Neutral Citation Number: [2009] EWCA Crim 1363

Case No: 2007/1140/D2

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SHEFFIELD CROWN COURT
His Honour Judge Keen QC T20027383

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 July 2009

Before :

LORD JUSTICE MOSES
MR JUSTICE HEDLEY
and
HIS HONOUR JUDGE RUSSELL

- -

Between :

Russell John Knaggs	**Appellant**
- and -	
The Crown	**Respondent**

- -

Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr T Owen QC (instructed by **Hughmans Solicitors**) for the **Appellant**
Mr C Garside QC (instructed by **The Crown Prosecution Service West Yorkshire**) for the **Respondent**

Hearing date: 16th February, 2009

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Judgment As Approved by the Court

Lord Justice Moses:

1. This is an appeal against a confiscation order made at Sheffield Crown Court on 29 January 2007 by HHJ Keen QC. He ordered that the appellant should pay the sum of £1,418,702.71 within 3 months and in default serve a 10 year sentence of imprisonment pursuant to the Drug Trafficking Act 1994. The order was made nearly 4 years after the appellant's plea of guilty to conspiracy to supply Class A drugs at the same court but before a different judge, HHJ Lawler QC, on 5 March 2003. On that occasion the appellant was sentenced to 16 years' imprisonment; the term of 10 years' imprisonment in default was ordered to run consecutively to that sentence.

2. Part of the evidence on which the prosecution relied to establish the appropriate benefit figure was based upon evidence from a probe secretly inserted in the appellant's motorcar. The judge ruled that it was not open to the appellant to challenge the evidence obtained from the probe, nor, apparently, the inferences to be drawn from that evidence. It is that ruling which is the target of this appeal.

3. In order to understand how the ruling came to be made it is necessary to appreciate the chronology of events and some of the background facts.

4. The appellant was a central figure in an organisation responsible for trafficking large amounts of Class A drugs throughout the Midlands and the north of England. He used his motorcar as an office in which to arrange deliveries and supply of cocaine, heroin and ecstasy. It was for that reason that a listening device was placed in his motorcar. He was arrested on 5 April 2002. In July a co-defendant pleaded guilty and offered to give evidence. In October 2002 submissions were made as to breaches of the Regulation of Investigatory Powers Act 2000 on which HHJ Lawler QC gave judgment on 25 October 2002.

5. Between 25 October 2002 and 15 November 2002 the judge heard submissions that the proceedings should be stayed as an abuse of process or, that evidence arising out of the installation of the probe should be excluded pursuant to s.78 of the Police and Criminal Evidence Act 1984.

6. The judge dismissed both of those applications following which most of the defendants changed their pleas and, during the process of jury empanelment, the appellant also pleaded guilty. At that stage the defendant had had the benefit of legal representation by two legal teams including leading counsel. We should stress that when he pleaded guilty he did not put forward any basis of plea to contradict the prosecution version of events. He did assert that he was not an importer of drugs and that certain conversations were not concerned with any conspiracy to kill or to cause grievous bodily harm, both of which assertions were accepted by the prosecution.

7. Before sentence, during the course of a hearing on 2 December 2002, the appellant was permitted to address the judge. He made clear, at that hearing, that he had voluntarily pleaded guilty and was aware of the consequences he faced. But he also made clear that he disputed the record of the conversations in the vehicle. He spoke of some 4050 other people who had driven the vehicle and asserted that he was disputing some of the conversations attributed to him in the recordings obtained by the probe.

8. A fresh defence team was authorised in February 2003 and, as we have said, the appellant was sentenced on 5 March 2003. Six months later, on 7 November 2003, applications were made that the judge, HHJ Lawler QC, should recuse himself and that the appellant should be allowed to change his plea. On 8 December 2003 the judge refused to recuse himself and on 15 December 2003 he refused the appellant leave to change his plea.

9. The prosecution had served a prosecutor's statement pursuant to s.11 of the Drug Trafficking Act 1994 dated 5 February 2003. The appellant responded in a document dated 12 February 2004

broadly asserting that the only business in which he was involved was legitimate and that he had been made bankrupt. During 2004 there was correspondence and hearings concerning the authenticity of digital audio tapes, the contents of which formed, at least in part, the basis of the prosecution's s.11 statement. It is plain that during that period yet further counsel had been instructed and were challenging the authenticity of those tapes for the purposes of the confiscation hearing.

