C/2001/2146

Neutral Citation Number: [2002] EWCA Civ 215

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

(DEPUTY JUDGE JACK BEATSON QC)

Royal Courts of Justice

The Strand

London

Tuesday 5 February 2002

B e f o r e:

LORD JUSTICE LAWS

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B E T W E E N:

IN THE MATTER OF ANDRE N'GUESSAN

IN THE MATTER OF THE DRUG TRAFFICKING OFFENCES ACT 1986

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(Computer Aided Transcription by

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THE APPLICANT did not attend and was not represented

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J U D G M E N T

Tuesday 5 February 2002

1.
THE ASSOCIATE:Application in the matter of N'Guessan. My Lord, the applicant is not here.

2.
LORD JUSTICE LAWS: The case should be called outside.

3.
THE USHER: There is no reply.

4.

LORD JUSTICE LAWS: This an application for permission to appeal against an order of Mr Jack Beatson QC sitting as a Deputy Judge in the Queen's Bench Division made on 26 September 2001 when he struck out the applicant's application for a certificate of inadequacy pursuant to section 14 of the Drug Trafficking Offences Act 1986 in relation to a confiscation order in the sum of £750,000 which had been made against him following his conviction on charges of drug trafficking. I refused permission to appeal on the papers on 26 November 2001.

5.
The applicant is not present. He is serving the prison sentence which was passed on him for the drug trafficking offences. It appears that on 2 January 2002 he wrote from prison a letter to the Civil Appeals Office in which he said:

“As you are aware, I spoke to you on the phone and I am writing this letter to confirm that I want to renew my appeal hearing myself personally.”

6.
On 10 January 2002 the Civil Appeals Office wrote to the applicant at the prison giving notice of today's date. There is no reason whatever to suppose that he did not receive that letter. It was sent to the prison where he is currently serving his sentence.

7.
So far as I am aware no application has been made for any special arrangements to be put in place so that he might be brought from the prison to the Royal Courts of Justice in order to prosecute his application. Since for reasons which I shall shortly explain it seems to me that the application is entirely hopeless, I do not propose to set in train any such arrangement of my own motion.

8.
The essential facts are these. The applicant was convicted on 28 April 1995 by a jury at the Southwark Crown Court of conspiring to supply large quantities of crack cocaine. His Honour Judge Rivlin QC sentenced him to 20 years' imprisonment. The Crown applied for a confiscation order against the applicant under the drug trafficking legislation. Judge Rivlin assessed the applicant's benefit from his crime at not less than £1.3 million and his realisable assets at £750,000. In consequence he made an order by which the applicant was to pay the lesser of these two sums within twelve months or serve an additional three years' imprisonment in default.

9.
The figure for the benefit was based principally upon an estimate of the profits of the whole conspiracy. That was largely founded on a record of cash transfers which had been made by the conspirators through a Thomas Cook bureau de change, and there was also evidence of the applicant's lavish lifestyle.

10.
As to the figure for realisable assets, the learned judge entirely discounted the evidence given to him by the applicant on that matter. He arrived at his figure of £750,000 by making what he considered to be the justifiable assumption that a conspirator in such a criminal operation as this would undoubtedly have retained much of the profit gained from the conspiracy. The judge then reduced that figure because it appeared that the majority of the assets were abroad and the applicant might have to rely upon others to produce them.

11.

The applicant appealed against his sentence. On 8 March 1996 the Court of Appeal, Criminal Division, gave judgment against him. It is to be noticed that the confiscation order was not challenged on the criminal appeal. On 28 July 1997 the High Court appointed a receiver over the defendant's affairs. The receiver recovered, however, no more than £18,900 odd.

12.
On 6 September 2001, the applicant's then solicitors filed an application in the Administrative Court for a certificate pursuant to section 14 of the 1986 Act. The certificate would be to the effect that the value of the applicant's realisable property was inadequate for payment of the amount remaining due from him under the terms of the confiscation order. A sworn affidavit was put in by the applicant. At paragraph 9 he said:

“There is now fresh evidence as to the amount of realisable assets. On 28 July 1997 a receiver, Nicholas O'Reilly of Rothman Pantall and Co was appointed by the High Court, in respect of the confiscation order. I exhibit a copy of the report produced by the receiver .... The report states that all assets have been realised pursuant to the confiscation order. The assets total £18,920.72. I was willing to assist the receiver and he had extensive powers to investigate and locate all my assets if indeed there were any.”

