

JERSEY / JUDGMENT

Whelan -v- A.G. [2005] JCA 155 (09 September 2005)

[2005] JCA 155

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COURT OF APPEAL November Before: P. D. Smith, Esq., Q. C., President; D. A. J. Vaughan, Esq., C. B. E., Q. C.; and M. S. Jones, Esq., Q. C. David Whelan v The Attorney General Application for leave to appeal against the confiscation order imposed by the Superior Number on 14 th April, 2005 after guilty pleas to: 2 counts of: supplying a controlled drug, contrary to Article 5(b) of the Misuse of Drugs (Jersey) Law , 1978 1 count of: possession of a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law , 1978 Crown Advocate S. M. Baker Advocate C J. Scholefield for the Appellant

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Background

1. On 4 February 2005, the Appellant pleaded guilty to two counts of supplying a controlled drug, contrary to Article 5(b) of the Misuse of Drugs (Jersey) Law 1978 (Counts 1 and 2) and one count of possession of a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law 1978 (Count 3). 2. On 14 April 2005, the Appellant appeared before the Superior Number of the Royal Court, together with a co-accused, William Byrne. The Appellant was represented by Advocate Fogarty. He was sentenced to 6 years' imprisonment on Count 1, 6½ years' imprisonment on Count 2 and 3 months' imprisonment on Count 3, all of the sentences to be concurrent. 3. At the same hearing, on the unopposed application of the Attorney General for a confiscation order made in accordance with the provisions of Article 3 of the Drug Trafficking (Jersey) Law 1988, ("the 1988 Law"), the Court:- (i) determined that the Appellant had benefited from drug trafficking in the sum of six thousand six hundred and seventy pounds; (ii) determined, in accordance with Article 6 of the 1988 Law, that the amount to be recovered from the Appellant was the sum of six thousand six hundred and seventy pounds; and (iii) ordered the Appellant to pay that amount. 4. On 27 May 2005, the case came before the Inferior Number of the Court, on the application of the Attorney General. The Appellant represented himself. During the course of the hearing, the Crown Advocate invited the Court to make certain technical amendments to the Act of Court of 14 April. The nature of these proposed amendments is not relevant to the application now

before this Court. Having heard the Crown Advocate, the Appellant was asked whether he had any objection to the proposed amendments. He replied, " Yeah. I'm disputing the confiscation order. " When asked for confirmation of his position, the Appellant said, " Yeah, because my, my paperwork was given to my Advocate at the time and it wasn't brought up that when the prosecution said "Was the confiscation order disputed?" it was and my advocate was misinformed and said that it wasn't". 5. In light of that exchange, the Court adjourned the Crown's application for four weeks, to enable the Appellant to obtain legal advice on a possible appeal against the confiscation order. 6. By Act of Court, dated 27 July 2005, the Royal Court granted the Appellant leave to appeal against the confiscation order of 14 April. By Notice of Appeal, dated 1 August 2005, the Appellant intimated his desire to appeal to the Court of Appeal. At some point thereafter, the Appellant's advisers took the view, rightly, that the application for leave to appeal ought to have gone before the Court of Appeal, rather than the Royal Court. Application for leave to appeal against sentence was made to this Court by Notice dated 11 October 2005. No application for an extension of time within which to appeal was made prior to the hearing of this application. Grounds of Application 7. In the Grounds of Appeal set out in his Notice of Application for Leave to Appeal against Sentence, the Appellant narrates the terms of the confiscation order, and continues:- "The Appellant's representative at the time consented to the Attorney General's application. The Appellant contends that he had not instructed his representative to consent to the Attorney General's application being allowed nor had he agreed to the extent of any such application. "The Appellant had provided his representative at the time with evidence as to the source of the funds with which the Attorney General's application was concerned. The Royal Court was never asked to consider that evidence. The Appellant contends that the Royal Court should have been asked to consider that evidence and that failure to consider that evidence was not the fault of the Appellant." The Appellant's Contentions 8. We were told by the Appellant's Counsel that, during the month of November 2004, the Appellant was represented by Crills, Advocates. Crills advised the Appellant that a confiscation order would be sought by the Attorney General following his sentencing and that any such application would involve assessing the Appellant's assets and income over the previous six years. The Appellant was further advised that the burden of proving a legitimate source for his income and capital assets was on him and that in preparation for this he should obtain evidence as to the source of his income over the past few years. 9. In accordance with this advice, the Appellant collected various receipts for carpentry work carried out by him ("the receipt evidence") with a view to proving to the Court that his income was from a legitimate source. 10. On 5 April 2005, after Crills had withdrawn from acting because of a conflict of interest, the Appellant instructed Advocate Fogarty. Advocate Fogarty and her colleague, Mr Langlois, visited the Appellant at HM Prison La Moye on 12 April 2005, two days before the Appellant's sentencing. The Appellant contends that he received advice at this meeting in relation to the starting point for the calculation of his custodial sentence and in relation to the confiscation order sought by the Attorney General. According to Counsel's narrative of events, Advocate Fogarty advised the Appellant that it might not be in his interests to oppose the Attorney General's application for a confiscation order. We were told that she further advised the