10. The confiscation hearing was listed to begin on 16 March 2005. Further confirmation that everyone understood that the authenticity of the tapes and the identification of the voices to be heard on them were in issue is demonstrated by the fact that HHJ Lawler QC granted an application to adjourn for voice recognition evidence to be obtained on 22 March 2005. On 10 May 2006 this court, differently constituted, refused the applicant's application for permission to appeal against the judge's rulings as to alleged breaches of the Regulation of Investigatory Powers Act 2000, and in relation to challenges to the judge's rulings in relation to evidence from the probe. It is important to record that the Court of Appeal noted:-

> "At this stage in the proceedings there was no challenge to the reliability of the evidence produced by the probe and it was on that basis that the judge approached the matter.
>
> Although there was no challenge to the integrity, so to speak, of the material produced by the probe, there was a root and branch attack on the credibility and behaviour of the three police officers who gave evidence..." (§§ 36 and 37).

When considering the judge's ruling under s.78, the Court observed that the defendants could have advanced an innocent explanation of the tapes. The appellant applied to the Court of Appeal to call 40 witnesses to say that the telephone conversations either did not take place, or were in a different form or related to matters other than drug dealing. The court ruled that the challenge was unfounded.

11. The Court of Appeal went on to dismiss the application to appeal against the refusal to change his plea. Towards the end of the hearing leading counsel, then acting on behalf of this appellant, raised the issue as to whether the challenge to the tapes obtained as a result of the probe could be raised in the drug trafficking proceedings. Lord Justice Latham observed that that was a matter for HHJ Lawler QC.

12. Unfortunately it was not. HHJ Lawler QC decided to recuse himself and gave his reasons on 26 June 2004. He concluded that after three years involvement with the case it was desirable to have a fresh tribunal. He was also concerned that he might, by virtue of the terms in which he had previously expressed himself, have given the appearance of possible or potential bias. He referred to a letter from the appellant's solicitors, dated 24th May 2004, suggesting that a different judge should try the confiscation proceedings but said he had already, after consultation with the Recorder of Sheffield, reached the same conclusion.

13. We must and do respect the decision the judge made; it was a matter for him. We merely observe that, with hindsight, the decision had unfortunate consequences. The judge who had had the misfortune to have the conduct of these protracted proceedings, which he had conducted with conspicuous fairness and whose rulings had been entirely vindicated by the Court of Appeal was deprived of the legitimate opportunity to use his knowledge and experience of those previous proceedings in resolving the confiscation issues. We return to this theme later (§31).

14. But once the original judge had recused himself, a different judge, HHJ Keen QC, came to rule as to the future conduct of the confiscation proceedings. It is that ruling, on 15 August 2006, which is challenged in this appeal. The judge accurately recorded the prosecution's essential contention, namely that once the defendant had pleaded guilty, and declined the offer of a Newton hearing, he had not only agreed that the term of imprisonment should be fixed on the basis of the prosecution's case but was bound by the admissions implicit in his plea for the purposes of the confiscation proceedings (see §§ 2 and 3 of the ruling).

15. The judge noted that the appellant disputed that the recordings were either accurate or authentic.

He dealt in substantial detail with the course of the proceedings and concluded:-

> "A plea of guilty in such circumstances, although not necessarily a concession of the Crown's entire evidence, does mean, as that as this Defendant must have known and accepted, that he was sentenced on the basis of the facts disclosed in the papers, subject to minor and unimportant exceptions. That is an inevitable consequence of an unequivocal plea. Also, as confiscation proceedings are part of the sentencing process, that acceptance, in my judgment, extends to them as the Defendant can be taken to have been aware. He would also have known, as found by the learned judge, that the evidence inevitable confiscation hearing would be substantially based on the crown's evidence. He cannot now go behind it. In my judgment, it is binding upon him, as would be any concessions made by the Crown binding on them.
>
> It follows, and I so find, that the Defence submissions that the evidence of tape recordings and telephone call is subject to the same uninhibited challenge as at trial is not sustainable. Also, as the DATs were a substantial and important part of the Crown's case, I do not accept that the Defendant could not enter a guilty plea without accepting them, unless there was a basis of plea entered, which would inevitably have led to a Newton hearing.
>
> This Defendant could have contested the Crown's case, in whole, by a trial before a jury or, in part, by a Newton hearing. He took neither course, but now seeks to challenge that case, in whole or in part, during the confiscation hearing. In my ruling, he is unable to adopt that course, as he is bound by his unequivocal guilty plea. I accept the Crown's submission, in the light of that plea and subsequent events, the confiscation proceedings fall to be dealt with on the basis of the facts disclosed in the Prosecution's case.
>
> I should also mention, for the sake of clarity, that other matters also arise in the confiscation proceedings, for example, an alleged collusive bankruptcy, about which evidence can be produced in the normal way."