13.
At paragraph 10 he continued:

“The position is as follows:

a.The amount realised by the appointed receiver represents the whole of my realisable property;

b.I do not possess the means to pay the amount outstanding under the Confiscation Order;

c.I have no other realisable property within, or outside, the jurisdiction;

d.I have no bank accounts abroad in my name or in nominee accounts;

e.I have no other property outside the jurisdiction;

f.I have no other real property abroad;

g.I do not receive any rent either directly or through servants or agents;

h.I have no share certificates, National Savings Certificates, Unit Trusts, Shares, nor Debentures in any jurisdiction;

i.I have no arrears of salary, income, or other debts due;

j.There are no trusts of which I am a beneficiary.

11.Consequently, the realisable property is inadequate for the payment of the amount remaining to be recovered under the confiscation order.”

14.
The application was duly made to Mr Beatson QC for the certificate of inadequacy. The prosecution submitted to the learned Deputy Judge that the application was an abuse of the process because it sought to re-litigate the issue that had been determined by His Honour Judge Rivlin. The Deputy Judge said this:

“7. On behalf of the defendant, Mr Lewis first submits that the issue before me under section 14 is not identical to that determined by His Honour Judge Rivlin. So no question of collateral attack on that decision, ie issue estoppel in the strick sense, applies. He further submits that in the circumstances of this case, in particular fresh evidence which has not been contradicted by evidence on behalf of the prosecution, there is no abuse of process and it is just that I issue a certificate of inadequacy.

8. Since the decisions of the House of Lords in Government of the United States of America v Montgomery[2001] 1 WLR 196 and Re Norris[2001] 1 WLR 1388, it is clear that in relation to confiscation orders there is a division of responsibility and function between the Crown Court, which is concerned with what order to make under sections 1 to 4, and the High Court exercising the civil jurisdiction: see Lord Hope at paragraph 3 and 5, and Lord Hobhouse at paragraph 23 of Re Norris. The question for the Crown Court under section 4 was the amount of the value of the defendant's proceeds from drug trafficking or, if the defendant shows that this is the lesser sum, the amount appearing to the court that might be so realised.

9. In the context of section 4(3), on Mr Lewis's submission the Crown Court is looking to the future. The question for the High Court, however, on his submission, is whether the realisable property is in fact inadequate for the payment. Mr Lewis submitted that the function of the High Court is not to revisit the order as a collateral attack on the judge's decision, but to determine whether the assets available to the defendant as a matter of fact are adequate. The classic example of this is where the asset in fact realised less than was assumed by the Crown Court when making the order. So, in his submission, although the issues are related, as was recognised in Re Norris, they are not identical. Moreover, he submits, this is shown by the fact that the receiver as well as the defendant can apply for a certificate of inadequacy. In such a case there can be no question of the matter having been decided against the receiver.

10. I accept, given the temporal differences, that the issue under section 14 is not identical to that under section 4 so as to give rise to issue estoppel in the strict sense. Nevertheless, I conclude, for the reasons below, that the present application should be struck out as an abuse of process. The issues which the defendant was seeking to raise were ones which had been adjudicated by His Honour Judge Rivlin and which the defendant had an opportunity to contest and to adduce evidence to satisfy the judge.”

15.
Then at paragraph 13 he continued:

“Mr Lewis submitted that the classic statement of what a defendant must show when applying for a certificate of inadequacy, as set out by Lord Justice Keene in Gokal v Serious Fraud Office, paragraph 24, simply does not apply to hidden assets, Keene LJ stated:

'.... it is not enough for a defendant to come to court and say that his assets are inadequate to meet the confiscation order, unless at the same time he condescends to demonstrate what has happened since the making of the order to the realisable property found by the trial jude to have existed when the order was made .... Any other approach would amount to an attempt to go behind the finding embodied in the confiscation order, and such an attempt would be an abuse of process.'