Appellant that the confiscation order would be dealt with separately from sentencing. 11. The Appellant's position is:- (i) that he understood the advice that he was given to mean that the confiscation order would be dealt with at a later date; (ii) he noted the advice given but did not instruct Advocate Fogarty whether or not he would consent to or oppose the confiscation order; and (iii) he decided to address that issue later and concentrate on the matter of his starting point instead. 12. We were told by Counsel for the Appellant that the remainder of the meeting on 12 April focused on the starting point for sentencing and available mitigation. 13. In his Outline Contentions, the Appellant continues the narrative in the following terms:- "At sentencing the Confiscation Order was dealt with quickly. Having been told by the Crown Advocate that the Confiscation Orders were agreed and by Advocate Fogarty that the Confiscation Order was not opposed, the Court declared that the Appellant had benefited from drug trafficking in the sum of £6,670 and made a Confiscation Order in that sum. "The Appellant did not appreciate the significance of what had transpired in relation to the Confiscation Order until later. Having appreciated that the Confiscation Order had been made without the Court being invited by Advocate Fogarty to consider the Receipt Evidence, the Appellant told the Inferior Number of the Court Below on the 25 th May 2005, that he thought that Advocate Fogarty had not understood his instructions (or rather his view that he could provide them later) and that he intended to appeal against the Confiscation Order." 14. Against that background, the Appellant tells us that he did not intend to consent to the confiscation order ("the consent issue") and argues that (i) the confiscation order should be quashed, and (ii) the receipt evidence that he procured to prove the legitimate sources of his income should be considered by this Court ("the receipts issue"). 15. The Appellant's contentions on the receipts issue are as follows:- "The Appellant is only able to show to the Court one item of Receipt Evidence from a customer of his detailing amounts paid to the Appellant for carpentry work. This is in the sum of £4,550. "The Appellant had provided approximately four items of Receipt Evidence to his previous representatives, all of which appeared in the Appellant's sentencing bundle as used at the hearing of the 14 th April 2005. Not one party involved in these proceedings has been able to locate a copy of that bundle, far less provide a copy of its contents and particularly the Receipt Evidence. Even the copy held by the Greffier of the Court Below has been mislaid. "The Appellant has been unable to assemble the same documentary evidence for a second time. "The Appellant accepts that a Confiscation Order must be made in the sum of at least £2,000 as that was the amount he received as a minder of drugs, for which role he was convicted. There was no finding that the Appellant had been involved in drugs otherwise than as a minder on the occasion charged. Further, there was no finding that the Appellant had benefited otherwise than in the sum of £2,000." 16. In conclusion, the Appellant asks that the confiscation order that he acknowledges would have to be pronounced be made in the sum of £2000. The Relevant Legal Test 17. Advocate Scholefield, who appeared for the Appellant at the hearing before us, made the following submissions:- (i) The apparent consent to the confiscation order given by Advocate Fogarty on the Appellant's behalf would not per se preclude him from appealing against the confiscation order; (ii) Such an appeal could succeed, however, only if the Appellant were to satisfy the Court on a balance of

probabilities that he did not give his consent to the confiscation order. 18. Having regard to the cases of *Wood v Attorney General*

