

# Confiscation—honouring the unchallenged basis of plea of a custodian (R v Mohammed Zia Munir)

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**Corporate Crime analysis:** The appellant was sentenced on an unchallenged, written basis of plea to the effect that he was a mere custodian of drugs on behalf of another. In these circumstances the court was bound to apply the provisions of the Proceeds of Crime Act 2002 (POCA 2002) consistently with the facts of the basis of plea. On his basis, the appellant could not be said to have received the drugs for his own benefit and therefore he did not obtain property within the meaning of POCA 2002, s 76(4). The judge fell into error by focusing on the concept of control. The fact that the appellant received possession, and therefore physical control of the drugs, is insufficient to amount to the obtaining of property as a benefit to him personally. A mere custodian or courier would not ordinarily be treated as obtaining property. The street value of the drugs was removed from the calculation of the appellant's benefit figure. Written by Francesca Levett, barrister, at 5 St Andrews Hill.

*R v Mohammed Zia Munir* [\[2020\] EWCA Crim 1549](#)

## What are the practical implications of this case?

The prosecution should be cautious before electing not to challenge a defendant's basis of plea. Accepting that a defendant is a mere custodian of drugs is likely to restrict the prosecution's ability to pursue confiscation proceedings that include the street value of those drugs as part of the benefit calculation. One could argue that it may mitigate against pursuing confiscation at all.

The defence should always submit a written basis of plea if claiming the defendant is a mere custodian or courier, and should seek the prosecution's agreement to it if possible. If the defendant was paid a small fee for their role, then there is a strong argument that the defendant's benefit from their criminal conduct, is limited to the fee or reward received. This is likely to be far smaller than the street value of the drugs seized.

This short case is extremely helpful to the defence in reinforcing the established position that the court should honour the basis of plea and apply the confiscation process so that it is consistent with it. It is also helpful in reinforcing that mere couriers or custodians or other very minor contributors to an offence, having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property within the meaning of [POCA 2002, s 76\(4\)](#).

## What was the background?

The appellant had pleaded guilty to two offences of possession with intent to supply on the basis that his co-defendant had provided him with a bin liner that contained cannabis shortly before the appellant left for Pakistan and Dubai. The appellant put the cannabis in a suitcase in his garage. While abroad, the appellant received a telephone call from an associate of his co-defendant, asking whether he could leave some cocaine in the garage on behalf of the co-defendant. The appellant agreed to this and believed all the drugs would be removed by his co-defendant within a short period of time. The prosecution did not challenge the appellant's basis of plea.

At the confiscation hearing, the prosecution contended that the full street value of the drugs found in the appellant's garage should be taken into account as part of the appellant's benefit figure. The appellant contended that as a mere custodian of the drugs, the drugs did not constitute his property and were not a benefit to him. The learned judge agreed with the prosecution and ruled that:

'he who is storing [the drugs] and comes into possession of [them] has effective control over [them], because he was the person who was the man in charge of his garage and could, if he so wished, have had [the drugs] removed at any time'

The learned judge found that the drugs fell to be assessed as part of the benefit which the appellant obtained as a result of his criminal conduct. The appellant appealed on the basis that the learned judge failed to give effect to his basis of plea that he was a mere custodian of the drugs.

### What did the court decide?

Referring to *R v Lazarus* [2004] EWCA Crim 1962 and *R v Fowles* reported as *R v May* [2005] 1 WLR 2902 at para [88], Lord Justice Popplewell stated that where a defendant pleads guilty on a written basis of plea which is not challenged by the prosecution, the court is bound to apply the provisions of [POCA 2002](#) consistently with the facts of the basis of plea.

[POCA 2002, s 76\(4\)](#) provides that a person benefits from criminal conduct 'if he obtains property as a result of or in connection with the conduct'. Popplewell LJ referred to Lord Bingham's judgment in *R v May* [2008] 1 AC 1028, when he stated that:

'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'

The court ruled that 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 [POCA 2002](#). The judge in this case had not been referred to Lord Bingham's judgment and was likely to have fallen into error by focusing on the concept of control, which does not necessarily equate to 'obtaining property' as recognised by [POCA 2002, s 76\(4\)](#). The fact that possession carries with it a degree of control, does not alter the position of the mere custodian unless they subsequently takes it upon themselves to use their possessory control to obtain an actual benefit by, for example, selling the property for their own ends.

### Case details

- Court: Court of Appeal, Criminal Division
- Judges: Popplewell LJ, Mrs Justice Cheema-Grubb and His Honour Judge Sloan QC (Recorder of Newcastle)
- Date of judgment: 29 October 2020

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