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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 27th October 2010

B e f o r e:
LORD JUSTICE ELIAS

MR JUSTICE MADDISON
HIS HONOUR JUDGE MORRIS QC
(Sitting as a Judge of the CACD)
R E G I N A

v

RAYMOND GAVIN
STEPHEN APACHNURA TASIE

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Miss Z Van Den Bosch appeared on behalf of the **Appellant Gavin**
Mr M Wyeth QC appeared on behalf of the **Appellant Tasie**

Mr A Gardner & Mr M Pinfold appeared on behalf of the **Crown**

J U D G M E N T
(As approved)

1. LORD JUSTICE ELIAS: In both these appeals, which have been heard together, the appellant was found guilty of criminal offences and a confiscation order was subsequently made notwithstanding in each case that the appellant was not present at the hearing before the judge when the order was made because he had been deported.

2. In the case of Tasie, the appellant had not wanted to go. In the case of Gavin he had willing returned to Jamaica having taken advantage of a Facilitated Return Scheme.

3. In each case the single ground of appeal is that the judge ought not to have proceeded to make a confiscation order in the absence of the appellant and, as a consequence of the error of law, it is said that the confiscation order should be quashed. We shall deal later with the chronology of the confiscation proceedings in each case.

4. The details of the offences for which the appellants were tried is not material to these appeals and we deal with them very shortly.

Tasie

5. On 26th March 2008 Tasie was sentenced to 3 years' imprisonment for conspiracy to commit fraud by false representations, having earlier pleaded guilty to that offence. He and a co-conspirator wheedled significant sums of money from an elderly woman by leading her to believe that she was next of kin with a share in a substantial fortune held in a bank account in Hong Kong. She was told that various sums of money would be needed to secure her interest. She paid them to the defendants but it was all a scam and the defendants kept the money.

6. Some 2 years after his conviction, on 31st March 2010, a confiscation order was made in the sum of £64,216 to be paid within 6 months or in default an application to serve 20 months' imprisonment. In addition the appellant was ordered to pay compensation of £56,966 to the complainant.

Gavin

7. On 20th March 2009 this appellant pleaded guilty to offences of transferring criminal property and fraud by false representation. There were four counts in all on the indictment. He was sentenced to two-and-a-half years in total. The basis of the offences was, at least in part, that he had come into the country using a false passport in the name of "Mark Anthony Pearson". He had later used that to open an account in which he transferred money which was the proceeds of criminal conduct. He also secured a mortgage for a property in Gurney Road.

8. Following conviction the Crown applied to proceed to confiscation under the Proceeds of Crime Act 2002. He was subsequently made the subject of a confiscation order in the sum of £28,176, of which £22,493 was to be paid forthwith and £5,656 to be paid within 90 days with 9 months' imprisonment in default.

The Material Principles of Law

9. Before analysing the arguments advanced in these two cases, it is necessary to set out certain relevant statutory and common law principles. First, it is necessary to bear in mind the stages in the making of a confiscation order, in so far as they are material to these two cases. Under section 6(2) of the Proceeds of Crime Act it is mandatory for a court to proceed under that section once two conditions are satisfied, namely that the defendant is convicted of an offence before the Crown Court and that the prosecution applies for the order to be made.

10. An exception is made where a defendant has absconded after conviction. It is provided by section 6(8) that in those circumstance the first condition is not satisfied and therefore the court has no power to act under section 6. Instead the court may act under section 27, if it considers appropriate to do so and if the prosecution has taken reasonable steps to contact the defendant. However, if the court go ahead the assumptions in section 10 of the Act, which we will mention in a moment, are inapplicable.

11. When making an order the court must first determine whether or not a defendant has benefited from a criminal life-style. This depends on the nature of the offence or offences for which he has been charged. It is accepted that in both these appeals the appellants had benefited from a criminal life-style.

12. If the appellant has benefited from a criminal life style then the court must determine how much he has benefited from his general criminal conduct. If he does not have a criminal life-style, it must determine whether he has benefited from the particular criminal conduct (section 6(4)). When calculating the amount of benefit derived from general criminal conduct the courts must, in accordance with section 10, make certain assumptions, the effect of which, broadly stated, is that property in the possession of a defendant is assumed to be the product of his criminal activities unless he can show otherwise on the balance of probabilities. In other words the effect is to reverse the burden of proof with respect to how he came by his assets.