16. Thus the issue in this appeal can be focussed on the proposition, which found favour with the judge, that the appellant's plea of guilty without any challenge to the facts by way of a Newton hearing debarred him from challenging the authenticity of the recordings obtained from the probe and any inferences to be drawn from them. Before resolving that issue it is necessary to record further stages in the chronology.

17. On 22 January 2007 a confiscation hearing began and one day later the appellant's legal team withdrew since they were unable to comply with the appellant's instructions to challenge the evidence obtained from the probe. The judge refused a further adjournment and the appellant declined thereafter either to attend or to participate. On 29 January 2007 the judge made the order we have identified. He made it after careful analysis of the evidence obtained from the tapes and, we should record, rejected some of the inferences and factual submissions made by the prosecution. He found that there was benefit to the amount of £835,500 as a result of his analysis of the evidence from the probe but concluded that there was other evidence, independent of the probe to prove a benefit in the sum of £583,202.71. Thus the total benefit the judge declared was less than half that which the prosecution originally asserted. So far as realisable assets are concerned the judge concluded that the defendant had taken steps to hide his assets and to shroud his affairs in mystery. He concluded that the defendant had lied when he informed the court that he had no assets and continued:-

> "He is lying about matters that can clearly be demonstrated to be untrue by merely listening to the tapes and it leads me to believe that there are other assets of which no trace has been found that would also be consistent with the level of drug-dealing in this case."

18. The starting point for resolution of this appeal must be the meaning of HHJ Keen's ruling of 15 August 2006. Surprisingly, that appears to be in issue. Although the prosecution continued to assert that the judge rightly ruled that it was not open to the appellant to challenge the authenticity of the

tapes, it contended that there was nothing in the judge's ruling which prevented the appellant from challenging the prosecution's interpretation or submissions as to the inferences to be drawn from those tapes. It seeks to blame the appellant for refusing to follow this approach at the final confiscation hearing in January 2007.

19. This stance taken by the prosecution is inconsistent with its earlier written submissions contained in an earlier skeleton argument dated 4 August 2006 as recorded by HHJ Keen QC. More importantly, it is plain that the judge accepted the prosecution's submission that the appellant's plea of guilty equated to an acceptance of the evidence. The judge's ruling was that the effect of the appellant's unequivocal plea was, as a matter of law, that the confiscation proceedings must be resolved on the basis of the facts disclosed in the prosecution case, including the covert tape recordings and telephone evidence, and those inferences, for which the Crown contended, based on that evidence. He, thus, ruled out any challenge either to the authenticity of the recordings or to the identity of the voices speaking or to the inferences to be drawn from what could be heard. We reject the submission that the effect of the judge's ruling was confined to authenticity and admissibility but did not preclude submissions as to interpretation. It is on that basis that we shall consider the correctness of the judge's ruling.

20. The Crown's reluctance to accept the full consequences of the judge's ruling demonstrates their lack of enthusiasm in supporting his approach in law. But the ruling was made at their invitation. We understand their frustration at the success of the defendant's attempt to gain advantage from a plea of guilty when being sentenced, whilst avoiding its consequences when faced with the confiscation proceedings. But they led the judge into error.

