

JERSEY / JUDGMENT

Hawkins v AG [2024] JRC 121 (24 May 2024)

[2024] JRC 121

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JUDGMENT

THE DEPUTY BAILIFF: 1. At the conclusion of the hearing on 2 May 2024, we dismissed the appeal in this case. 2. We now give our reasons for so doing. The facts 3. At 10.40pm on 11 December 2023, the Appellant was seen driving a Fiat motorcar on St Saviour's Road by a police officer. The Appellant parked the car outside a pizza restaurant on St Saviour's Road and went inside to collect food. The officer observing the Appellant knew that he only held a provisional driving licence and that on a previous occasion the Appellant had told him that he was uninsured to drive a vehicle. When the Appellant came out of the restaurant, he was approached by the police officer. He was asked to stop. The Appellant ran away. He was pursued until the officer caught up with him. He then walked back to the restaurant and other police officers arrived. The other officers described that the windscreen insurance disc displayed on the car was for another vehicle and, in any event, had expired on 20 October 2023. The Appellant was issued with a statutory form requiring him to produce his licence and proof of insurance. He was also invited to attend police headquarters on 13 December 2023. He was unable to produce a driving licence or proof of insurance. In interview, he made no comment. He had been disqualified from driving in March 2021 with a condition to take a re-test. The Appellant's antecedents 4. The Appellant is twenty-eight years old. In June 2014, he was convicted of, inter alia, driving without insurance on two occasions, reckless or dangerous driving and many other driving offences. He was put on probation and ordered to perform community service, and disqualified from driving for three months until the required test was passed. 5. Other relevant convictions include driving whilst disqualified in 2018, for which he was disqualified from driving for twelve months and ordered to perform ninety hours community service. On the same occasion, he was also sentenced for using a windscreen insurance disc with intent to deceive and sentenced to community service for fifty hours, and for driving without insurance for which he was disqualified for twelve months and ordered to perform one hundred and twenty hours community service. 6. He was convicted of other motoring offences in May 2019 and in March 2021 convicted, inter alia, of causing serious injury by careless driving for which he was disqualified from driving for twelve months, ordered to perform one hundred and ten hours community service and disqualified until the required test was passed. The hearing in the Magistrate's Court 7. The Appellant was sentenced by the Magistrate on 27 February 2024. As the Appellant had not passed his driving test and was driving in breach of the terms of his provisional licence, he was driving whilst disqualified in December 2023. In the course of sentencing it was confirmed by the Crown that this was the Appellant's

fourth offence of driving without insurance and second offence of driving whilst disqualified. 8. The Crown applied for a forfeiture order in relation to the car. The Crown said " The vehicle was in possession at the time of the offending, it was used for the purpose of committing the offence, and the circumstances are such that it was clear that the vehicle was intended to be used for committing the offence" . The Crown said they did not have information as to the value of the vehicle, but that it was a modern (as opposed to old fashioned) Fiat 500 three-door vehicle. The Appellant was the registered keeper. 9. The Appellant's counsel relied upon the case of AG v Dorynek , to which we will turn below, and said that the Court did not have the power to order the forfeiture of the vehicle. The Magistrate was directed to the provisions of the relevant statute, the Criminal Justice (Forfeiture Orders) (Jersey) Law 2001 ("the 2001 Law") and the need of the Court to have regard to the value of property and the likely financial and other effects on the offender of making the order. 10. She was also referred to the Projet de Loi which accompanied the 2001 Law in this case, to which we will also refer below. 11. Defence counsel accepted and adopted the description of the Appellant's driving record as " appalling " and said that this was accepted by the Appellant. It was accepted that the custodial threshold was passed and that the Appellant had outstanding fines. Counsel for the Appellant said that the Appellant bought the car six years ago for £7,000 and did not know the exact value of the car at the date of the hearing. It was said that the Appellant had spent money on wheels, seats, interior stereos and that " a lot of money has gone into it ". Counsel for the Appellant said that these were " not the sort of things that necessarily increases its value but certainly the costs have been great ". 12. The Magistrate retired at the end of mitigation and returned with her decision. The custodial sentence that she imposed is not appealed, nor could it be. The total sentence was seven months imprisonment. The period of disqualification of twenty-four months is also not appealed. 13. In relation to the only part of the sentence which is appealed, namely forfeiture of the car under the 2001 Law, the Magistrate said: "There is the question of forfeiture of the vehicle under Article 2, and I do make an order for forfeiture. I do not know the exact value of this car. It was purchased for £7,000 six years ago and so it will have devalued anyway, even though you have put bits and pieces on it, and it might be valuable to you, but you are not a driver and you are not going to be a driver for at least the next two years. So this vehicle has been used in other offences and I am very much taking that into account. It is not just on one occasion that you have committed a driving offence using your car. I have looked at the case that the Defence gave me. This is the case of Dorynek, who was a man carelessly driving a motorboat effectively, and the Royal Court said that they would not order forfeiture in that case because forfeiture (I think what they are saying) should not apply every time somebody commits a road traffic offence. But the report on the law referred to it not being the sort of law that would be exercised when, for example, somebody with a modest excess of alcohol in his blood drove a vehicle, and they contrast that with a getaway car at the scene of a burglary. That is not to say that no road traffic offence can carry forfeiture. I think persistent road traffic offences with the same vehicle is a matter where the justice of the situation is met by forfeiture of the vehicle. So I do order that that vehicle will be forfeited. It will be seized by the police, unless they have it already. Then they will dispose of it. That order is made under the Criminal Justice (Forfeiture Orders) (Jersey) Law 2001." Test on appeal 14. There were two aspects to the appeal. The first was a question of law upon which I needed to direct the Jurats,