13. Once the benefit has been determined the judge must make an order in that sum unless the defendant can prove that the total sum of all his available assets is less than the benefit figure. Where that is the case the order will be limited to this sum. A defendant is never required to pay what he does not have.

14. The Act lays down a procedure for enabling the court to obtain necessary information to make the necessary findings as to benefit and assets. The prosecution serves a statement of information pursuant to section 16, outlining what it considers to be matters potentially relevant to the enquiry. The defendant may be ordered to indicate to what extent he accepts the matters in the statement and to particularise those matters which he does not in (section 17). In addition a defendant may be required to provide information to help the court to carry out its function (section 18).

15. One of the issues this court is obliged to consider in these appeals is whether the right to be present at the confiscation hearing is a right conferred by Article 6 of the European Convention. Article 6 is as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

The House of Lords has recently affirmed in R v Briggs-Price [2009] 1 AC 1026, that confiscation proceedings are criminal proceedings within the meaning of Article 6(1) because they are part of the process of sentencing after conviction. It follows that a defendant is entitled to a fair and public hearing within a reasonable time. However, their Lordships also held that a person facing the possibility that a confiscation order may be made against him has not been charged with an offence. They therefore held, consistently with their earlier ruling in R v Benjafield [2003] 1 AC 1099, that the right conferred by Article 6(2) which establishes a presumption of innocence, is not applicable at this stage in the criminal proceedings. Although their Lordships were not in that case directly concerned with Article 6(3) it must logically follow that those rights are not strictly applicable either since they too only apply where someone is charged with a criminal offence. Lord Phillips held in terms that Article 6(3) was inapplicable in confiscation proceedings. It follows that the appellant cannot rely on Article 6(3(c)to establish his right to be present.

However this does not mean that the rights found in Article 6(3) are necessarily inapplicable to confiscation proceedings. As Lord Phillips point out in Briggs-Price (paragraph 45), many of the safeguards found in Article 6(3) will be relevant in the context of determining whether a trial is fair within the meaning of Article 6(1). In that context he referred to the decision of the ECHR in Grayson and Barnham [2008} EHRR 1222 in which the court held that the reverse burden of proof did not infringe Article 6(1). However, in reaching that conclusion the court placed emphasis on a number of features of the procedure including the fact the defendant had been able to attend and adduce oral evidence and be represented by counsel of his choice (see paragraph 40). We have little doubt that the right to be present at the confiscation hearing, at least for someone who wishes to do so, would be considered to be an aspect of a fair trial within the meaning of Article 6(1).

16. It does not however follow that a hearing, whether establishing criminal liability or determining sentence, cannot take place without the presence of a defendant. The circumstances in which this may be permitted in a manner consistent both with the common law and with the European Convention was considered by the House of Lords in R v Jones [2002] UKHL 5 and [2003] AC. In that case two defendants were allegedly involved in a robbery. They did not surrender to bail and had not been arrested by the date the trial was due to take place. There was one adjournment for some 5 months to enable the defendants to be found. They were not found and at that stage the judge decided to continue with the trial, notwithstanding their absence and even though their counsel had in that case withdrawn from the proceedings. In taking this decision the judge was strongly influenced by the fact that there was a large body of witnesses, some of which had undergone traumatic experiences and it would be unfair for them to be subject to the worry of further adjournments. The judge said that he would put all the material favourable or potentially favourable to the defendants before the jury. In his summing up he told the jury not to hold it against those defendants that they were absent from the trial.

17. The defendants were convicted and sentenced to lengthy terms of imprisonment. One of them appealed his conviction. This court held that the judge was entitled to go ahead while emphasising the discretion to carry on in the absence of the defendant should be exercised with extreme care and only in rare cases where the judge was able to conclude a fair trial could be conducted. The Court of Appeal posed a question for their Lordship's House in the following terms:

> "Can the Crown Court conduct a trial in the absence from its commencement of the defendant?"