[2003] JCA051 and *Barr v Attorney General*

[2003] JCA158, we are of the view that these submissions are well founded. We are also of opinion that we could grant leave to appeal only if we were satisfied that the Appellant has persuasive grounds for suggesting that, if the confiscation order were quashed for lack of consent, a further confiscation order, which the Appellant acknowledges must follow, would be in any smaller amount. See *Wood* ; *supra* . The Lack of Consent Issue 19. In an affidavit sworn on 13 October 2005, the Appellant depones to the gathering of the receipt evidence, and the circumstances in which Advocate Fogarty came into the case. He goes on to narrate what happened at the meeting on 12 April 2005, in substantially the same terms as are set out at paragraph 10 above. In particular, he says:- "(W)hen Advocate Fogarty and Richard Langlois visited me at the prison on the 12 th April 2005, one or the other or both of them advised me that it may not be in my best interests to oppose the Confiscation Order sought for the reason that if I was not able to clearly show where my income had come from the Court may find my involvement in drugs to be worse than previously thought. "(W)hen Advocate Fogarty and Richard Langlois visited me at the prison on the 12 th April 2005, one or the other or both of them advised me that the issue of the Confiscation Order would be dealt with separately from my sentencing. I understood that to mean that I would not have to worry about the Confiscation Order until a different sitting of the Court on a later date. Accordingly, I listened to the advice given but chose to concentrate the rest of our meeting on my mitigation and the starting point for my sentence. I did not instruct Advocate Fogarty to agree to the Attorney General's application for a Confiscation Order." 20. Of the hearing on 14 April, he says only this - "... on the 14 th April 2005, I attended at the Royal Court House to hear my sentence. Advocate Fogarty did not meet me before or after my sentencing." 21. In an affidavit sworn on 17 October 2005, Advocate Fogarty adopts as her evidence the contents of a letter from her, addressed to Advocate Tremoceiro, and dated 23 June

2005. At that time, Mr Tremoceiro was acting for the Appellant. In her letter, Advocate Fogarty recorded that she had no personal recollection of the meeting on 12 April and said that she had relied on the file note of that meeting and upon Mr Langlois. She confirmed, however, that she had seen letters regarding some income received by the Appellant for legitimate work and noted that these letters were placed before the sentencing Court. She said that she did not regard these letters as proof that the Appellant had not benefited from drug trafficking, only that he had possibly received some form of legitimate income. 22. Advocate Fogarty continued as follows:- "Secondly, at our meeting Mr Whelan did not instruct me to oppose the confiscation order, rather, he raised a question regarding the mechanics and legitimacy of the order being sought. He was advised that the Court generally makes a confiscation order in the amount of the benefit from drug trafficking, or in the amount of the realisable assets if that is less than the proceeds of drug trafficking."