namely whether or not a forfeiture order could extend to the car in the circumstances of this case. The second was a question of discretion for the Jurats to determine, i.e. whether the forfeiture order was wrong in principle or manifestly excessive. 15. The Appellant appealed on both bases, namely that the Magistrate erred in law and erred in the way that she exercised her sentencing discretion in this case. The legal principles 16. The starting point is the 2001 Law. The relevant provisions are as follows: "2. Power to deprive offender of property used, or intended for use, for purposes of crime (1) Subject to the following provisions of this Article, where a person is convicted of an offence and - (a) the court by or before which the person is convicted is satisfied that any property which has been lawfully seized from the person or which was in the person's possession or under the person's control at the time when he or she was apprehended for the offence or when a summons in respect of it was issued - (i) has been used for the purpose of committing, or facilitating the commission of, any offence, or (ii) was intended by the person to be used for that purpose; or (b) the offence, or an offence which the court has taken into consideration in determining the person's sentence, consists of unlawful possession of property which - (i) has been lawfully seized from the person, or (ii) was in the person's possession or under the person's control at the time when he or she was apprehended for the offence of which he or she has been convicted or when a summons in respect of that offence was issued, the court may make an order under this Article in respect of that property, and may do so whether or not it also deals with the offender in respect of the offence in any other way. (2) In considering whether to make such an order in respect of any property a court shall have regard - (a) to the value of the property; and (b) to the likely financial and other effects on the offender of the making of the order (taken together with any other order that the court contemplates making). (3) Facilitating the commission of an offence shall be taken for the purposes of this Article to include the taking of any steps after the offence has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection. (4) An order under this Article shall operate to deprive the offender of the offender's rights, if any, in the property to which it relates, and the property shall, if not already in their possession, be taken into the possession of the police. (5) Where any property has come into the possession of the police by virtue of paragraph (4) the court that made the order under paragraph (1) may, on application by a claimant of the property, make an order for the delivery of the property to the person appearing to the court to be the owner thereof. (6) No application under paragraph (5) - (a) shall be made after the expiration of 3 months from the date on which the order under paragraph (1) in respect of the property was made or 3 months from the date on which any appeal from that order was disposed of; and (b) shall succeed unless the claimant satisfies the court either that the claimant had not consented to the offender having possession of the property or, where an order is made under paragraph (1)(a), that the claimant did not know, and had no reason to suspect, that the property was likely to be used for the purpose mentioned in that paragraph. (7) Property in the possession of the police by virtue of paragraph (4) and not subject to an order under paragraph (5) or Article 3 shall be disposed of in accordance with the Police Force (Disposal of Property) (Jersey) Regulations 1975." 17. It can be appreciated that the key issue here is whether the car " has been used for the purpose of committing, or facilitating the commission of any offence or was intended by the person to be used for that purpose ". If the Crown is correct that the 2001 Law

applied to the circumstances, there was then the question of the Court's discretion under Article 2(2), and the Court must have regard to the value of any property and the likely financial and other effects on the offender of the making of the order, together with any other order that the Court contemplates making. 18. We observe that the Court has made similar orders before in not dissimilar circumstances. For example, in AG v Coelho