The House of Lords, Lords Bingham of Cornhill, Lord Nolan, Lord Hoffman, Lords Hutton and Lord Rodger dismissed the appeal. They held that a court did have a power at common law to conduct a trial in the absence of a defendant provided a fair trial was possible. Furthermore, they held there was no breach of Article 6. Three of their Lordships agreed with the conclusion of the Court of Appeal that by absconding, as they had, in full knowledge that the trial was to go ahead, the defendants had waived their right to be present both at common law and under Article 6. However Lord Rodger, with whose judgment on this point Lord Hoffman agreed, thought it

illegitimate to infer waiver, essentially because that requires full knowledge of all the relevant facts and it was not clear that the defendants understood precisely what would happen in their absence. Lords Rodger and Hoffman took the view that the ECHR authorities established that a waiver can be shown only where there is a clear and unequivocal waiver with full knowledge of what is being waived. Here there was no evidence that the absent defendants either knew that the trial would go ahead or, if they did know that, they did not know that it would be without them being represented by counsel. However, all their Lordships held that whether there was a waiver or not, a discretion to continue with the trial was available to the judge and it would be a legitimate exercise of that discretion if, assessing the procedures as a whole, including the safeguards provided by the appellant process itself, the defendants received a fair trial. Their Lordships were satisfied that the appellant did receive a fair trial in that case, notwithstanding that he was not being represented by counsel, although they thought in general an absent defendant should be represented by counsel even in circumstances where he has absconded.

18. The difference in the approach of the majority and minority would not appear to be of much practicable significance. All their Lordships agreed that even if there was a waiver to attend a trial and be legally represented, that did not amount to a waiver to the right to the basic elements of a fair trial, at least within the limitations which the defendant's absence created. It did not, therefore, relieve the court of the duty to satisfy itself that the defendant would receive the basic elements of a fair trial notwithstanding his absence. Moreover, the fact that the defendant voluntarily chooses to be absent himself is itself a very relevant feature for a judge to consider when exercising that discretion, and that is so whether in the particular circumstances it amounts to a formal waiver of his right to be present or not. Presumably where it amounts to a waiver of his rights, that will tell more strongly in favour of carrying on with the trial.

19. It is important to emphasise, however, that the discretion to continue with the trial arises not only where a defendant is at fault, as where he absconds, but also where his absence may be for reasons wholly outside his control, such as illness or incapacity. The fact that the absence is involuntary will in practice be an important factor weighing against the carrying on of a trial, as the following remarks of Lord Bingham indicate:

> "If the absence of the defendant is attributable to involuntary illness or incapacity, it would very rarely, if ever, be right to exercise a discretion in favour of commencing a trial at any rate unless the defendant has been represented and asks that the trial should begin."

We would surmise that the discretion may be exercised more readily where the issue concerns sentence rather than the question of guilt itself and in particular where the proceedings have already been commenced.

20. We now turn to consider the two cases.

<u>Tasie</u>

21. In Tasie the chronology of these proceeding, put briefly, was as follows. Following the guilty plea the prosecution indicated they would be pursuing a confiscation order under the 2002 Act with a view to obtaining compensation for the victim. Various documents were ordered to be provided to assist the court, the court exercising the powers conferred by section 16 to 18. There was initially some slippage in the timetable that was set and finally a confiscation hearing was fixed for 10th December. It was shifted to 11th December, but the defendant was not produced on that date, and so the hearing was refixed for 13th March.

22. Counsel for the appellant was aware that there was a risk that the appellant might be deported and he brought this to the attention of the court. An order was made to prevent his being deported. In fact, notwithstanding that order, the appellant was deported. We are not in a position to say for sure whether that was done with knowledge of the order or not.

23. On 12th December the appellant's solicitors wrote to the fraud prosecution service informing them that they had received a telephone call from the appellant, who was in Lagos, Nigeria. The appellant had told his solicitors that he had been deported by the UK Home Office despite the fact that he had informed the Home Office of the confiscation proceedings were pending and indeed it is not disputed that the authorities did know that these proceedings were on foot when they carried out the deportation, whether or not they were aware of the court order forbidding the deportation.

24. Notwithstanding the appellant's absence, the prosecution wished to continue with the confiscation proceedings. It was suggested that evidence could be given by video link or possibly the appellant could obtain a special Visa to return to the UK. When His Honour Judge Robbins was told about these developments he directed that enquiries should be made by the prosecution as to the viability of these options. In the event, none of these proved to be possible.

25. The matter came before the court again on 13th March 2009. The Crown at this hearing accepted that the appellant had been deported against his will. It was also conceded, whether at this stage or later we are not entirely clear, that he had not absconded and therefore the provisions in section 6(8) and 27 were not applicable. At that stage it was still anticipated that he might seek to return to the United Kingdom because his wife had remained here and he had valuable property in the country so an adjournment was granted. In order to mitigate the adverse consequences of his deportation, an application was made to the Legal Services Commission to enable defence counsel to travel to Nigeria to conduct proceedings via video link but that application was not successful.