21. There is no authority for the proposition that by pleading guilty and declining to challenge the prosecution evidence in a Newton hearing, the defendant accepted all the prosecution evidence for the purposes of the confiscation process. It is true, as recognised in *McIntosh v Lord Advocate* [2003] 1 AC 1078, that the confiscation proceedings do not amount to the bringing of a fresh criminal charge and thus Art. 6(2) of the European Convention on Human Rights is not directly engaged. But as Lord Bingham acknowledged a court is required to act with "scrupulous fairness" in making its assessment for the purposes of a confiscation order. Further, the proceedings are designed to be fully adversarial, affording the accused every opportunity to challenge evidence against him and to call witnesses (§33 of the Opinion of the Board). The principles identified by Lord Bingham in *Mackintosh* establishing the requirements of fairness for the purposes of Art. 6 were applied in this country by their Lordships' House in *R v Rezvi & Benjafield* [2003] 1 AC 1099 §10. At one stage in their earlier submissions, the Crown had relied upon *R. v Lunnon* [2005] 1 Cr App Reports (S) 111 for the proposition that since the Crown may, at the confiscation stage, be held bound by concessions made at the earlier trial or sentencing stage, so must a defendant. But *Lunnon* is no authority for so stark a proposition when the Crown has made earlier concessions. The concession in that case was that the appellant had no prior involvement in drug-trafficking before the conspiracy in question. Eady J said that such a concession should not be ignored unless and until it was withdrawn (see §18). In the instant case the appellant made no factual admissions.

22. The Crown attempted to liken his plea of guilty to admissions made pursuant to s.10 of the Criminal Justice Act 1967. The terms of s.10 make it clear that admissions which, by operation of law are made conclusive, cannot be inferred but must be express and unless made orally in court, must be in writing (see s.10(2)(a) and (b)). Moreover, since it is plain that the appellant never made admissions to the prosecution allegations contained in s.11 statements, there is no warrant for holding him to admissions to be inferred from his earlier plea of guilty.

23. The Crown also relied upon *R v Tolera* [1991] 1 Cr App R 29 in which this court ruled that where a defendant's account, as disclosed to a probation officer for the purposes of a pre-sentence report, differed from the Crown's case, the defendant should draw the passage to the attention of the court and if the court did not accept a defendant's account it should make that clear before sentence. None of those principles seem to us to support the conclusion that a defendant is debarred, as a matter of law, from challenging the prosecution evidence for the purposes of a confiscation hearing where he has pleaded guilty.

24. We conclude, accordingly, that the judge was wrong to rule that the defendant was debarred either from challenging the authenticity of the recordings obtained by virtue of the probe or the inferences which the prosecution invited the judge to draw from those recordings. The judge's conclusion, which we have already set out in §*14* had no basis in law.

25. There is a further respect in which HHJ Keen appears to have fallen into error. During the course of his judgment he referred to HHJ Lawler QC's approach during 2004. He recognised that that judge had been prepared to listen to arguments and to adjourn hearings for the purposes of challenging the tapes during the course of the confiscation hearing. That was true. It is quite apparent that HHJ Lawler QC had expected the defence to challenge both the authenticity of the tapes and inferences to be drawn from what could be heard. But HHJ Keen QC appears to have been under the impression that it was the defendant's own fault that those investigations had never led to any challenge either to the tapes or to the inferences to be drawn from them. HHJ Keen said, during the course of the judgment:-

> "The defendant may well have thought that any application to rely on the fruits of such enquiries would find favour with the learned judge. However, no such application was ever made. No argument was mounted and heard in support of it. Further, no argument was ever heard and ruled upon in respect of the Crown's contention already referred to..." (§48)

26. The judge went on to refer to the Court of Appeal which, as we have already indicated, in fact left to HHJ Lawler QC the decision as to the extent to which the tapes could be challenged in the confiscation proceedings. HHJ Keen continued:-

> "The defendant, over several years, has had the opportunity, wholly exceptionally in terms of time, to pursue investigations which might assist him. Indulgence has been shown far beyond that which he could have expected. This is a unique advantage. He has known of the Crown's stance since, at the very latest, February of 2005. He has had all the benefit of numerous Queen's Counsel and juniors and a judge who could not have done more for him.I cannot even begin to see any unfair disadvantage to him.nor could he be left feeling any proper sense of injustice."