[2024] JRC 006 , the Court, consisting of the same judge and one of the two Jurats presiding in this case, considered the case of a defendant who was driving whilst disqualified and had a bad motoring record. He also fell to be sentenced for an offence of driving without insurance. He was twenty years old at the date of the hearing and nineteen when he offended. 19. As to the Crown's application to forfeit his Mini, the Court made the observations at paragraph 19: "You will continue to pay the outstanding fines, but now at the rate of £200 per month in view of the employment that you have secured which is to commence on Monday. In relation to the application made under the Criminal Justice (Forfeiture Orders) (Jersey) Law 2001 we order the forfeiture of the 1998 Mini under Article 2 of that Law. We regard it as a proportionate order to make in the circumstances of this case having regard to the facts of the case and the value of the vehicle concerned." 20. Defence correctly observe that there was no substantive discussion in that case as to the relevant legal principles governing forfeiture under the 2001 Law. 21. In AG v Pacheco

[2016] JRC 220A , Deputy Bailiff Le Cocq, as he then was, considered a defendant who had been convicted of, inter alia , dangerous driving. Again, the defendant had a bad record for motoring offences. 22. The Crown sought a forfeiture order under the 2001 Law. The Court declined to make such an order but held that it had discretion to do so, although did not consider the issue at length. The Court said this: "6. In terms of the confiscation of your vehicle we have given very careful thought to this and we do not think in principle it is incorrect to confiscate a vehicle used in these circumstances but we believe that the value of the vehicle is such that it would be disproportionate for us to order confiscation of it at this time and we do not do so." 23. The provisions of the 2001 Law were considered in the case of AG v Dorynek

[2019] JRC 025A , in which the Court sentenced the defendant for operating a ship in territorial waters without due care and attention or without reasonable consideration for other people contrary to various harbours regulations. 24. In respect of the application to forfeit the vessel, Commissioner Bailhache, giving the judgment of the Court, made these observations at paragraph 12: "We are asked by the Crown to make an order for forfeiture of the boat pursuant to the Criminal Justice (Forfeiture Orders) (Jersey) Law, 2001 . We are told by Advocate Hall that the defendant does not want the boat back. She tells us that apparently it was left in a not very good state with water in it and it has been in a police compound for some time and effectively now is valueless, whereas at the time of the accident its value was some £2,000. Article 2(1) of the Criminal Justice (Forfeiture Orders) (Jersey) Law, 2001 gives the Court power to order the forfeiture in question if the boat has been used for the purpose of committing an offence. We do not think that this case falls

within that paragraph. It does not seem to us that the boat has been used for the purpose of committing the offence any more than one would say that when a person drives a car carelessly the car has been used for the purpose of committing the offence. It does not seem a natural use of language as far as we are concerned. It has not been adapted or amended or altered in any sense. Advocate Maletroit says there is authority which would assist us in the construction of that article. It has not been produced and it leaves us uncomfortable to make the order for forfeiture and we are not going to make it, recognising that if that authority had been produced we might have reached a different view." 25. The Appellant says that the 2001 Law was not intended to cover motor vehicles " in relation to ordinary motoring offences ". Reliance is made not only on the case of Dorynek to which we have referred, but also to the Report or *Projet de Loi* , which accompanied the draft 2001 Law when it was lodged for debate for the States. 26. The Report spoke of various deficiencies in the powers of the Royal Court and noted there was no power which allowed the tools of a criminal's trade to be forfeit and continued " Neither is there a discretion to order, in appropriate cases, the forfeiture of a motor vehicle used in connection with an offence not otherwise covered by existing statutory provisions ". The Report went on to say that in the United Kingdom, there had been such a power of forfeiture since the enactment of Section 23 of the Criminal Justice Act 1972 which was consolidated and extended in Sections 43A of the Powers of Criminal Courts Act 1973, as amended by the Criminal Justice Act 1988. 27. The Report continued: "This draft Law would confer similar powers on the Magistrate's Court and the Royal Court to order the forfeiture of property lawfully seized from an offender in his possession or under his control when apprehended for an offence (or when a summons in respect of it was issued) if the property was used for the purpose of committing or facilitating the commission of an offence or if it was intended to be used for that purpose. The Court would have to have regard to the value of the property and to the likely financial and other effects on the offender of making the order. Forfeiture would not follow as a matter of course; the Court would have to look at all the circumstances of the case to determine whether or not it was fair and reasonable to deprive the offender of the property or goods involved. This would not, for example, result in the forfeiture of a motor vehicle driven by somebody with a modest excess of alcohol in his blood, but might be invoked where a motor vehicle was used as a 'get-away' vehicle from the scene of a burglary. " [Emphasis added] 28. Reliance is placed upon the words emphasised in the extract above by counsel for the Appellant. The Appellant says that the terms of Article 2 of the 2001 Law need to be read subject to and in the context of the words of the Report. Although a report accompanying a draft law is often a useful guide to the intention of the States when adopting a law and may, in the case of ambiguity, be employed to assist the Court in interpreting the provisions of a statute, the contents of the report are of no assistance when the terms of a statute are clear. This, in our view, is such a case. The real question is was this car used for the purpose of committing or facilitating the commission of an offence? 29. Is it possible to reconcile the approach taken by the Royal Court in Dorynek upon which the Appellant relies, and the approach taken by the Royal Court in the other two cases? In our judgment,