26. There were further adjournments in part to enable the judge to get a full transcript of a case at the Southwark Crown Court where a similar issue had been considered by a judge in relation to another defendant. The hearing finally took place on 31st March 2010.

27. After hearing submissions and taking into account the decision of the judge in the Southwark Crown Court case, the judge decided that notwithstanding the absence of the

appellant, he would continue the proceedings. Although it was not a case of absconding, the judge was satisfied that following Jones, he had jurisdiction to carry on in the appellant's absence and he was fully satisfied that a fair trial could be effected in the circumstances of this case, notwithstanding the appellant's absence. He did not consider that the appellant would suffer any real prejudice or injustice.

The Grounds of Appeal

28. The central factual point in this case, which is the context in which the grounds of appeal are mounted, is that the appellant was deported by the Home Office (an arm of the State) against his will. Furthermore the deportation was in circumstances where it was known that the confiscation proceedings were on foot.

29. Mr Wyeth QC, counsel for the appellant, submits that in these circumstances there was no justification for the court continuing with the confiscation proceedings. He puts his case on three distinct grounds. First, he submits that the power to make a confiscation order is conferred only under the 2002 Act. Whilst that Act envisages an order made in circumstances where a defendant has absconded, that was not the situation here. That is the only situation which is regulated by the statute dealing with the absence of a defendant. Mr Wyeth submits that in the absence of expressed power to carry on in the circumstances arising here, the court had no jurisdiction to continue the proceedings and its order was a nullity.

30. Mr Wyeth recognises that Jones does confer the power on a court to continue proceedings notwithstanding the absence of the defendant, even in circumstances where that absence is involuntary. His submission is that the common-law principle cannot take effect since it is precluded in this case by the statute. The Act envisages circumstances where proceedings can continue notwithstanding the absence of the defendant and these must be treated as exhaustive.

31. Second, he submits that even if in principle the court had jurisdiction, it was an abuse of process for the appellant to be denied the right to take part in the proceedings where his unavailability was not only involuntary but was the direct consequence of action taken by an organ of the State. It was moreover a breach of his right to be present at his trial (conferred by Article 6). While Jones confirms that in exceptional circumstances a judge can conduct a trial, even where a defendant is involuntarily absent, that ought not to extend to a situation where the State itself is the cause of that absence.

32. Third, Mr Wyeth submits that the common-law principle is enunciated in Jones even if applicable, only applies where the judge is satisfied that a fair trial can be held. He submits that the decision of the judge in this case that there could be a fair trial was wrong and constituted an error of law. There was a real dispute as to the value of the realisable assets available to the appellant and the issue could not be fairly determined in his absence.

33. The Crown submits that the principle of Jones is applicable here. If a criminal trial may be continued at the discretion of the judge notwithstanding the involuntary absence of the defendant, then in an appropriate case so can confiscation proceedings. Nothing in

the statute removes that common-law discretion. The provisions dealing with absconding defendants are not intended to be exhaustive of the circumstances where proceedings may continued in the defendant's absence. The fact that the absence was caused by the Crown itself was irrelevant. The only issue was whether he would receive a fair trial. Furthermore the appellant himself could have sought to obtain a special Visa to return to this country.

34. As to the question of fairness, the judge was manifestly entitled to conclude that a fair trial could be held notwithstanding the absence of the defendant. He had been involved in earlier stages when responding to the Crown's statement under section 16. He had agreed, at earlier stages, the benefit figure and there was no real dispute as to the property in his possession. The principal issue here was simply one of valuation. That could be determined without the appellant being present.

Conclusions

35. Our conclusions with respect to these grounds are as follows. As to the first, we accept the prosecution submission that there is in principle no reason why in an appropriate case the common law principle that the trial could continue absent the defendant could not apply here. Jones was concerned with a case where the question of guilt and innocence was at stake. A fortiori it must in principle be open to a judge to permit sentencing and related hearings to take place even where the defendant is involuntarily absent. Of course Parliament can, by appropriate language, limit or exclude the common-law rule. We do not, however, accept that it has done so here. It is true that the Act deals specifically with the position of absconding defendants and not with others who may be absent voluntarily or involuntarily for one reason or another. Perhaps that is because the absconsion is the most common reason why defendants do not appear at these hearings. Be that as it may, we do not think it is legitimate to infer that Parliament's intentions must have been to prevent hearings continuing, in all circumstances where a defendant is absent save where he has absconded. The simple fact here is that the two conditions in section 6 were met when the proceedings were initiated. The only question then was whether the absence of the defendant should bring those proceedings to a halt. This was not a jurisdictional matter, it was a case of a court having to exercise its discretion in the light of common law and Convention principles. Accordingly, this ground of challenge fails.