After narrating a number of facts in the case which she regarded as relevant to the making of a confiscation order, she went on to say:- "Mr Whelan was advised that it might not be in his interests to have such information put before the sentencing Court. Given the probability that such opposition [to the confiscation order] would fail, it might be suggested thereafter by the Prosecution that his involvement in the drug scene and drug trafficking was greater than suggested by the Prosecution's case summary. Mr Whelan accepted this advice without further questions and we went on to discuss general mitigation. He was asked at the conclusion of our meeting if there was anything further he would like to add and he said there was nothing." 23. The file note taken by Mr Langlois, which is referred to by Advocate Fogarty, records that mitigation was discussed at the meeting and that certain advice was given about the likely sentence. The note concludes with the following words:- "Confiscation order to be dealt with 1st" 24. The transcript of the sentence hearing on the 14 April begins as follows:- "CROWN ADVOCATE: Sir, the case of David Whelan and David Byrne (sic) is listed for sentence. I represent the Attorney General, Advocate Gilbert represents Mr Whelan and Advocate Fogarty represents Mr Byrne (sic). The first matter to be dealt with is that of confiscation under the Drug Trafficking Law (1988); Confiscation Orders are agreed. In respect of Whelan, benefit is assessed at £6,670; realisable assets are agreed at £6,670 and an Order in that sum is requested. In relation to Byrne ... "DEPUTY BAILIFF: Sorry, £6,670? "CROWN ADVOCATE: Yes sir. "DEPUTY BAILIFF: The only point I had on that was that the Volvo is included. Have you not asked for forfeiture of that? "CROWN ADVOCATE: I won't be asking for forfeiture of it. "DEPUTY BAILIFF: You won't? Right. "CROWN ADVOCATE: In respect of Byrne, benefit is assessed at £1,170; realisable assets in the same sum and the Crown requests an Order in the sum of £1,170 against Byrne. "ADVOCATE FOGARTY: Sir, the position is that I in fact appear for Mr Whelan and the Confiscation Order is not opposed. "DEPUTY BAILIFF: You won't? Right. "ADVOCATE GILBERT: Sir, on behalf of Mr Byrne, the Confiscation Order is, likewise, not opposed. "DEPUTY BAILIFF: Very well then, in the case of Mr Whelan we declare benefit in the sum of £6,670 and make a Confiscation Order in that sum and in the case of Mr Byrne, benefit of £1,170 and Confiscation Order in the same sum. "CROWN ADVOCATE: Sir, if I can move on then please to the facts of this case and the Prosecution conclusions on sentence. ... " 25. No evidence was placed before us of any attempt by the Appellant to challenge the confiscation order, before the hearing on 27 May 2005. 26. The Appellant's evidence, that he understood that the confiscation order would be dealt with at a different sitting of the Court on a later date, is inconsistent with Mr Langlois' file note that the Appellant was told that the confiscation order would be dealt with first, as in fact it was. We prefer the file note evidence, because it was made on the day of the meeting and accurately describes the order of proceedings that was, in fact, adopted at the hearing on 14 April. 27. The evidence which comes from Advocate Fogarty, that she advised the Appellant that it might not be in his interests to oppose the confiscation order and that such opposition would probably fail, and that the Appellant accepted that advice without further question, is uncontradicted. 28. There was no evidence from the Appellant, nor was it contended on his behalf, that, when he was present in Court on 14 April, he was

