NCN: **[2020] EWCA Crim 351**

No: 201902955/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 20 February 2020

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE LEWIS

MRS JUSTICE MAY DBE

R E G I N A

v

TRACEY NEWELL

REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION UNDER S 9

CRIMINAL JUSTICE ACT

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

Ms G Rose appeared on behalf of the **Applicant**

Mr G Wills appeared on behalf of the **Crown**

J U D G M E N T

LORD JUSTICE DAVIS:

Introduction

1. This is an appeal against sentence, in the form of a confiscation order, brought on a reference by the Criminal Cases Review Commission. It is based on what is said to be fresh evidence which, it is said, only emerged after the confiscation order proceedings were concluded.

2. The original confiscation order made in the Crown Court was in the sum of £17,637.93. The order was made as long ago as 28 May 2013. An appeal against that confiscation order was then dismissed by the Court of Appeal (Criminal Division) on 8 April 2014.

3. The proposed fresh evidence and change in circumstances had, on the face of it, been identified by, at all events, October 2014. Indeed, an application to re-open the confiscation order in the Crown Court was made at that time; but it was rejected on jurisdictional grounds by the Crown Court on 19 December 2014. There was then a delay until an application was made to the Criminal Cases Review Commission by the solicitors for the appellant on 12 January 2016. Even more regrettably, there was then very significant delay thereafter until the actual reference was made to this court. That was done on 8 August 2019, that is to say, nearly 3 years and 9 months after the original application to the Criminal Cases Review Commission. We will need to come back to that.

4. We observe that the prosecutor in the Crown Court proceedings (the London Borough of Southwark) has not opposed this appeal. Ms Rose has appeared on behalf of the appellant. She has presented careful arguments on the appellant's behalf. Mr Wills has today appeared on behalf of London Borough Southwark and we are also grateful to him for his attendance and his observations.

Background Facts and Proceedings Below

5. The background, shortly put, is this.

6. On 29 November 2012 the appellant had pleaded guilty in the Crown Court to seven counts of dishonestly failing to give proper notification of a change of circumstances affecting an entitlement to benefit, contrary to section 111A(1A) of the Social Security (Amendment) Act 1992. In short, she had pleaded guilty to benefit fraud. She was in due course sentenced in the Crown Court to a term of 18 weeks' imprisonment suspended for 18 months and with an unpaid work requirement. It may be noted, among other things, that she had a previous conviction for similar offending, albeit on a much lesser scale. A basis of plea had been put forward at the time of sentence which was not accepted by the prosecution. However, it was not thought necessary to conduct any Newton hearing.

7. The circumstances of the offences were that over a period between 1 August 2005 and 5 December 2012 the appellant held money in seven bank accounts which she had failed to notify to the local authority. As a result of that she had received an overpayment of benefit in the sum of £17,637 odd. Four of those accounts had been held in her sole name, whilst three of them had been in the joint names of herself and her father. As at September 2011 the total sum in the sole accounts in her name was just over £4,000, while the total sum in the joint accounts exceeded £67,000.

8. Confiscation proceedings in the Crown Court were commenced and pursued. It may be noted that at that time there were already ongoing tribunal proceedings between the London Borough of Southwark and the appellant with regard to recovery of what is said to be due to her, these proceedings being in the Social Entitlement Chamber. No explanation has been given as to why confiscation proceedings were pursued in the Crown Court, when the relevant proceedings in the Tribunal were ongoing. Nor is it clear whether it was made known to the Crown Court that that was the position.

9. At all events, it was the appellant's case in both sets of proceedings - indeed it had been her case as advanced in a prior interview in 2011 and was her case advanced in the basis of plea tendered at the Crown Court - that so far as the joint accounts were concerned she had no beneficial interest in any of them. Those accounts, she said, had represented the lifetime savings of her father and his twin brother, Miguel, in whose joint names the accounts originally had been held. Miguel had died and at that stage her father was very elderly, being over 80 years old at the time. So the suggestion was made by the bank that she be named as one of the joint account holders in place of Miguel. As was her case, she at no stage had made any contribution to the sums in those accounts and at no stage had she withdrawn any sums from those accounts for her own benefit. The money was initially entirely her father's and her uncle’s and then latterly entirely her father’s. That also was the father's position: he said that money (after Miguel’s death) all belonged to him.

