

JERSEY / JUDGMENT

AG -v- Warren [2013] JRC 224 (19 November 2013)

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JUDGMENT

THE commissioner: 1. On 7 th October, 2009, the defendant was convicted by a jury of conspiracy to import cannabis into Jersey. He was sentenced to 13 years' imprisonment. The Attorney General's application for a confiscation order was adjourned. The defendant appealed to the Court of Appeal and to the Privy Council. The application for confiscation was finally heard between 21 st October and 5 th November, 2013. On the latter date, the Court announced its decision, namely, that there would be a confiscation order against the defendant in the sum of £198 million, that he would have 28 days to pay that sum, and in default of payment would serve 10 years in prison. The Court now gives its full reasons for that decision. 2. Because of the unusual nature of the case, I gave my directions of law to the Jurats in open Court before we retired. What follows in paragraphs 4 - 15 are those directions with minor alterations, and with authorities added where relevant. The Law 3. The application is brought under the provisions of Article 3 of the Drug Trafficking Offences (Jersey) Law 1988 :- (1) Where a person appears before the Court to be sentenced in respect of one or more drug trafficking offences (and has not previously been sentenced or otherwise dealt with in respect of the conviction for the offence or, as the case may be, any of the offences concerned), then - (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 benefited from drug trafficking. (3) For the purposes of this Law, a person who has at any time (whether before or after the commencement of this Article) received any payment or other reward in connection with drug trafficking carried on by the person or another has benefited from drug trafficking. (4) If the Court determines that the person has so benefited, 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) (6) (7) The standard of proof required to determine any question arising under this Law as to - (a) whether a person has benefited from drug trafficking; or (b) the amount to be recovered in the person's case by virtue of this Article, shall be that applicable in civil proceedings. 4. There are three questions which

the Court must ask itself in deciding applications under this Article. 5. Has the Defendant benefited from drug trafficking? The burden of proving that he has is on the prosecution. They do not have to prove it beyond reasonable doubt; they must establish it on the balance of probabilities, that is to say that it is more likely than not. Advocate Baker has not argued on behalf of the defendant that the prosecution have not discharged the burden in relation to this question. 6. What is the amount of his benefit? Again the burden of proving this is on the prosecution and again the standard they must achieve is on the balance of probabilities. The figure the prosecution says it can establish in demonstrating the amount of his benefit is based upon two areas of evidence:- (i) the admissions in the intercepts concerning the money-laundering, in shorthand, of '10-15 million a week', and (ii) the "Tony Liverpool" account. 7. Whatever sum the Court finds to be proved must then, as required by the Law, be uprated to take account of inflation. It is for that reason that higher figures have been given by the Solicitor General. 8. As a matter of law it is still the defendant's benefit, even if he has obtained the money jointly with others. See, for example, R-v-Ahmad

[2012] 1 WLR 2335 . 9. The way in which they seek to prove their case does not depend upon their proving his exact role in the 1991/1992 importations, nor the various other importations and deals that they say they can connect him with. That evidence though is important background evidence when the Court considers whether it is plausible that what the Crown say are admissions as to laundering £10-15 million a week are to be accepted as such. They argue that that places the conversation in context and demonstrates that his assertion, if that is what the Court finds it to be, that he did launder that amount, to use his words, "sometimes" is plausible and there would be the money to support it. 10. What sum is recoverable from the Defendant? Once the prosecution has established the amount of his benefit in a particular sum, the Court then considers what sum is recoverable from him. The starting point is the amount of his benefit. So far as this question is concerned the burden then shifts to the defendant to prove, again on the balance of probabilities, that his realisable assets are less than this amount. 11. It is not necessary for the prosecution to produce any evidence that he has apparent or hidden assets in the sum claimed, although they may adduce such evidence as they have here. They do not have to prove that he still has £198 million, but he must prove that he does not. 12. The defendant did not give evidence. He was not obliged to do so, but since the burden of proving that his assets are less than his benefit rested on him on the balance of probabilities, it meant that he had adduced no account from himself to discharge that burden. A defendant who does not give evidence will inevitably find it difficult to discharge the burden that the law imposes on him. (See R-v-Mackintosh and Marsden

[2011] 1 Cr App R (S) 60 at para 15 and R-v- Mahmood

[2013] EWCA Crim 325 at para 31). 13. In considering this question the Court must take into account the other evidence that he has adduced and any material in the prosecution case that is relevant to this issue. 14. Discretion . At each stage the Law under which these proceedings are brought says that the Court "may" carry out one or other of the steps of

the confiscation process. This obviously gives the Court a discretion whether to take that step or not. However that discretion must be exercised on rational grounds. The Court exercises any discretion against the background of the purpose of the statute. 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, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime. As was said in *R-v-May*

