

Judgments

CA, CRIMINAL DIVISION

Neutral Citation Number: [2020] EWCA Crim 1549

201804326 B3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

[\[2020\] EWCA Crim 1549](#)

No. 201804326 B3

Royal Courts of Justice

Thursday, 29 October 2020

Before:

LORD JUSTICE POPPLEWELL

MRS JUSTICE CHEEMA-GRUBB

HIS HONOUR JUDGE SLOAN QC

(RECORDER OF NEWCASTLE)

REGINA

V

MOHAMMED ZIA MUNIR

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**5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737**

CACD.ACO@opus2.digital

MR R. DAVIS appeared on behalf of the Appellant.

MR J. BOYD appeared on behalf of the Crown.

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JUDGMENT

LORD JUSTICE POPPLEWELL:

1 The appellant, now aged 46, pleaded guilty to counts 11 and 12 on the indictment, which charged possession with intent to supply controlled drugs, namely cannabis and cocaine respectively. He also faced charges on counts 1 and 2 of conspiracy with his four co-defendants to supply Class A and Class B drugs over a period of almost two years. As against him those charges were ordered to lie on the file.

2 On 15 February 2018, he was sentenced by his Honour Judge Timothy Smith QC sitting in the Crown Court at Manchester to 40 months' imprisonment on count 11, and 5 months' imprisonment on count 12, to run concurrently. On 24 September 2018 before the same court the appellant was ordered to pay a confiscation order in the amount of £42,613.73, pursuant to s.6 of the [Proceeds of Crime Act 2002](#) ("the 2002 Act"), to be paid within three months, or twelve months' imprisonment in default of payment.

3 He appeals against the confiscation order with leave of the single judge. The benefit figure which determined the amount of the confiscation order included the street value of the drugs involved in these convictions, namely £28,790. The difference between that figure and the benefit figure of £42,613.73, namely £13,823.73, represents benefits treated as obtained from general criminal conduct as a result of a criminal lifestyle. This appeal is only concerned with the £28,790 treated as the benefit from the particular criminal conduct involved in the convictions.

4 The drugs were found in the garage of the appellant's house in Manchester. They comprised approximately 1.5 kilograms of cannabis in a black bin liner, and approximately 180 grams of cocaine.

5 The appellant was sentenced on a written basis of plea which was not challenged by the prosecution. The basis of plea was that he was provided with the bin liner by Rawal Rehman shortly before he, the appellant, went to Pakistan and Dubai. Rehman was a co-defendant who pleaded guilty to the conspiracy counts 1 and 2, and was sentenced to a total of 11 years, 3 months' imprisonment.

6 The basis of plea was that Rehman was his supplier of cannabis for personal use. Rehman asked the appellant to hold on to the bin liner for him. When Rehman did not return for the bag the same day, the appellant put it in a suitcase in his garage. He contacted ,and tried to contact, Rehman in the following days to persuade him to collect the bag of cannabis, but was fobbed off. As for the cocaine, the appellant was in Pakistan when he was contacted by a man he knew as Sully, who was a friend of Rehman. Sully asked the appellant if he could leave a small amount of cocaine in his garage as a favour for Rehman, and the appellant agreed. He understood that the cocaine would be returned to its owner, whom he understood to be associated with Rehman, within a short period of time.

7 At the confiscation hearing the Crown contended that there should be taken into account as benefit the full street value of the drugs found in the appellant's garage. The appellant contended that since he was a mere custodian, they did not constitute his property and were not a benefit to him.

8 In ruling against the appellant the judge said:

"What he was involved with was the storage of drugs for the benefit of somebody who was in fact a major part of the conspiracy. He who is storing it and comes into possession of it has effective control over it because he was the person who was the man in charge of his garage and could, if he so wished, have had that removed at any time, but chose not to do so. So to that extent, albeit he may have been abroad, he nevertheless had control of the drugs that were in his possession in the garage at that time, so he is receiving it for the benefit certainly of others who were coincidentally, and as a matter of fact, involved in the conspiracy and involved in the supply of drugs.

It seems to me that looking at the wording of the Act in the way I am invited to do by [counsel for the prosecution], this case falls within that wording, and therefore, the drugs that were found in the garage fall to be assessed as part of the benefit which he obtained as a result of his criminal conduct."

9 The single ground of appeal is that the judge erred in this approach because it failed to give effect to his basis of plea that he was a mere custodian of the drugs.

10 It is well established that confiscation proceedings pursuant to the 2002 Act are part of the sentencing exercise. Accordingly, where a defendant pleads guilty on a written basis of plea which is not challenged by the Crown, which is what happened in this case, the court is bound to apply the provisions of the 2002 Act consistently with the facts of the basis of plea (see *R v Lazarus* [2005] 1 Cr App R (S) 98 and *R v Fowles* in conjoined appeals, reported as *R v May* [2005] 1 WLR 2902 at paragraph 88).