10. Before any decision had been made in the Tribunal proceedings, there was a hearing of the confiscation proceedings in the Crown Court before a Recorder. The appellant and her father gave evidence at that hearing. It was the prosecution case that the benefit figure was the £17,637, representing the calculated amount of the overpaid benefits to the appellant. Although in the section 16 statement it had been advanced that this was a criminal life-style case, it can be seen that, in practice, the benefit was being treated as benefit arising from her particular criminal conduct. It was, amongst other things, also the prosecution case in the Crown Court proceedings that it was not accepted that the appellant had no beneficial interest in the joint accounts.

11. On 28 May 2013 the Recorder made a confiscation order in the amount sought. The Recorder found that the criminal life-style provisions applied: although the relevance of that does not seem to be particularly material for present purposes, in view of the way in

which the benefit figure had been confined.

12. The Recorder found that the appellant had not been a frank witness. What he was to say was this:

> "I did not find Tracey Newell to be a frank witness, given her answers in interview and her answers to me about her entitlement in law or indeed her status in law to being a joint account holder."

13. Having made those somewhat cryptic statements (although the Recorder was at least not cryptic as to his finding her not to be a frank witness) the Recorder then went on rather vaguely to say this:

> "Tracey Newell called on her behalf her elderly father. It may be that some or indeed the bulk of monies in the accounts held by Barclays belonged to him and/or his late brother Miguel. Even if that was the case, that does not either preclude me from making or indeed enforcing the order with a period of imprisonment in default unless it is unjust so to do."

14. Quite why notions of injustice were built into this ruling in this way is not altogether clear. The Recorder at all events then indicated that he found her conduct "thoroughly dishonest", and that it was right to make the order as sought.

15. There was then an appeal by the appellant to the Court of Appeal (Criminal Division). The appeal related solely to the realisable amount. It was based on the Recorder's asserted failure to make appropriate findings or to determine the realisable assets of the appellant and his failure to make clear findings as to her beneficial interest, if any, in the joint accounts. However, no appeal against the decision as to benefit was pursued (indeed, the amount of benefit appears to have been agreed). Nor was any application to adduce fresh evidence made before the Court of Appeal.

16. In the meantime, the Tribunal proceedings in the Social Entitlement Chamber had been proceeding. There had been an initial hearing in front of Judge Hindley in March 2014. The Court of Appeal, when the matter came before it, in April 2014, was informed of that fact. Although it is not entirely clear, it seems to be the case that in March 2014 the Tribunal judge, whilst not making any final or written decision, had given an indication that he was minded to accept that the appellant in truth had no beneficial interest in the joint accounts, and that the monies had been entirely those of the father and the uncle and then subsequently of the father alone.

17. In addition, the Tribunal by then was having to deal with certain technical points which had arisen, which suggested that the original calculation of the overpayment to the

appellant may in any event have been wrong in some respects.

18. On 8 April 2014 the Court of Appeal (Criminal Division) dismissed the appellant's appeal against the confiscation order. As we have said, the focus of the appeal had been on the available amount. It was held by the Court of Appeal (Criminal Division) that, even if the appellant had not beneficially owned all the money in the joint accounts or even one-half, still she could properly have been adjudged to own sufficient of these sums so that, taken together with the sums held by her, whether in the other accounts in her own name or otherwise, they amounted to not less than the benefit figure of £17,637. The substantive finding was that the appellant had failed to discharge the burden of proof resting on her in that regard. Accordingly, the conclusion of the Recorder in the Crown Court was upheld.

19. As to the point made about the ongoing Tribunal proceedings, it appears that an unsuccessful application to adjourn, pending the outcome of the Tribunal proceedings, had been made to the Court of Appeal. In the judgment of the court, given by Jeremy Baker J, this was said:

> "We have been informed that since the confiscation hearing took place, there has been a hearing before the Social Security Tribunal in which it determined that the monies held in the joint accounts were not owned by the appellant. We understand that the local authority is considering its position as to whether to appeal against that determination. However, regardless of that matter, the determination was of course a matter for the Tribunal for the purpose of the proceedings before it. Accordingly, we do not consider this is a matter which affects the validity of the findings of the Crown Court in this case, nor the legality of the order made by it in these proceedings."

20. So far as the Tribunal proceedings were concerned, the detailed and careful written decision of the Tribunal judge was in due course handed down on 6 June 2014. It was fully and thoroughly reasoned. The First-Tier Tribunal judge amongst other things found, on the documentary evidence and on the evidence of the appellant and her father, that the appellant had no beneficial interest at all in the joint accounts. The judge accepted her and her father's evidence on this. The judge in this respect also had regard to an amount of documentation, not all of which may have been produced in the Crown Court.