[2008] WLR 1131, it is not to be doubted that this severe regime goes further than the schoolboy concept of confiscation. 15. It is against that background that the Court in exercising its discretion considers the question of whether there is a real risk of serious injustice if the order is made. The order must be proportionate. The purpose of the discretion given by the law is to protect a defendant from unjust confiscation. It is not there to punish the authorities for any perceived or proved bad behaviour. (See the judgment of Lord Woolf CJ in the Court of Appeal in *Benjafield*

[2001] 3 WLR 75 and the speech of Lord Steyn in the House of Lords in *R-v- Rezvi*

[2002] 2 Cr App R 2). 16. Two other matters of law:- (i) Expert evidence . Mr Saggars was called not to give factual evidence but to give evidence as an expert on behalf of the prosecution, which allowed him to give evidence of opinion in a way that an ordinary factual witness could not. His evidence is not disputed, indeed Mr Baker in his final submissions relied upon it to some extent. Expert evidence is permitted in a criminal trial to provide the Court with information and opinion which is within the witness's expertise but which is likely to be outside the Court's experience and knowledge. It is important that the Court see it in its proper perspective which is that it is part of the evidence as a whole to assist the Court with regard to one particular aspect of the evidence, here drug prices and practices, drug slang and the like. Because he was called as an expert he was entitled to express his opinion. The Court was entitled to have regard to this evidence and the opinion that he expressed when coming to its own conclusion. The Court bore in mind that it did not have to act upon it and must consider all of the evidence before reaching a

conclusion.

(ii) Delay . This case is concerned in part, with events which took place a long time ago. The Court had regard to the potential consequences of that. To a limited extent this case depended upon the memory of witnesses. To the extent that it did, the Court made allowance for the fact that with the passage of time memories fade and witnesses cannot be expected to remember events with the same clarity even refreshing their memory from contemporaneous notes, as they would had they been asked to give evidence at the time. Perhaps a more important consequence in this particular case was the fact that some of the original documents and tapes which would have been available had this hearing been closer to the time of the events are no longer in existence. The Court also made allowance for the fact that from the defendant's point of view where a detailed explanation of a particular incident might have been possible near the time, the

longer that has passed since the incident the more difficult it may be for him to give that detailed explanation. Has the defendant benefited from drug trafficking? 17. Having regard to his conviction in Holland and the other evidence in the case, this was not disputed by the defence. They accepted that the prosecution had discharged their burden in relation to this question. What is the amount of his benefit? 18. '£10 to £15 million a week'. In answering this question, the prosecution relied on two areas of evidence. The first was a covert recording of a conversation between the defendant and an associate, Zulfu Vatandas, in Zoetemeer prison on 25 th April, 2004. During the course of the conversation (Vol. III.221), the defendant said "...sometimes we'd do about £10 or £15 million in a week/3 or 4 days for me". Having listened to the tape several times, the Court was sure that the transcript is accurate. The Court was also satisfied from the full context of the conversation that the defendant was talking of money laundering and that he was not just bragging. He was talking to trusted associates to whom he would have no reason to boast. 19. The prosecution argued that it would be proper to infer that, in the context of the whole of the evidence, "sometimes" should be taken as being at the very least ten occasions and, applying the lower of the two figures, that meant that the defendant was there admitting to benefitting from drug trafficking in at least the sum of £100 million. The context of the conversation makes clear that the defendant is describing regular money laundering in very large sums up to £15 million. The question for the Court was whether, on the balance of probabilities, the prosecution has established that this would amount to at least ten times £10 million. 20. The Court considered this argument against the background of all the evidence. This demonstrates absolutely clearly that the defendant was involved in drug dealing on an enormous scale yielding huge profits, that that continued over the years and was not brought to an end by his incarceration. The Court accepted the evidence of Mr Saggars as to the coded references in the intercepts and as to the price of different drugs at different times. The Court did not accept the assertion of Advocate Baker that the defendant is given to wild boasting. While it may be plausible that he would boast of his wealth to a helicopter pilot, his disclosures in the intercept material are in the course of business conversations with trusted associates. 21. In Summary:- (i) His close involvement in two huge shipments of cocaine in 1991 and 1996 was not only clearly demonstrated on the evidence but, in respect of one, on his own admission through his counsel in the 2004 asset recovery proceedings, that he was a major participant. The profit on a 500 kilo importation sold wholesale would be at least £10 million. (ii) References in the intercepts to other importations of cocaine. For example his dealings with 'the father and son'. (iii) The defendant remained in contact with Mario Halley who was a major player in the 1991 importation and who visited him in prison in Holland in 2003. (iv) References in the intercepts to 10 million ecstasy tablets and other ecstasy deals. The profit per tablet would depend on when and where it was sold, but would be in excess of £1 wholesale. If they were being sold on the street, the profit would be much greater. In the 1990s, the street price of one tablet was £5-£10 in the UK and three times that in Australia. (v) The defendant speaks of deals involving 'smack' and 'horrible', meaning heroin, of tens of kilos. A 54 kilo importation organised by the defendant was intercepted at Dover in October 1996. The profit would be at least £10,000 a kilo. (vi) The defendant speaks of multi-tonne importations of cannabis probably from Morocco. A tonne of cannabis was recovered from 'The Shed' in Holland. At wholesale prices, the profit would be £1000 a kilo or more. (vii) Regular references to the

export of household goods clearly relate to large drugs deals. To take one example, it is absurd to suppose that the defendant had decided to branch out into installing bathrooms when he refers to '3000 bathroom interiors to Russia'. (viii) The defendant was capable of continuing his drug-trafficking activities quite unperturbed, despite sustaining massive losses by way of seizures of importations by British and Dutch Customs. (ix) The Dutch investigation concluded that his turnover from drug dealing over a few months would be £17 million and his net profit £12 million. (x) Although the matters set out in this and the following sub-paragraph post-date the relevant conversation, they demonstrate that the defendant was continuing to deal while in custody. He made thousands of calls from HMP La Moye in 2008 and 2009 to known criminal associates and all over the world. (xi) The pattern of calls to Christopher Burgan in June 2008 very strongly suggests that the defendant was arranging the importation of heroin seized from Burgan at Dover on 11 th June, 2008. (xii) The defendant's defence at trial in Jersey was that he was 'a sophisticated and successful career criminal' who would hardly trouble himself with importing 180 kgs of cannabis into Jersey. 22. The Court was satisfied that all of the evidence established that the prosecution case that the defendant had laundered £10 million on ten occasions, or its equivalent, was fully justified and was a considerable underestimate of the amount of his benefit within the meaning of that term in the Law. 23. The Tony Liverpool account . Between October 1994 and September 1996, £11,748,310 were converted into foreign currencies including Deutschmark and Dutch guilders through an account at the TEB Bureau de Change in King's Cross in the name of Tony Liverpool. The account had been opened in 1992 but no other records survive. In the asset recovery proceedings referred to above, the defendant's counsel asserted in the clearest possible terms that this was his account. That assertion was repeated after counsel and solicitor had visited the defendant in prison. 24. These admissions would be ample evidence to prove that this account is the defendant's but it is confirmed by covert surveillance of known associates of his visiting the TEB sometimes having travelled from Liverpool and intercept evidence concerning money laundering. These visits and intercepts can in part be married up to transactions on the account. 25. The Court had no doubt that this account was the defendant's. Indeed it was not really challenged by the defence. 26. Adjusting the sums proved to be the defendant's benefit from drug trafficking to take account of the change in value of money, the Court finds that the defendant's benefit is at least £198 million. What sum is recoverable from the Defendant? 27. The sum recoverable from the defendant is the amount of his benefit unless he establishes on the balance of probability that his realisable assets are a lesser amount. As set out above, the defendant called no evidence. As Mackintosh above makes clear at para 15:- "a Defendant who is found not to have told the truth or who has declined to give truthful disclosure will inevitably find it difficult to discharge the burden imposed on him. But it may not be impossible for him to do so. Other sources of evidence apart from the Defendant himself, and a view of the case as a whole, may persuade a Court that the assets available to the Defendant are less than the full value of his benefit." 28. The Court has considered the material that he has submitted. That material does not really touch directly on this issue at all. It establishes that Brian Charrington, the defendant's associate in relation to the 1991 importation is himself a major drug dealer with considerable assets and corrupt relations with police and customs. Further it confirms that Mario Halley was involved in major drug dealing. Other admissions are