11 Section 76(4) of the [Proceeds of Crime Act 2002](#) provides that a person benefits from criminal conduct, "[...] if he obtains property as a result of or in connection with the conduct." Section 76(7) provides that in such cases the value of the property is the value of his benefit for the purposes of s.6 and 8 of Act.

12 The meaning of s.76(4) of the 2002 Act, and of its precursors in a series of statutes from the [Drug Trafficking Offences Act 1986](#) through to the [Proceeds of Crime Act 1995](#), was considered by the House of Lords in *R v May* [2008] 1 AC 1028. Lord Bingham, giving the opinion of the Judicial Committee, said the following at paragraph 48(6) as part of his concluding summary

"D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of a property to

someone else. [...]

Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property."

13 In *R v Sivaraman* [2009] 1 Cr App R (S) 80 Toulson LJ said at paragraph 12(6):

"[...] Where property is received by one conspirator what matters is the capacity in which he receives it, that is whether for his own personal benefit or on behalf of others or jointly on behalf of himself and others. This has to be decided on the evidence [...]"

14 In *R v Allpress* [2009] 2 Cr App R (S) 58 a five-member constitution of this court endorsed this approach. Toulson LJ, again giving the judgment of the court, said at paragraph 30:

"It was submitted on behalf of the prosecution in some of the appeals that the court was wrong to say in para 12(6) of *Sivaraman* that, 'Where property is received by one conspirator, what matters is the capacity in which he receives it, that is, whether for his own personal benefit, or on behalf of others, or jointly on behalf of himself and others.' We will come to the question whether any of the legislation requires a different approach in relation to money, but we remain of the view that the sentence quoted correctly states the effect of *May* and others. Otherwise, the judicial committee would not have concluded its report in *May* by observing that mere couriers or custodians are unlikely to be found to have obtained the relevant property. A mere courier or custodian is a bailee who receives physical possession of property for another."

15 It is clear from these passages that a defendant who receives property solely on behalf of another, who cannot be said to be receiving it for his own benefit, whether sole or joint, does not obtain such property for the purposes of s.76(4) of the 2002 Act. The Act is concerned with identifying benefits received as a result of, or in connection with, criminal conduct, and a person who receives and holds property solely on behalf of another receives no benefit from obtaining it on those terms unless he is rewarded by a fee or in some other way, in which case the benefit is the reward. In order for the property obtained to constitute a relevant benefit, the defendant must obtain some proprietary interest, not merely possession. A person who receives property solely by way of possession on behalf of another and without obtaining a proprietary interest himself does not obtain the benefit of the value of the property within the meaning of the 2002 Act.

16 The appellant's basis of plea puts him squarely within this category. He received the cannabis on terms that it was to be returned to Rehman. He received the cocaine on the basis that it was to be returned to its owner, an associate of Rehman. He was a mere custodian who did not receive the property for his own benefit whether jointly or solely. He received possession merely as a bailee.

17 The judge in this case was not referred to the House of Lords' decision in *May* and was, we think, led into error by focusing on the concept of control. A bailee has physical control of property by virtue of his possession. That physical control means that he may in fact sell it, or otherwise deal with it in a way which is contrary to the terms on which he has agreed to hold it. So, for example, a drug runner carrying out a delivery from a dealer to the user has physical control, so as to be able to sell it elsewhere or consume it himself, were he brave enough to do so. Section 76(4), however, focuses on *obtaining* property, and requires assessment of the circumstances governing what role the defendant was to play when he received the property. The mere fact that he received possession, and therefore physical control, is insufficient to amount to the obtaining of property as a benefit to him, recognised by s.76(4), if he was obtaining

possession solely on behalf of another. It is for this reason that Lord Bingham observed that a mere custodian or courier would not ordinarily be treated as obtaining property. The fact that the obtaining of possession carries with it some degree of control does not alter the position. Of course, if he subsequently takes it upon himself to use his possessory control to obtain an actual benefit by, for example, selling the property for his own ends, he will at that stage obtain a benefit recognised by the 2002 Act which will be represented by the benefit which he obtains by selling it. But unless and until he does so, his mere possessory interest when holding the property is not a recognised benefit.

18 Moreover, although this is not an essential part of our reasoning, we consider that the error in the judge's approach is pointed up by considering the nature of the offences which constituted the particular criminal conduct for which this element of the confiscation order was imposed in this case. The offences were possession of controlled drugs with intent to supply them, not conspiracy offences. If one asks the question: with intent to supply to whom?, the only answer, on the appellant's basis of plea, is supply back to Rehman or his associate. That intended supply, which is an essential ingredient of the particular offences, was to be without benefit to the appellant. Accordingly, neither aspect of the particular criminal conduct charged, that is to say possession and intended supply, involved any benefit to this appellant.

19 The street value of drugs in question must therefore be removed from the calculation of the benefit figure, which results in the benefit and the recoverable amount becoming £13,823.73. The amount of the confiscation order will be reduced to that figure. It will payable within three months of today's date, and the period of imprisonment in default will be reduced to one of nine months' imprisonment. To that extent the appeal is allowed.