21. In dealing with the matter, the judge made clear that he had been made aware of the Crown Court proceedings and the guilty pleas but that otherwise he had very little information about the course of events in the Crown Court. The Tribunal judge, in the circumstances, understandably took the view that he was to regard that as a separate matter and that he was to deal with the matter in accordance with the relevant provisions relating to social security entitlement.

22. Quite apart from the position about the interest in the joint accounts, by this stage the London Borough of Southwark had been accepting before the Tribunal that it had indeed to some extent miscalculated the overpayments; and indeed a fresh calculation in these respects had been directed by the judge. Those errors, put shortly, were to the effect that there had been an inadvertent failure to have regard to a particular Social Security regulation to the effect that in cases of joint accounts the beneficial interest was not to be assessed in excess of one-half; that a sum of money in one of the appellant's own accounts should, under the regulations, have been disregarded, as reflecting the proceeds of a particular kind of damages claim; inadvertent failure to adhere to a rule called the "diminishing notional capital rule", which had been misapplied; and finally, there had been an oversight in carrying forward certain debit balances which should have been set off against certain credit balances.

23. At all events, these particular errors, as was accepted, gave rise to a recalculated figure of £13,458. But if one then added in the Tribunal's judge's finding that the appellant in fact had no beneficial interest in the joint accounts then that figure was further reduced to a revised figure of £3,225. That was the figure which the judge ultimately accepted: as confirmed by him in his final ruling on 30 October 2014. There was no appeal by the London Borough of Southwark against the Tribunal judge's decision.

24. Following that particular decision, in December 2014 the appellant's solicitors applied in the Crown Court for the confiscation order to be reopened and varied. However, the Crown Court judge rejected that application on jurisdictional grounds in December 2014; and no appeal was brought against that particular decision. So the confiscation order stood.

25. So far as enforcement of the Tribunal decision was concerned, in due course, on 14 December 2015, the London Borough of Southwark wrote to the appellant writing off the outstanding balance of the sum then estimated as being due, in the amount of £2,451. Consequently, so far as those Tribunal proceedings were concerned and enforcement thereof, the matter would have seemed to have come to an end.

The current Appeal

26. By this appeal, however, it is now said that the confiscation order in the Crown Court has been shown to be erroneous. In particular, it is said that the true figure of benefit was wrongly calculated and should not have exceeded the sum of at all events £3,225; although Ms Rose did also seek to argue for a figure even lower than that. That figure of £3,225 was, of course, the sum which the Tribunal judge had found to be due.

27. As it seems to us, we need to be careful at the outset here. As the Tribunal judge had rightly noted and as the Court of Appeal (Criminal Division) also had rightly noted, the proceedings in the Tribunal were separate from the proceedings in the Crown Court; and,

likewise, the proceedings in the Crown Court were separate from the Tribunal proceedings, albeit overlapping issues were raised in both set of proceedings. In the Crown Court the Recorder had heard the evidence. He had rejected the appellant's account and he had rejected her case that she had no interest in the joint account monies. That finding cannot be regarded as superceded simply and solely because, at a later stage and in separate proceedings and perhaps on rather different evidence, a Tribunal judge has come to a different conclusion.

28. How then is the confiscation order, as made by the Recorder, to be set aside? The answer is, so far as the reference is concerned and so far as Ms Rose's submissions are concerned, by reliance on what is said to be fresh evidence. It is said that the findings of the Tribunal judge, perhaps to a degree supplemented by what has since been said in correspondence by the London Borough of Southwark, demonstrate that the amount of the confiscation order made in the Crown Court was wrong and, in particular, demonstrates that the benefit figure was wrongly stated.

29. The first point to which we must allude is to the very great delay that has occurred here. As we have said, the substantive confiscation proceedings were to be regarded as at an end by, at the latest, December 2014. The application on behalf of the appellant to the Criminal Cases Review Commission was not made until January 2016. And the reference was not made to this court until August 2019.

30. This delay is not in any substantial way addressed by the reference itself. This court accordingly, in advance of the hearing today, sought an explanation for what had occurred. The explanation provided to this court yesterday (and we appreciate that the Criminal Cases Review Commission would have had relatively little time to put in a full response) with all respect, barely confronts the realities of the delay.

31. It is said that at the time of the initial application in 2016 there was a huge backlog within the Criminal Cases Review Commission and thus it was that the application was not considered until January 2017. As to the lapse of time thereafter, it then is sought to be said that the subsequent period was to a considerable extent taken up by correspondence between the Criminal Cases Review Commission and the London Borough of Southwark, as well as by internal consideration which was said to be needed in respect of the responses from the London Borough of Southwark.