relevant to the exercise of the Court's discretion considered at paragraph 30 below. 29. The prosecution case establishes the enormous profits that the defendant has made from drug trafficking. They are not obliged to adduce any evidence as to the defendant's realisable assets. They have, however, done so. The bundle of documents described as the asset folder is derived from the Dutch investigation. While it does not prove that the defendant holds assets in a certain sum, it does strongly support the argument unchallenged by any evidence from the defendant, that he owns valuable assets and has interests in multi-million pound businesses worldwide, that he has easy access to very large sums in cash and acquires property in the name of others. There is no evidence to suggest that these assets have been dissipated over the years. We also had compelling evidence that he had not lost contact with his associates in spite of his long sentence of imprisonment. Exercise of discretion 30. Having concluded that the prosecution had established that he had benefited in the sum of £198 million and had not discharged the burden on him to show that his realisable assets were less than this sum, the Court considered whether it should exercise its discretion and not make what would otherwise be the proper order. The defence had argued that the Court should not make an order on three bases. 31. Evidence was adduced by the defence of corrupt or improper behaviour by police and customs in relation to dealings with the defendant and others. This may or may not have been relevant to other proceedings and has on several occasions been adjudicated on by courts. However, this Court does not regard this behaviour as a proper basis for exercising its discretion not to make a confiscation order. 32. A request was made to the UK Attorney General during the course of the hearing on 29 th October, 2013, to give an undertaking that any admissions of criminal conduct made by the defendant in evidence during the Jersey confiscation hearings should not be used in evidence in any criminal proceedings in the UK. It was not clear why this request had not been made earlier. The UK Attorney General declined to give such an undertaking. Such protection would have been available to the defendant had he been giving evidence in England. This refusal did not prevent the defendant from giving evidence in Jersey. If any proceedings had been taken in England based upon his answers in Jersey, he could have argued that the reception of the evidence in those proceedings would be unfair but it did not make these proceedings nor an order made in them unfair. 33. Before the Jersey trial, correspondence had passed on two occasions between Advocate Baker and Crown Advocates as to what their position as to confiscation would be in the event of a guilty plea. They responded respectively: "As matters now stand, the Crown would not be seeking a confiscation order" and "it is likely that the usual practice will be followed and I will seek a nominal confiscation order". Those indications were clearly given on the basis of there being a guilty plea. The defendant did not alter his position to his detriment following those indications. He pleaded not guilty and as indicated above argued that he was too sophisticated and successful a career criminal to become involved in a conspiracy of the kind charged. 34. The Court did not consider that it would be unjust or disproportionate to make a confiscation order. Period in default. 35. After it had announced its decision on the three relevant questions, the Court heard submissions as to the appropriate period in default of payment and any time to pay the confiscation. 36. Under Art. 11(1)-(3) of the Law, the Court may order a sentence of imprisonment of up to ten years to be served in default of payment of a confiscation order. The Court of Appeal in Castillo

[2011] EWCA Crim 3173 at para 12 summarised the principles to be applied to these cases. That court noted in particular that the purpose of the default term is to secure payment of the confiscation order and the court is not to be influenced by the overall totality of the sentence passed for the crime plus the default term. 37. This is undoubtedly the largest order made in Jersey and it is hard to imagine a case where a larger one would be made. The Court therefore concluded that the maximum of 10 years was appropriate to secure the payment of the sum ordered. 38. Advocate Baker asked for a period of 18 months to make payment. The purpose of giving a defendant time to pay is either to allow for periodical payments to be made or to enable the defendant to have time to realise his assets to satisfy the order. The Court was willing to receive evidence that the defendant could, if given time, liquidate assets which would have enabled him to make payment. No such evidence was forthcoming nor did his advocate advance any argument as to why payment would be made in that time. The only relevant event during that time would be the defendant's release from prison on licence. Once released from custody, it is clear that his wide range of criminal contacts, his vast wealth and his proven ability to obtain false passports would ensure that he would leave the UK and the order would never be satisfied. If authority is needed for the proposition that it is proper to make an order which will not allow a defendant to abscond without paying the sum due, see Ahmad above at para 68. The Court therefore ordered the defendant to pay the sum ordered in 28 days. 39. The Court adds as a footnote, a reminder that the defendant may apply under Art. 21 for a variation of the amount of the order and any period in default should he wish to make full and truthful disclosure of his realisable property. Authorities Drug Trafficking Offences (Jersey) Law 1988. R-v-Ahmad

[2012] 1 WLR 2335 . R-v-Mackintosh and Marsden [2011] 1 Cr App R (S) 60. R-v- Mahmood

[2013] EWCA Crim 325. R-v-May [2008] WLR 1131. Benjafield

[2001] 3 WLR 75. R-v- Rezvi

[2002] 2 Cr App R 2 . Castillo

[2011] EWCA Crim 3173. Page Last Updated: 17 Aug 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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