36. The second ground is that a discretion to continue should never be exercised where it is the action of the State itself which causes the absence. We accept that submission. Jones was not dealing with this kind of case. It seems to us there is a fundamental difference between a case where the defendant is unable to attend trial because, for example, he has some long-standing illness and a case where he cannot do so because the State itself, or an arm of the State, has prevented him from being present.

37. It cannot, in our judgment, be in accordance with the Convention for the State to deny a right to be present. It is an important safeguard in securing a fair trial, even in circumstances where his presence is not, on the facts, essential to secure that fairness. We consider this was a breach of Article 6.

38. It may be, as Mr Wyeth submits was probably the case, that the State may have deported the appellant not only against his will but against the court's will. If that were so, it would make the appellant's case even stronger. But whether it be so or not, we are satisfied that the State should not deprive someone of the rights conferred by Article 6 and then seek to contend that his presence is not that important and therefore a fair trial can continue.

39. We would add that in our view, it was also at common law an abuse of process for the judge to proceed in the defendant's absence.

40. As to the prosecution submission that the appellant could have sought to secure a special Visa, we find that most unattractive. His Honour Judge Robbins put the onus on the prosecution to see if steps could be taken to bring the appellant back to this country and we think where the State is at fault then it must put right that error. Had it been able to secure his return, or indeed had it been able to secure an effective trial by video link, then the outcome of this case would no doubt have been very different.

41. We recognise, of course, that this may create some inconvenient results. There will be cases, and perhaps this is one, where the scope of conflict over the evidence is very limited and where in truth the presence of the defendant is likely to make little difference to the outcome. But it is a very strong matter to determine the defendant's rights in his absence, at least in circumstances where he wishes to be present. That is particularly so in proceedings which involve the making of an order, breach of which places him at further risk of a custodial sentence. Accordingly, on the second ground, we find in favour of the appellant and we conclude that the confiscation order ought not to have been made and should be quashed.

42. The third ground is not in the event strictly relevant. We would simply observe there we are satisfied that given the very limited area of dispute, the fact that the appellant was not present did not render these proceedings intrinsically unfair. As we have said, he was able to make representations at an earlier stage. There was no real dispute about the benefit figure and, in any event, it was far larger than his available assets. He did not seek, at earlier stages when he was involved, to counter the prosecution evidence that there were four items of property. The matter was essentially one of valuation. Mr Wyeth says that because of his lack of instructions he was a little more than an amicus in these circumstances. That may be true, but the area of conflict here was very narrow and had, for example, this been a case of incapacity or lengthy and involuntary illness we have no doubt that the judge would have been entitled to have continued with these confiscation proceedings notwithstanding the absence of the defendant.

43. Gavin.

44. We turn to consider the case of Gavin. The chronology of the confiscation in his case is as follows. He was sentenced on 1st May 2009 and the Crown invited the court to move to confiscation. Directions were made fixing a hearing date on 21st August 2009. The prosecution issued a statement under section 16 and the appellant signed a statement pursuant to section 17 on the 22nd May, in which he claimed that the Gurney Road property had been repossessed. On 16th June 2009 he made a request to the

immigration officials to return to Jamaica under the Facilitated Return Scheme. He repeated to an immigration officer on 9th July that he was anxious to return to Jamaica. His application under the scheme was approved on 17th July. There was a further section 17 statement signed by him on 28th July in which he stated the Gurney Road property was not a realisable asset. On 30th July that property was sold by someone with the name of Mark Anthony Pearson which was of course the name on the false passport by which the appellant had gained admittance into the country.

45. On 21st August there was a hearing before His Honour Judge Brown at which the appellant was present and represented. That hearing was adjourned. On 25th August proceeds from the sale of the Gurney Road property were transferred to an account in Jamaica. A deportation order was faxed to Her Majesty's Prison at Maidstone and served on the appellant on 17th September 2009 and he was finally deported on 30th September.

46. The confiscation hearing came before Mr Recorder Ferris on 16th October. He heard a submission to the effect that the proceedings should not go ahead because of the absence of the appellant. He was not persuaded by that given that the appellant had wanted to go and could have contacted his solicitors, and also because there was every reason to suppose that he might be deliberately seeking to depart from the country because of what appeared to be false representations made in the section 17 statement. He did however adjourn the proceedings at that stage because counsel who was acting on behalf of the appellant was not in a position to deal with the matter on that date, given the lack of proper instructions.

47. The hearing was restored before His Honour Judge Tain. He adjourned the matter to allow for further enquiries into the circumstances surrounding the appellant's deportation. Whether he was right to reopen Recorder Ferris' conclusion is a moot point but nobody has taken that point. In any event, His Honour Judge Tain, having heard about the relevant circumstances, was fully satisfied that the confiscation hearing should proceed. He thought that there was no doubt at all that the appellant had unambiguously chosen voluntarily to place himself out of the jurisdiction, and applying the principles in Jones he considered that it was appropriate for the proceedings to go ahead.

48. We have seen information which confirms that at no stage does it appear that the appellant either told the authorities that confiscation proceedings were outstanding, nor did he contact his own solicitors. The Borders Agency did contact the prison at Maidstone where the appellant was held and it seems that they were wrongly informed that no confiscation proceedings were on foot at that time. No doubt he would not have been deported had they been given correct information. The judge was of the view that notwithstanding that error, this did not prevent the appellant's absence to being properly categorised as a voluntary absence.

49. The submissions of counsel essentially replicate those that were advanced with respect to Taise. We have already indicated why we reject the submission that there was no power under the statute for the court to continue with these proceedings

notwithstanding that here too it is common ground that this appellant had not absconded.

50. Counsel for the appellant, Miss Van Den Bosch, submits that this case is on all fours with Taise. She says that the judge was wrong to conclude that this was somebody who was voluntarily absent. Had the prison properly informed the Borders Agency, then the appellant would not have been deported and in all likelihood he would have been available to be present at the proceedings.

51. We do not accept that submission. The fact that the authorities were in error does not affect the fact that this appellant, with full knowledge that these proceedings were on foot, chose to take advantage of a scheme which would secure his removal from the country far more quickly than might otherwise have been the case. He did so without telling the authorities that the confiscation proceedings were ongoing and without telling his own solicitors. We are not suggesting that he was under any obligation to do that but he takes the consequences if he does not to so.

52. Miss Van Den Bosch submits that it cannot be said in these circumstances that he has waived his right. She refers to the judgment of Lord Rodger in the Jones case and says that this appellant would not necessarily have appreciated that the confiscation proceedings would continue in his absence and it would be wrong for the court to speculate as to whether that was so or not. She may be right to say that strictly there is no waiver in the circumstances, but whether that be so or no, as we have indicated, where he is voluntarily absent, whether it amounts to a waiver or not, the court can exercise its discretion in accordance with the principles enunciated in Jones and choose to continue the proceedings provided a fair hearing can take place. We would also add that there must be a very strong inference in this case that one of the reasons why the appellant wished to go back to Jamaica was because he had transferred to Jamaica assets from the sale of the property in Gurney Road which he had claimed were not his assets or under his control. The judge in fact found at the confiscation proceedings that it was under his control. So it reinforces the view that this was a voluntary absence; there was a strong motive for him wanting to leave the country as quickly as he did without even informing his own solicitors.

53. The issue then arises as to whether the judge was entitled to conclude that there could be a fair hearing notwithstanding his absence. We are wholly satisfied that the judge was entitled to reach that view. The appellant was able to instruct his lawyers for the first part of the proceedings. He was involved in making his section 17 statements. He does not appear to have disputed the benefit figure, but in any event that was far greater than the available amount. He had counsel to represent him. In this case, as in Taise's case it must be emphasised the prosecution rightly stated that by analogy with the absconsion principles they would not seek to rely on the assumptions in section 10.

54. We do not say that there were not any matters in dispute where his presence may have been of some assistance. It may be that he wanted to give some explanation about the Gurney Road property and why he was submitting that it was not properly to be taken into account. But he has by his own absence chosen to take the consequences and if and in so far as his absence may create some prejudice to his case, it did not begin to

defeat the judge's conclusion that the essence of a fair hearing could be achieved here. It follows that in his case the appeal fails and the confiscation order stands.