27. The judge appears to have been under the impression that the appellant was given an opportunity to adduce any evidence he had to challenge the tapes during the course of the confiscation hearing and that he had declined to take it. But there was no such opportunity. There had been numerous hearings before HHJ Lawler QC, it is true, but there had been no hearing at which the defendant was required to "put up or shut up". On the contrary the judge had recused himself and subsequently the defendant was faced with the prosecution stance that he was bound by virtue of his plea of guilty to accept the prosecution evidence.

28. However, HHJ Keen QC's misapprehension was wholly understandable. The defendant had, indeed, previously been granted every opportunity to marshal such evidence as he could obtain to challenge both the authenticity of the tapes and the inferences to be drawn from the recordings on them. This was a process that could and should have been curtailed. In so saying we do not in any way blame HHJ Lawler QC. He was faced with a number of different issues besides the question of confiscation, particularly in relation to the applicant's application to change his plea, aggravated by the frequent and bewildering changes of legal teams. Only with hindsight is it possible to see how the indulgence afforded to this appellant was excessive.

29. We think, with hindsight, the unacceptable delay in reaching a resolution of the confiscation proceedings could have been remedied by providing for stricter time limits for the appellant and for whatever legal team acting for him at the time to obtain and adduce such evidence as they could muster to challenge the tapes and inferences to be drawn from them. Strict case management could have avoided the meandering process which these proceedings followed.

30. Furthermore, we understand the prosecution's reluctance to call every officer who might have had anything to do with surveillance, obtaining the tapes, transcribing them or their custody. We do not

think that the prosecution need to have feared that this was the course that the proceedings should take. Once the defendant had been given a reasonable but short opportunity to marshal such evidence as he could, then the judge could have required him to indicate the nature of the challenge, the nature of the evidence he sought to adduce and the issues which he sought to advance. Any expert evidence would have had to be disclosed. Only then could it be seen whether any, if any, witnesses other than the one officer whom the prosecution proposed to call would be necessary. In short, any bluff which the prosecution or the court feared could have been called.

31. We repeat that we think that the proceedings took a wrong turning when the judge recused himself. We take the view that, absent some exceptional circumstance, it is important that the judge who had previously presided and passed sentence should be the judge conducting the further parts of the proceedings, as the Court of Appeal envisaged. This is important because he would be entitled to deploy his knowledge and appreciation of what had occurred earlier in reaching factual conclusions as to the merits or otherwise of the defendant's challenges to prosecution evidence during the course of the confiscation hearing. It would have been perfectly open to him to view with considerable scepticism challenges to the prosecution evidence which appeared inconsistent with the prosecution case. Such scepticism would not be the consequence of any operation of law for the reasons we have already given. The defendant was entitled, as a matter of law, to challenge the prosecution evidence. But as a matter of fact, his unqualified plea of guilty without a Newton hearing, and the unchallenged prosecution opening on the basis of which he was content to be sentenced were all circumstances the judge was fully entitled to regard as powerful evidence which contradicted the defendant's assertions made in the confiscation proceedings. The judge was entitled to view with considerable scepticism the defendant's account that he had made nothing out of the drug dealing, and was bankrupt in the light of the major part which the prosecution had contended he played during the course of the conspiracy. Moreover, he was entitled to add to that sceptical approach the knowledge that by avoiding a Newton hearing he had not aggravated what was in any event a serious offence but had then sought to resile from that position, once sentenced, for the purposes of the confiscation proceedings. We emphasise that that sceptical approach was not one which the judge was bound to take as a matter of law but as a matter of approach to the facts and the conclusions to be drawn.

32. We therefore conclude that the judge's ruling that the appellant was not entitled to challenge the authenticity of the recordings or the inferences to be drawn from them was wrong in law. This conclusion has an effect on the quantum of the confiscation order. As we have already indicated, the judge made a careful analysis of the tapes for the purposes of reaching his conclusion as to the amount of benefit. But that was to the extent, as he made clear in his ruling, of £835,500. The amount of benefit of £583,202.71 was not dependant upon any interpretation of the tapes but derived from the wholesale value of drugs relating to the appellant's participation and sums of money in bank statements and other documents. We can see no basis for challenging the judge's ruling in relation to the amount of benefit in the sum of £583,202.71.

