IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2024] EWCA Crim 202
Case No: 2023/01481/B5

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 16th February 2024

B e f o r e:

LORD JUSTICE COULSON

MR JUSTICE HOLGATE

THE RECORDER OF REDBRIDGE
(Her Honour Judge Rosa Dean)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

KHURAM JANJUA

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Mr R Furlong appeared on behalf of the Applicant

J U D G M E N T

Friday 16th February 2024

LORD JUSTICE COULSON:

Introduction

1. The applicant is now aged 43. As long ago as October 2011 he pleaded guilty to two counts of conspiracy to supply Class A drugs. On 10th December 2011 he was sentenced to three years and nine months' imprisonment.

2. Confiscation proceedings were then commenced against the applicant. On 18th December 2012, a confiscation order was made. The benefit figure, which was agreed between the parties, was £120,000, with the agreed available amount fixed at £3,874. Only a small part of that sum was ever paid, and so on 11th December 2014 the applicant was committed to prison in default of payment for 58 days. No further payments have been made in the intervening years.

3. Following a belated and unsuccessful attempt to appeal against the confiscation order, which we deal with in greater detail below, on 5th April 2023 the Crown obtained a variation of the confiscation order, made by Mr Recorder Patrick Upward KC ("the judge") at Birmingham Crown Court. That increased the available amount from £3,874 to £66,517.76. The applicant seeks to renew his application for leave to appeal against that variation, following refusal by the single judge.

4. The applicant has today been represented by Mr Furlong of counsel. We should say at the outset that we have been considerably assisted by his submissions. They were advanced clearly, fairly and frankly, in order to ensure, quite rightly, that all the points that the applicant wanted to make were made before us.

The Variation of the Confiscation Order

5. As we have said, the original order was made on 18th December 2012. On 22nd October 2018 the Crown applied, pursuant to section 22 of the Proceeds of Crime Act 2002, for a variation of the confiscation order. That was because further investigation had shown that the property held in the applicant's sole name, 204 Lawford Road, Rugby, had significantly increased in value, so that the applicant's interest in it was worth substantially more than the figure agreed in 2012.

6. The application to vary prompted the applicant to seek an extension of time of 2,942 days in which to apply for leave to appeal against the original confiscation order made on 18th December 2012. The argument was that the benefit figure in the original confiscation order had been erroneously calculated and agreed. It seems clear from the chronology that the applicant was advised that he needed to appeal against the original order before the variation application was heard – hence the belated applications for an extension of time and for leave to appeal.

7. Those applications were refused by the single judge. However, the applicant renewed his applications to the full court. On 18th November 2021, the full court refused those applications: see [2021] EWCA Crim 1797. This court noted, amongst other things, that there was a good deal of authority for the proposition that, when a confiscation order had been agreed between the parties, it was only in exceptional circumstances that the court could subsequently interfere with it. The full court agreed with the single judge that, first, that there was no possible basis for an extension of time; and secondly, that there had been no error in the original calculation and that what had happened in 2012 was instead "a classic case of compromise". There was no evidence of wrong advice, and the suggestion that the applicant

had not been advised in 2012 of the possibility of further section 22 proceedings was found to be "not credible". There was no evidence that the actual section 22 proceedings, when they were launched in November 2018, had taken the applicant in any way by surprise.

8. The Crown's section 22 application having been stayed so as to permit the applicant to apply for leave to appeal, was back on track once the applicant's application had been refused. It proceeded in the Crown Court at Birmingham to a hearing on 5th April 2023.

9. At that hearing, the judge heard evidence from Ms Williams (a financial investigator), who identified the increase in value of the property, and also a separate account containing £15,000. There was barely any cross-examination of her. There was then evidence from the applicant and his partner, Tania Gibbons. The judge then gave his judgment. For reasons which are not apparent, no part of the hearing was recorded on the DARTS system. Accordingly, there was no recording of the judgment. We are grateful to counsel for their agreed note, but it is, of course, a poor substitute for a proper transcript.

10. The agreed note of the judgment makes plain that:

(a) the judge began by setting out the background and the evidence;

(b) the judge was satisfied that the variation application should succeed – the applicant remained the sole owner of the deeds of 204 Lawford Road and was therefore the sole beneficial owner of the property;

(c) in consequence of the evidence of Ms Williams, the property was valued at £71,465.64, and there was also the £15,000 in a NatWest account about which Ms Williams had also given evidence and which was not challenged; and

(d) the judge recognised that Ms Gibbons had contributed to the upkeep of the house, and in consequence of that and other matters, he made a reduction of one-third of the value of the property when calculating the available amount;

(e) in consequence, the available amount was increased from £3,874 to £66,517.76. That was an increase of £62,643.76. That increase was made up of two-thirds of the value of the property, namely £47,643.76 (out of the total value of £71,465.64), and the sum of £15,000 from the NatWest account;

(f) the judge gave the applicant three months to pay the new amount and identified a period in default of six months' imprisonment.