14. Mr Lewis submits that this cannot be done in the case of hidden assets. All a defendant can do is to give his evidence and point to what the receiver has recovered.”

16.

At paragraph 18 of the judgment he said:

“Mr Dennison submitted, first, that Re Norris concerned an application by a third party and was primarily concerned with third parties who were not party to the criminal proceedings; that it did not affect the position of a defendant. He pointed to the speech of Lord Hope at paragraph 4, where his Lordship said:

'The scheme of the Act, so far as third party interests are concerned ....',

and in paragraph 6, where his Lordship stated that:

'It cannot be an abuse of process for a third party holding an interest in property .... to seek to exercise that right just because he or she gave evidence in the Crown Court.'

19. He also relied on the speech of Lord Hobhouse, at paragraph 26, in which his Lordship distinguished the position of a person who was trying to re-litigate in a civil court a factual issue which had already been decided against him in a criminal case in which he had been a party, and had a full opportunity of contesting the decision in the court by which it was made with the situation in Re: Norris, where there was a third party.

20. Secondly, Mr Dennison relies on the fact that Gokal v Serious Fraud Office was cited by Lord Hobhouse in Re: Norris and must be taken to be approved by it.”

17.
The learned judge then proceeded to cite from Lord Hobhouse's opinion. Finally, the Deputy Judge concluded:

“24. I accept Mr Dennison's submissions on Re: Norris. So although any indications in the early authorities that the matter is one of strict issue estoppel may not survive that decision, the general approach taken does. Though Mr Lewis submitted that Gokal v Serious Fraud Office had not been approved by their Lordships, it is difficult to read the last sentence of paragraph 26 quoted above otherwise. The recent affidavit evidence does not take things further than they were at the date of the confiscation order. It largely consists of the same evidence as was, or should have been, available at that time and seeks to go behind the confiscation order as to the amounts of the defendant's realisable assets; and in Gokal v Serious Fraud Office Keene LJ stated (at paragraph 17) that this was not a proper basis on which to seek a certificate. As far as the letter from the receiver is concerned, that is simply evidence that he has not recovered the assets, that he has not found the money which the judge found had been salted away abroad. It is not evidence that the realisable property is in fact inadequate.

25. With regard to the submissions that the position differs in the case of assumed hidden assets, I conclude that it does not. In both Gokal v Serious Fraud Office and Ex parte B and in the earlier case of Ex parte Anscombe, the orders were in whole or in part based on such assets.

26. With regard to Mr Lewis's point based on Phillips v the United Kingdom, the fairness of the confiscation order in such a case depends on the precise facts. The policy considerations that weighed with the European Court of Human Rights in Phillips, ie the legitimacy of the aim of preventing criminals profiting from their crime and the fact that the nature and extent of a defendant's assets are peculiarly in his knowledge, and the fact that the inquiry under section 4 and the reverse burden of proof occurs at the sentencing stage after conviction, apply equally in the case of hidden assets.

27. For these reasons I conclude that the application in this case is an abuse of process and I strike it out.”

18.
The applicant's grounds of appeal are summarised thus:

“Ground 1. The judge having found there was no issue estoppel was wrong to hold that the application was an abuse of process.

Ground 2. The judge gave insufficient weight to the distinction between the jurisdictions of the High Court in enforcing confiscation orders and the Crown Court in making confiscation orders.

Ground 3. The judge was wrong not to hold that the Receiver's report constituted fresh evidence.”

19.
These grounds are expanded in a skeleton argument which I have considered carefully. In my judgment the Deputy Judge was plainly right for the reasons he gave. This is a clear attempt to re-litigate the making of the confiscation order in the sum of £750,000. I regard the point on the European Convention on Human Rights as bad. The burden of proof is not reversed in relation to estimating the realisable assets. Their Lordships' House in R v Rezvi, in which the opinions were delivered on 24 January 2002, explained that there was no incompatibility between the Convention and the confiscation scheme under the Criminal Justice Act 1988, which is effectively identical to that contained within the drugs legislation.

20.
This application is hopeless. It is dismissed.