it is. 30. We were significantly assisted by the decision of the Queen's Bench Division in *Regina v Highbury Corner Metropolitan Stipendary Magistrate*

[1991] 1 WLR 1374, which considered the legislation referred to in the Report accompanying the draft 2001 Law, namely the relevant provision of the powers of Criminal Courts Act 1973, as amended by the Criminal Justice Act 1988. 31. The case involved an application for judicial review by the applicant who was convicted of two offences of driving whilst disqualified and two offence of driving without insurance. In addition to other penalties imposed upon him, his motor car was made the subject of a forfeiture order under the English legislation referred to above. 32. Section 43 of the PCCA 1973, as amended by Section 69 of the CJA 1988 provides: "Subject to the following provisions of this Section, where a person is convicted of an offence and -

- (a) the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued -
 - (i) has been used for the purpose of committing, or facilitating the commission of, any offence; or (ii) was intended by him for use for that purpose.... the court may make an order under this Section in respect of that property." 33. It can be appreciated that the key wording in the English statute is identical to the equivalent Jersey provision. The English legislation goes on to require the Court to have regard to the value of the property and the likely effect and other effects on the offender of the making of an order, again in identical terms to the Jersey statute. Accordingly, in accordance with established principles, it is appropriate to consider non binding English case law which considers similar statutory wording. 34. The judgment of the Queen's Bench Division was given by Watkins LJ. The applicant sought an order quashing the forfeiture order made by the Magistrate's Court on two grounds. First, that the forfeiture order was outside the scope of Section 43 of the 1973 Act and, secondly, that the Magistrate did not consider the relevant matters set out before exercising his discretion. 35. Having regard to the statutory provisions common to both Jersey and England in respect of this matter, Watkins LJ said at page 6 of the judgment: "Thus a court sentencing a defendant for a criminal offence which comes within section 43 has to have regard to the two matters specifically set out in section 43(1A) and ask itself whether, in respect of a particular offence, forfeiture of property, in conjunction with the other sentences or orders that the court proposes to make, inflicts too great a burden on the defendant and if that defendant has to be sentenced for more than one offence, the court must look at the total effect of the penalties imposed and measure that against the totality of his offending." 36. In *Highbury Corner*, the Magistrate held that it was necessary to remove the means by which a further similar offence could be committed by the applicant so as to protect the public, gave a warning that he was considering making such an order (as occurred in this case) and invited the applicant's solicitor to address him. The Magistrate had no evidence of the value of the car. The Magistrate did not make any inquiry as to the likely financial or other effects of making the order for forfeiture sought. In those circumstances, the Court held that it could not be said that the Magistrate had sufficient