unable either to hear or to understand that the confiscation order was consented to by his Counsel on his behalf, and granted by the Deputy Bailiff. If he did not consent to the confiscation order, we would expect him to have protested in some form to someone then, or shortly thereafter, and certainly long before 27 May. 29. Having regard to the whole facts and circumstances of this case, therefore, we are not satisfied on a balance of probabilities that the Appellant did not consent to the confiscation order. The Receipts Issue 30. It is helpful to begin consideration of the receipts issue by reference to the relevant provisions of the 1988 Law. Article 3 provides, *inter alia*, as follows:- "(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; ... it may act as follows. (2) The Court may first determine whether the person has benefited from drug trafficking. (3) ... (4) If the Court determines that the person has so benefited, the Court may ... determine in accordance with Article 8 the amount to be recovered in the person's case by virtue of this Article." 31. Article 3 also provides, at paragraph 7, that the standard of proof required to determine any question arising under the 1988 Law as to whether a person has benefited from drug trafficking, or the amount to be recovered in the person's case by virtue of Article 3 is that applicable in civil proceedings. 32. In this case, the Appellant concedes that he has benefited from drug trafficking. That being so, it is necessary then to notice the provisions of Article 8, which is in, *inter alia*, these terms:- "(1) Subject to paragraph (3), the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Court assesses to be the value of the defendant's proceeds of drug trafficking. (2) ... (3) If the Court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the Court assesses to be the value of the defendant's proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be - (a) the amount appearing to the Court to be the amount that might be so realised; ... " 33. The court may be assisted in its task of assessing the value of the proceeds of drug trafficking by the application of the provisions of Article 6 of the 1988 Law. That provides that the Attorney General may give to the Court a statement of matters which the Attorney General considers relevant in connection with, among other things, assessing the value of the defendant's proceeds of drug trafficking. 34. An Attorney General's statement was given to the Court Below in this case. In that statement, the Attorney General alleges that sums in cash totalling £12,943 were held by the Appellant or transferred to him within the period of six years ending when the proceedings in this case were instituted against him. In particular, a total of at least £6,923.00 in cash was credited to a bank account held by the Appellant between 1 January 2003 and 23 April 2004. Further, it is alleged that £3,600 in cash was found in a flat at which the Appellant periodically resided at the time of his arrest, that £420 was found on his person after he was arrested, and that £2,000 was found hidden in the seat of his motor car. None of these allegations has been challenged in this Court. 35. As we have seen, the value of the Appellant's proceeds from drug trafficking was assessed by the Court Below at

£6,670, of consent. If the confiscation order were quashed for lack of consent, the assessment of the value of the Appellant's proceeds from drug trafficking would fall with it, and it would be necessary for this Court to make a fresh assessment having regard to the evidence, including the Attorney General's statement. The Court would have to determine whether all or any part of the £12,943 was the Appellant's proceeds of drug trafficking, as the Attorney General alleges. In doing so, we would be entitled to apply the statutory assumptions specified in Article 5 of the 1988 Law, except to the extent that any of the assumptions is shown to be incorrect. One of those assumptions is that any property appearing to the Court to have been transferred to the Appellant within the six year period referred to above was received by him as a payment or reward in connection with drug trafficking carried on by him, and was, therefore, his proceeds from drug trafficking. In the circumstances of this case, therefore, we would be entitled to assume that each of the cash sums which go to make up the £12,943 was the Appellant's proceeds from drug trafficking, except to the extent that it is shown on a balance of probabilities that such assumption is incorrect. 36. It would be open to the Appellant to discharge the onus on him by, for example, establishing that all or any of the particular sums of cash which together amount to £12,943 were payments for carpentry work. The Appellant does not seek to do that. He offers to prove only that he had a legitimate income from carpentry, amounting to at least £4,550 in cash and in reduction of rent. In our view, evidence that the Appellant had a legitimate source of income is not, of itself, evidence that the £12,943, or any part of it, was not the proceeds of drug trafficking. In these circumstances, the Appellant has failed to satisfy us that he has persuasive grounds for an appeal against sentence on the receipts issue. 37. In light of the allegation that the copy of the receipt evidence held by the Greffier in the Court Below has been mislaid, we have made our own investigations. It transpires that there was a sentencing bundle for the Appellant before the Court Below, but it cannot now be located. That gives us cause for concern. The Judicial Greffier may wish to consider the matter and, if appropriate, give thought to the introduction of procedures that would operate to prevent a similar problem arising in future. Procedural matters 38. Finally, the time within which it was necessary to apply for leave to appeal in this case expired 28 days after the sentence hearing on 14 April. The Appellant did not seek legal advice on an appeal against the confiscation order until 27 May, by which date the 28 period had expired and any application for leave to appeal to this Court could only be made if there were a successful application for extension of time. No such application was made until the matter was raised by us at the hearing. We are prepared to grant an extension of time in this case, but it should be understood that if procedural requirements are not met in future, there may be adverse consequences for the party responsible. Decision 39. It follows from what we have said above that leave to appeal is refused. Authorities Wood v Attorney General [2003] JCA051 Barr v Attorney General [2003] JCA158 Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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