33. The judgment thus far, apart from corrections of fact at § 12, was sent in draft to the parties at the end of March, 2009. There followed a paragraph in which we rejected the challenge to the judge's conclusion that he was not satisfied that the defendant's realisable assets were less than the amount of the benefit. The appellant sought not only certain corrections, but to make fresh submissions as to the judge's rejection of his assertion that his realisable assets were less than the amount of the benefit: in fact he said they were worth nothing.

34. It is trite to observe that the onus was on the defendant to establish that the realisable amount was less than the amount of the benefit as assessed by the judge. Aggrieved at the adverse ruling of HHJ Keen the defendant chose to take no further part in the proceedings. He is an intelligent man. He dismissed his legal team and thereby, by his absence, deprived himself of the opportunity of proving his assertion that he had no assets. That was his own fault. If a defendant declines to take the opportunity to establish that his realisable assets are less than the amount of the benefit, because he is aggrieved at the judge's conclusion as to the benefit, he cannot later complain as to the consequences of that decision. He is not entitled to wait and see whether he can successfully

impugn the calculation of benefit on appeal.

35. On receiving our draft, the appellant complained that, during the course of the hearing of the appeal, he had not had a proper opportunity to argue or produce the evidential basis for his argument that the judge was wrong to reject his contention that his realisable assets were less than the amount of the benefit.

36. In part his argument was based on the proposition that in rejecting his assertion that he had no assets, the judge had relied on his interpretation of the impugned probe recordings. The success of his appeal was based on the judge's error, as a matter of law, in failing to allow him to challenge or explain those recordings. That error, it is submitted taints the judge's conclusions as to the realisable assets.

37. The Crown resists the correction sought. The rejection of the defendant's case assertion was not wholly based on what was recorded in the impugned tapes,; he was head of substantial commercial drug dealing enterprise and had failed to give any acceptable account of what had happened to the proceeds of that enterprise.

38. We wish to make two things plain: firstly, that sending a draft to the parties is not designed to afford a party the opportunity to make fresh submissions, let alone to seek to rely on further evidence (see by way of analogy *R(Edwards and another v Environment Agency* Note [2008] 1 WLR 1587, [2008] KUHN 22). Nor, as we have said, is a defendant entitled to withdraw from participation in resolution of the issue whether the realisable assets are less than the amount of the benefit when the burden of proof rests on him. But even though there may be a basis on which the judge's conclusion as to the amount of realisable assets can be upheld, a matter which we will not now decide, we think, in what we hope are these highly exceptional circumstances, that fairness to the defendant demands that he be given further opportunity to make submissions limited to the issue whether the amounts which might be realised were less than the amount of the benefit (s.5(1) and (3) of the Drug Trafficking Act 1994).

39. Our judgment as to all other issues stands. Our ruling does not preclude the prosecution from arguing that the appellant's stance deprived him of the opportunity to make good his assertion that he had no assets in addition to any other argument they wish to deploy.

40. There is no jurisdiction, we regret, to send this issue back to the Crown Court. We shall order this issue to be heard by a fresh constitution, but, presided over by Moses LJ. The appellant must serve a further skeleton argument detailing his submissions and referring to any evidence which he seeks to adduce. If he does wish to refer to such evidence that evidence must be served as for an application to rely on fresh evidence and it will be open to the Crown to object to the admission of that evidence at the further hearing. Any evidence on which the Crown wishes to rely in rebuttal must also be served. The appellant must serve such evidence and any application to adduce fresh evidence within six weeks of the handing down of this judgment, and the prosecution four weeks thereafter. Skeletons must be delivered at the same time. The further hearing is not to be listed before the expiry of those ten weeks but should be listed for one day as soon as possible thereafter. Any witnesses whom the parties wish to call must be present at the hearing. Any documents on which the parties rely must be served at the same time, even if they already form part of existing bundles of documents. The parties have liberty to apply in writing to vary these directions.

41. We shall allow the appeal and quash the order that the appellant should pay the sum of £1,418,702.71 or serve a period of 10 years' imprisonment, consecutive in default. We conclude that the amount of the benefit was £583,202.71. But we shall adjourn for a further hearing the question of the amount the appellant should pay and any question of imprisonment in default, should the court make an order that he pay that or a lesser sum.