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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 834

CASE NO 201800397/C4

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 18 May 2021

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE SPENCER

MR JUSTICE FORDHAM

REGINA

V

TROY ATHERTON

Computer Aided Transcript 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)

NON-COUNSEL APPLICATION

J U D G M E N T

1. MR JUSTICE SPENCER: This is a renewed application for leave to appeal against a confiscation order following refusal by the single judge.
2. The confiscation order was made as long ago as 22 December 2017. The applicant (now aged 61) was represented by solicitors and counsel at the confiscation hearing. Since then he has been a litigant in person. The single judge refused leave in July 2018. The reason why the renewed application for leave has taken so long to come on for hearing before the Full Court is largely because the applicant has been requesting more time to instruct new lawyers. The matter is listed before us today as a non-counsel application and there has been no attendance by the applicant himself.
3. The confiscation proceedings arose from the applicant's conviction for an offence of producing cannabis and an offence of abstracting electricity. He pleaded guilty to those two offences on 28 November 2016 in the Crown Court at Maidstone. He was sentenced to 30 months' imprisonment for the cannabis offence and 9 months' imprisonment consecutive for abstracting electricity. Those sentences were in turn ordered to run consecutively to sentences totalling 5 years' imprisonment on another indictment involving firearms. His total sentence was therefore seven-and-a-half years' imprisonment. He was released from that sentence some considerable time ago.
4. The confiscation proceedings eventually came on for hearing before HHJ Griffith-Jones at Maidstone Crown Court on 22 December 2017. There had been delays necessitating mention hearings in August and October 2017, at which directions were given for the service of further evidence by the applicant if he intended to rely on it.
5. One of the applicant's complaints is that his solicitors and counsel were not sufficiently prepared for the hearing. Furthermore, although it was not one of his original grounds of appeal, after refusal of leave by the single judge the applicant also now contends that the judge should have adjourned the confiscation hearing to allow him to seek alternative representation. We can deal with that ground straightaway. We note from the judge's ruling that in fact no application for an adjournment was made at the hearing, and for good reason. The judge indicated in his ruling that any such application would have encountered very real difficulty.
6. The offence of producing cannabis involved the finding by the police of 211 cannabis plants growing at the applicant's home address on 3 May 2016. The plants were at three different stages of growth and were found in an upstairs bedroom and in the garage. The house was in effect a cannabis factory. The electricity meter had been bypassed.
7. There was an issue as to the valuation of the cannabis plants. The expert evidence from an experienced police officer, DC Costello, was that the potential yield was 56 grams per plant, that being the mid-point in the appropriate range. The applicant did not raise any issue about the potential yield in his section 17 statement. Nevertheless the judge accepted that some allowance ought to be made for the possibility that not all the plants would achieve such a yield. Taking a broad-brush approach the judge discounted the prosecution calculation by 25%. The figure the prosecution had put forward was £47,200.
8. There was no challenge to the valuation of two other quantities of cannabis recovered from the house, £1,600 and £2,200 respectively. Nor was there any challenge to the value of the abstracted electricity, £1000.17.
9. Because it was a criminal lifestyle case the judge was required to consider any benefit from the applicant's general criminal conduct, applying the assumptions in section 10 of

the Proceeds of Crime Act 2002 ("POCA"). The relevant date for the purpose of the assumptions was 4 November 2010, 6 years before the commencement of proceedings for the relevant offences. The prosecution contended that there were cash deposits into a number of bank accounts totalling £155,709. The statutory assumption under section 10 was that this was property that had been transferred to the defendant as a result of his general criminal conduct. The burden of proof was on the applicant to displace that assumption, by clear and cogent evidence.