The Proposed Appeal

11. There were originally three points in the proposed appeal. The first was that the judge should have taken into account the applicant's argument that the original benefit figure was not compliant with the decision in *R v Waya* [2012] UKSC 51. The other two grounds – one concerned with the amount of the two-thirds calculation and one concerned with the period in default – both raised suggestions of double counting.

12. The single judge refused leave to appeal. As to the first point, she noted that the benefit argument had not been argued before the judge and was in any event unarguable in the light of the decision of the full court in 2021. As to the double counting grounds, the single judge gave clear reasons as to why neither of those was arguable.

13. The renewed application did not suggest that any part of the proposed appeal was abandoned. This morning, however, Mr Furlong told us that, having seen the views of the single judge, the two points based on the double counting argument were no longer pursued. Whilst this court obviously encourages parties and counsel to abandon arguments which they consider will not succeed, as we pointed out to Mr Furlong, it is unsatisfactory when that happens on the morning of the hearing itself. In our view – and our experience this week has highlighted this – when parties seek to renew applications for leave to appeal, they need to do so having considered in careful detail the observations of the single judge. In that way,

arguments which will plainly not succeed for the reasons pointed out by the single judge can then be abandoned before the court has to spend time and effort preparing to deal with them. We also note that Mr Furlong has had some difficulties as a result of being at least the third counsel to represent the applicant in these confiscation proceedings. He did not appear before the judge on 5th April 2023. We have, we hope, made proper allowance for that fact. Ultimately, of course, the issue is whether or not there is an arguable case that the judge erred in his approach at that hearing.

Ground 1: The Original Benefit Figure

14. We therefore turn to ground 1 of the proposed appeal, which is now the only live ground of the renewed application. This is the argument that, on 5th April, the judge failed to take into account the applicant's argument about the original benefit figure and how it was, so it is said, not compliant with the decision in *Waya*. We have considered that argument carefully, but there are three reasons why we have concluded that that point is not open to the applicant, and is not arguable in this court.

15. First, we are satisfied that the point was not taken before the judge on 5th April 2023. We accept, of course, the difficulties created by the malfunction of the recording system. But it is plain to us from a consideration of all the documents that do exist in relation to that hearing that there was no argument that the judge was obliged to re-open, or should have re-opened, the issue of the original benefit figure. Clearly it cannot be a ground of appeal to suggest that the judge failed to address a particular argument when that argument had not been raised with him.

16. Secondly, we consider that that argument had not been made to the judge on 5th April for the good reason that it could not have succeeded. That is because of what happened in 2021

in this court. This court established, finally and conclusively, that the original benefit figure fixed in 2012 was an agreed figure and was, in the circumstances of this case, inviolable. That is what this court said in express terms. The applicant had tried to open up the benefit figure eight years out of time, and both that attempt and the required extension of time had been refused. That was the end of it. It could not be the subject of any further consideration. We do not accept that a chance observation by the single judge in respect of that proposed appeal (made when refusing permission) somehow meant that the right to raise further points about the original benefit figure survived the conclusive judgment of this court in 2021.

17. Thirdly, standing back and looking at the merits, we consider that the argument is not open to the applicant because of the reasons expressly set out in paragraph 17 of the judgment of this court in 2021. The benefit figure in 2012 had been agreed. There was a series of different potential benefits, different accounts, different sums of money, all of which were potentially in play. There was, very sensibly, a compromise. It was what this court called a "classic case of compromise". Accordingly, there was no unfairness in 2012, because all of the various matters were taken into account in arriving at the agreed figure. This court reiterated in 2021 that there had been no unfairness. There had been no wrong advice. The order in 2012 was just – in the widest sense of the word – regardless of the nitty gritty as to how it might have been made up. That was the end of the matter in 2012 and it is the end of the matter now.

18. Accordingly, for those reasons we refuse the renewed application on Ground 1.

19. As we have said, neither of the other two grounds based on double counting is now pursued and so we do not deal with them.

20. We observed during the debate with Mr Furlong that, in one sense at least, the applicant

has been the author of his own misfortune, because the very modest available amount that was identified in 2012 was a sum that plainly should have been paid. It was not. All the difficulties since have arisen out of that non-compliance. So, although for some of the reasons set out in the papers we have a certain amount of sympathy with the applicant, his position overall is not meritorious.

21. For all those reasons, and repeating again our thanks for Mr Furlong's submissions and the way in which they were presented, this renewed application for leave to appeal against the confiscation order must be refused.