32. We have noted all that has been thus far said. But the reality is that in this time from 2017 there were in effect two substantive letters from the Criminal Cases Review Commission to the London Borough of Southwark in that time and two substantive responses from the London Borough of Southwark. Periods of months elapsed before the letters were sent, responded to, queried and responded to again. Moreover, it is not at all obvious to us that those responses, lengthy though they are, in truth add anything

material to the sum of knowledge which was already known and addressed by the Tribunal judge in 2014. Ms Rose herself accepted as much.

33. The Criminal Cases Review Commission performs a valuable and important function. The Court of Appeal (Criminal Division) has frequently been greatly assisted by it in achieving justice. We also entirely understand that the Criminal Cases Review Commission is under enormous pressure, with a huge case load and limited resources. We have regard to that of course, and we have sympathy for the Criminal Cases Review Commission in its position. But on any view, a delay of some 3 years and 9 months in dealing with a case of this kind is surely unacceptable. There are some cases before the Criminal Cases Review Commission which unquestionably need lengthy and meticulous and time-consuming investigation. But this was not of them. Here, the correspondence conducted was conducted in a desultory way and in effect seems to have achieved nothing of any material consequence different from what had been identified in 2014. No sense of any kind of urgency or indeed any kind of promptitude is revealed, notwithstanding that the case had not even first been addressed until January 2017 and so particular promptitude thereafter might have been expected.

34. Also, it is rather disconcerting, we have to say, that in its very recent written response, the Criminal Cases Review Commission seems to intimate no expression of contrition or apology or regret at all. Indeed, many of the points that need in this case to be addressed – for example, as to the proper application of s.23 of the Criminal Appeal Act 1968 – are not fully addressed in that response, notwithstanding the court's query. Further, unfortunately it seems that no representative of the Criminal Cases Review Commission was available to appear before the court today, in spite of the court's request; and we had to raise our continuing concerns with Ms Rose, who, of course, had no instructions on the Criminal Cases Review Commission's behalf. We are grateful to her for her attempt to explain matters; but all we can say is that the position is still to be considered as thoroughly unsatisfactory.

35. We think it necessary to make these points because it can be the case and will often be the case that delay of this order will be wholly contrary to the good administration of justice and may in some circumstances operate to defeat justice.

36. All that said, the next point to consider is what the purpose of these proceedings are. As we have said, the London Borough of Southwark had, by 2015, entirely written off the balance which it was then saying had been due to it. Given all that, this court in advance of the hearing today, had queried what the purpose was in pursuing this appeal. However, the response that we have now received has been to a degree illuminating. It seems, although this court had not been made specifically aware of the fact earlier, that whilst the London Borough of Southwark itself (the original prosecutor) is not pursuing any enforcement of the balance of the sums otherwise due to it under the Tribunal decision, the local Confiscation Unit has seen fit to pursue and maintain enforcement

proceedings in the Magistrates' Court in the entire amount, with interest, payable under the confiscation order made in the Crown Court. As we gather, the proceedings in the Magistrates' Court have in the meantime been adjourned pending the resolution of this appeal: that adjournment being very protracted, in view of the intervening delay. Thus it is that so far as the appellant is concerned, this appeal does potentially have a real practical purpose: just because she potentially faces pursuit of enforcement proceedings against her by the Confiscation Unit.

37. There is, however, yet another point of initial concern. The question also has to be asked as to why this purported fresh evidence should be admitted at all. The provisions of section 23 of the Criminal Appeal Act 1968 have to be borne in mind in this context.

38. The point, as we have indicated, is barely addressed in the reference or in the grounds of appeal. The essential fact remains, as we see it, that the potential errors in the London Borough of Southwark's calculation, which had initially given rise to a benefit figure of £17,637, had been fully identified by 2014. It is certainly true that the oversight as to the various technical regulations had not been made known to the Crown Court in 2013 and, if known, would presumably have yielded a lesser benefit figure for the particular criminal conduct, in the sum of £13,458. But even then, that had been identified by the time of the hearing in the Court of Appeal (Criminal Division) in April 2014, so it would appear. Yet it was never sought to be raised in that court. Moreover, as to the principal issue of whether the appellant had any beneficial interest in the various joint accounts, this was indeed raised in the confiscation order proceedings in the Crown Court, as we have said, and was rejected on the evidence. In so far as further and better documentary evidence such as bank statements and so on were produced to the First-tier Tribunal judge in 2014, it may be that those had not been produced in the Crown Court; but no explanation whatsoever has been proffered to explain why those documents had not been produced by the appellant either in her section 17 statement in the Crown Court or at least at the hearing before the Recorder. These were documents of a kind which would have been available to the appellant to obtain. Indeed she had been asked for all supporting documents as far back as 2011 when she had been interviewed. Moreover, this information related as much to benefit as it did to available amount.

39. With all respect to the reference, this point is completely glossed over. The reference shortly and blandly in effect asserts that the evidence was new and was only revealed in the intervening correspondence with the London Borough of Southwark. This, with all respect, by no means conveys the full picture: and simply does not attempt to provide an explanation as to why the documents could not have been produced at the time.

40. The question, nevertheless, ultimately still has to be decided by reference to what is expedient in the interests of justice. So far as the delay is concerned that, in our judgment, ought not, in the particular circumstances of this particular case, to be visited upon the appellant herself. Further, as it seems to us, on any view it can now be seen

that the amount of the original confiscation order was wrong; it should at least not have been more than £13,458, given the subsequently identified errors on the part of the London Borough of Southwark: errors of which the appellant and her legal team could not reasonably have known at the time.

41. However, what about the issue concerning the question of whether or not the appellant had an interest in the joint bank accounts? We have hesitated on this. The Recorder had reached a conclusion, which was open to him on the evidence before him, and his decision was upheld by the Court of Appeal (Criminal Division). Ms Rose in this regard submitted that the whole focus in the Court of Appeal (Criminal Division) had been on available amount, when what should have been addressed was the question of benefit. That may or may not be so: but it remains the case that that is not the way in which the argument was put before the Court of Appeal (Criminal Division) in 2014.

42. Moreover, whilst it is right that the Tribunal Judge reached a different decision from the Crown Court Recorder on, it would appear, significantly better and fuller evidence, it is to be clearly understood that a concurrent decision of a Tribunal judge, in the context of social security proceedings, cannot be taken of itself to trump a prior decision of the Crown Court judge in confiscation proceedings.

43. Very much on balance, we have come to the conclusion that we should nevertheless permit this proposed evidence to be adduced. We do take the view that it would be unjust for this confiscation order to stand in its current amount. Unsatisfactory though the position is about properly presenting this evidence, whether before this court in 2014 or before the Crown Court in 2013, the realities are that all the indications would suggest that the amount of the benefit, and not simply the available amount, was significantly overstated.

44. We consider in such circumstances that this court should interfere. Having formally admitted the evidence, we will reduce the amount of the confiscation order to the sum of £3,225: which corresponds to the amount established in 2014 in the Tribunal proceedings and which corresponds to the evidence as it now stands.

45. Ms Rose sought to persuade us to substitute a lesser figure than that; but we see no reason for doing so. She also suggested, and Mr Wills did not oppose, that in terms of proportionality the right order would be that the confiscation order be quashed altogether and that no sum should be due from the appellant under such an order. We can, however, see no justification whatsoever for taking such a course on this appeal brought by way of this reference. The fact remains that the appellant had behaved dishonestly. She had pleaded guilty. She had benefited from her fraud.

46. Accordingly, in the result the confiscation order will be quashed. For it there will be substituted a confiscation order showing benefit in the sum of £3,225. Moreover, in the circumstances of this case, that should be recorded as benefit arising from *particular* criminal conduct and not benefit arising from *general* criminal conduct. Whether the Confiscation Unit considers it appropriate or sensible hereafter to pursue enforcement proceedings in respect of that particular amount (if, indeed, there still is any undischarged balance), we leave to the good sense of the Confiscation Unit.

47. Finally, we will direct that a transcript of this judgment is to be provided and considered by the Criminal Cases Review Commission. We do not wish unduly to belabour the point about delay; but, equally, this cannot and should not be glossed over or passed by. It remains of concern that the latest response of the Criminal Cases Review Commission would not seem to indicate much penitence at what has occurred. Delay may be unavoidable in some situations, and we repeat that we understand all the many pressures on the Criminal Cases Review Commission, which has but limited resources. Even so, a delay of 3 years and 9 months in a case of this particular kind is simply not good enough.

48. LORD JUSTICE DAVIS: Are there any points arising?

49. MR WILLS: My Lord, just one point. I take note that the default term is reduced up to 3 months given the adjustment of the order.

50. MS ROSE: Yes, I would agree with the point made by my learned friend. The section 16 statement contains the brackets, so to speak, for the default term and amount exceeding £2,500 but not exceeding £5,000. The default can be up to 3 months.

51. LORD JUSTICE DAVIS: One month.