10. There was also a statutory assumption that the applicant's purchase of a Range Rover motor vehicle, valued by the prosecution at £7,500, was met from property obtained as a result of his general criminal conduct.
11. Two of the bank accounts were in the name of Beverley Davis, the applicant's girlfriend at the relevant time. The applicant's case was that the cash deposits into the bank accounts were derived from a legitimate business, KBC Landscaping Solutions Ltd. It was evident that the company had purchased hydroponic and other equipment for growing cannabis. However, police investigations revealed that on 30 March 2014 the applicant had applied for the company to be struck off the register, stating it had not traded since 1 October 2013. Almost all the cash deposits and purchases were made either before the company was formed or after the date when the company was said to have ceased trading. The judge was satisfied that the applicant had provided no evidence to suggest that the company had ever traded. The applicant was in receipt of State benefits throughout the relevant period, and he had never declared for tax purposes any income from a legitimate business.
12. At the hearing the applicant also suggested (for the first time) that some of the cash deposits and payments prior to May 2013 were made through his girlfriend's account on behalf of two other named individuals called Garrett and Sears. There was no documentation to substantiate this. The judge made it clear that he disbelieved the applicant's oral evidence.
13. In relation to the purchase of the Range Rover, the judge rejected the applicant's evidence that he had only paid £1,200 to £1,500 for the vehicle, but he did reduce the prosecution's figure of £7,500 to one of £5,000.
14. This all resulted in a total benefit figure of £200,909.17.
15. The judge next had to assess the "available amount" to meet the confiscation order. The applicant's principal asset was his house, 78 Shorefields. The property was in the applicant's sole name. There was no suggestion at the hearing that his girlfriend had any beneficial interest in the property although that has been suggested more recently, to which we shall return. There was no evidence to contradict the prosecution's figure of £304,130 for the gross value of the property. After deducting the outstanding balance on the mortgage, and the amount of a second charge, the net equity in the property was £114,650. The only other asset was the Range Rover. The judge assessed its current value at £1,750. The total available amount was therefore £116,400.
16. As this was less than the benefit figure, the available amount constituted the recoverable amount and the judge duly made a confiscation order in the sum of £116,400. He ordered that the confiscation order be paid within 3 months, with a term of 27 months' imprisonment in default.
17. The applicant has advanced a number of grounds of appeal of his own composition, not all of which are easy to follow. Broadly they may be summarised as follows:

18. Ground 1: the court should not have made the assumptions it did because they were incorrect and caused injustice; rather the court should have accepted the applicant's factual basis and made appropriate subtractions.
19. Ground 2: the applicant disputes the quantity of cannabis which would have resulted from the plants seized. He complains that he was effectively coerced by his solicitor into signing his section 17 statement; he was given an ultimatum of signing it or being left unrepresented. He asserts that he had no control over the bank accounts (or some of them) and that the value of the cannabis was inflated. He denies that he had a criminal lifestyle, asserting that he had been cultivating cannabis for only 4 months.
20. Ground 3: he contends that his girlfriend, Beverley Davis, had a right to be heard as an interested third party; she had not been available at the hearing because she had been ill. He disputes the valuation of his property and complains that his lawyers failed to obtain information and evidence as instructed.
21. Ground 4: he contends that he never signed for the items and documents seized from his home by the police. He continues to dispute the valuation of his vehicle and disputes responsibility for the bank accounts.
22. In view of the criticisms made of his solicitors and counsel the applicant was invited to waive privilege, and did so. We have considered carefully the responses from his counsel and solicitors. It is plain from the material we have seen that the applicant in fact agreed the content of his section 17 statement, albeit he was unhappy with the concession in the statement that the benefit figure would be at least £52,000. It is plain that the applicant had been dilatory in providing necessary information for his lawyers to prepare the case properly. He and his girlfriend had been uncooperative. At the hearing it appears that the applicant had instructed his counsel to attempt to negotiate a settlement, which she sought to do, but in the event the applicant turned down the proposal which was negotiated preferring instead to allow the judge to determine the matter.
23. We note in relation to potential entitlement of his girlfriend Beverley Davis to a share in the equity of the property, that she was given every opportunity by the applicant's solicitors to make such a claim. The emails she exchanged with the applicant's solicitors show that although she was saying she had paid some arrears of the mortgage and other expenses of the property, she was not asserting any entitlement to a beneficial interest in the house. As a matter of law she could have had no such claim.
24. We also have the benefit of a respondent's notice supporting the approach of the judge on each of the contested issues.
25. We have considered carefully all the material before us, including all the applicant's written submissions and supporting documentation. We are not remotely persuaded that there was any error of principle in the judge's approach or that any of his calculations were incorrect. The benefit figure was correctly assessed and, if anything, was generous to the applicant. The statutory assumptions under section 10 of the Act were properly applied. It was for the applicant to displace those assumptions by clear and cogent evidence. He failed to do so and the judge was entitled to reject his evidence.
26. The amount of the confiscation order was, in the end, determined by the available amount, namely the equity in the applicant's house plus the modest valuation of the Range Rover. It is not arguable that those figures are incorrect.
27. We observe that examination of the bank accounts and expenditure on hydroponic

equipment demonstrated very clearly that the applicant had been engaged in this criminal venture of growing cannabis for far longer than might be suggested simply from the crop which was discovered by the police in May 2016. The statutory assumptions were positively vindicated on the evidence which emerged. The applicant came nowhere near to displacing those assumptions.

28. The applicant has had ample time and every opportunity to seek and obtain further legal advice. The time has now come for the order to be enforced. We are quite satisfied that there is no arguable merit in this appeal and the renewed application for leave is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk