to have taken place and also a similar point that the passage of time has meant that some documentation or evidence which would otherwise have been brought no longer exists, in particular for example, the surveillance tapes of the TEB foreign exchange office. In my judgement all of those arguments which I have summarised in short form, though they were deployed at greater length, are arguments as to the strength of the evidence which the Defence can explore and set out again during the hearing. It is not an abuse, in my judgement, to proceed against the background of the

passage of time in respect of the offences alleged or in against the background of the absence of some of the evidence. 9. Deserving of more detailed consideration is the argument that it is an abuse for the Attorney to proceed because there was an agreement that he would not do so. I turn now to look at the correspondence that passed between Advocate Baker and the Attorney General's office in the run up to the trial which led to the present proceedings. On 21 st January, 2009, Advocate Baker wrote to the Crown Advocate who then had the conduct of this case and he says this:- "So that I can advise my client fully on plea it would be of assistance if the Crown were prepared to indicate to me the sentence it was minded to move for in the event of a guilty plea. It would also be of assistance to know what the Crown's position is as regards confiscation or other financial penalty. There appears to be no suggestion of benefit from the offences charged on the Indictment. Given that Mr Warren has been at liberty for less than one month in the last decade, I therefore anticipate there will be no application for confiscation. I will be grateful if you could clarify the position. My client is aware that the sentence is ultimately a matter for the Court." In his response Advocate Gollop, who was then the Crown Advocate with responsibility for the case, after dealing with the question of sentence, which is not directly relevant now, says at paragraph 3:- "You have raised with me the question of any confiscation proceedings. I can advise that as matters currently stand the Crown would not be seeking a confiscation order against your client." He then deals with the submissions that the Crown would make were there to be a guilty plea by Mr Warren and what he would argue the ultimate sentence ought to be. 10. Of course Mr Warren, as he was fully entitled to, maintained his not guilty plea, and was duly convicted but before that had happened the prosecution had been taken over by Crown Advocate Sharp, as he then was, Solicitor General who appears before me today. A letter in, I think identical terms, was written by Advocate Baker to Crown Advocate Sharp, as he then was, and this was dated 2 nd September, 2009. This is the response, after setting out the various matters that were relevant to sentence and the conclusions that the Attorney General intended to present, Crown Advocate Sharp said this at the end of the letter:- "In respect of confiscation it is likely that the usual practice will be followed and I will seek a nominal confiscation order. The Attorney General has as yet not reached a view on whether to open a financial investigation. If there is a guilty plea I shall not seek an order for costs, if there is a conviction after trial I would then ask for all the prosecutions costs." 11. As I have indicated, and as is self-evident, after those letters Mr Warren continued to assert his innocence, as of course he was fully entitled to do, had a full trial and was, in due course convicted. It is not suggested that he altered his position in any way adversely as a result of those indications given to him, indications which were not firm in relation to never proceeding in respect of confiscation, but in any event would have been against the background of the Court's power of its own initiative to start confiscation proceedings against him. This very argument was indeed deployed by Advocate Baker when, at the sentencing hearing before sentence was passed, the prosecution then being conducted by Crown Advocate Sharp, indicated that they intended to proceed to apply for an order for confiscation and setting out in very short summary form particularly the allegations in relation to matters that ended in the unsuccessful trial in Newcastle. Those were answered,

again in summary form, but in exactly the same way by Advocate Baker as he advances this argument today. He did not speak in terms of abuse of process, but he referred to the correspondence and said that it would be wrong for the Prosecution to proceed to make an application for confiscation, having given the indication that they did in the letters, first of all from Crown Advocate Gollop, and then from Crown Advocate Sharp. That argument was not accepted by the sentencing court who then adjourned the confiscation proceedings. 12. In my judgement, looking at all of the facts relating to that part of the case, it is not an abuse for the Prosecution now to proceed to apply for confiscation and accordingly I reject Advocate Baker's application that this case should be stayed as an abuse of process. Authorities Drug Trafficking Offences (Jersey) Law 1988. Proceeds of Crime Act 2002. CPS (Durham)-v-Nelson

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