information to enable him to discharge the duty placed upon him under the relevant section to have regard to the value of the car and the likely financial and other effects on the applicant on the making of a forfeiture order. On that ground alone the decision of the Magistrate was quashed. 37. Nonetheless, Watkins LJ went on to consider the first issue and did so because the Court had been "strongly urged to do so....because this is an issue which, it is said, arises frequently and guidance upon it would be generally appreciated". 38. The Court summarised the arguments before it thus: "The argument advanced on behalf of the applicant was this: the essence of a driving offence is the actual use of a motor vehicle whereas the forfeiture provision is in respect of property which has been used "for the purposes of committing or facilitating the commission of any offence." That is to say, the use of the property is subsidiary to the commission of an offence and not the offence itself. A strict or narrow construction of that provision of section 43, it was submitted by counsel for the applicant, should be adopted by the courts because it could not have been Parliament's intention that such a general forfeiture provision should be used by the courts to confiscate motor vehicles where the essence of the offence committed was the use of the motor car. Counsel for the prosecution argued that, as to the offence of driving whilst disqualified, the car must have been used for the purpose of committing that offence. That is to say, for the very purpose of driving whilst disqualified and that provided the other material requirements of it were satisfied, section 43 applied." 39. The Court went on to hold, having considered the legislative history of the provisions: "In our judgment the words used in section 43 should be given their natural and ordinary meaning, unless on a reading of the section there are two possible interpretations in which case, this being a penal provision, the interpretation most favourable to a defendant should be adopted. That is to say, the section should be confined to the narrower of the two possible interpretations. But we see no ambiguity in section 43(1) when seeking to apply it to the facts of the present case. The applicant was convicted of an offence, namely of driving whilst disqualified. He had in his possession at the time he was apprehended the Ford Granada motor car. The remaining question for the magistrate was whether that car had been used by the applicant for the purpose of committing any offence? In this case the words "any offence" referred to the driving whilst disqualified. His conclusion that the car had been used by the applicant for the purpose of committing the offence of driving whilst disqualified, in our opinion, placed no strain on its language, but was an application of section 43(1) using the ordinary and normal meaning of the words therein contained." 40. The Court went on to say: "In the present case, in our judgment, the use of the car was an integral part of the offence. The applicant could not have committed the offence without the car." 41. The Court contrasted this with another English decision where the defendant had used a vehicle to take a girl to a particular location and then indecently assaulted her after the girl had left the car. In that case, the Court had held that it was not proved that the commission of any offence was intended at the time the journey started. 42. In the final substantive paragraph of the judgment, Watkins LJ said: "It was argued by the applicant's counsel that Parliament cannot have intended section 43(1) to apply to driving offences at all. He instanced the offences of driving without due care and attention or parking in prohibited areas which he said surely

could not result in the confiscation of the offender's motor car. Superficially that seemed to be an attractive argument. But we do not accept it because in our opinion, first, for an offence to come within section 43(1) it must be an offence of intention and not one of inadvertence - there must have been a deliberate use of the property for the purpose of committing or for facilitating the commission of an offence - and, secondly, the subsection would not apply to parking offences because a confiscation of the vehicle involved in such a case would offend the principle of sentencing that the punishment must fit the crime." 43. Accordingly, the decision in the three Jersey cases referred to above can be reconciled. The Court has the power to make a forfeiture order in cases of driving whilst disqualified, driving without insurance and, contrary to the submissions made on behalf of the Appellant, cases of driving with excess alcohol. In all such cases, there has been a deliberate use of the property for the purpose of committing or facilitating the commission of an offence. It is highly unlikely that such an approach would apply to parking offences because the confiscation of a vehicle would offend the principle that punishment must fit the crime. Further, the statutory provisions would not extend to careless driving in the sense of offending caused by a moment of inadvertence. Whether or not the Court's power to make a forfeiture order arises in cases of dangerous driving would depend upon the circumstances of the offence. Decision 44. The commission of the offences of driving whilst disqualified and driving without insurance, two of the offences for which the Appellant was convicted in this case, are *prima facie* within the forfeiture provisions in Article 2 of the 2001 Law and the Court had the power to make the order which it did. 45. The only remaining issue is therefore the question of proportionality, having regard to the matters that the Court is required to have regard to under Article 2(2) of the 2001 Law. 46. The Magistrate had some, although not complete, information before her as to the value of the vehicle. The defence made no application to adjourn the matter for further evidence. What the Magistrate said in relation to forfeiture is set out at paragraph 13 above. 47. The Magistrate correctly directed herself in respect of the 2001 Law and took into account the statutory factors that she was required to have regard to. It cannot be said that this order was manifestly excessive. 48. Accordingly, the appeal was dismissed, for the reasons which we have now given. Authorities Criminal Justice (Forfeiture Orders) (Jersey) Law 2001. AG v Coelho

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