



Neutral Citation Number: [2020] EWCA Crim 1243

Case No: 201903988 B1 and 202000908 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM ISLEWORTH CROWN COURT

His Honour Judge Dennis QC
201903988 B1 / 202000908 B1

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 29th September 2020

Before :

LORD JUSTICE HADDON-CAVE
MR JUSTICE JEREMY BAKER
and
MRS JUSTICE MOULDER DBE

Between :

REGINA

Appellant

- and -

CARON WESTBROOK

Respondent

MARTIN RICHARDSON

Ms Laura Brickman (instructed by The CPS Appeals Unit) on behalf of the Prosecution
Mr Francis McGrath (instructed by The Registrar of Criminal Appeals) on behalf of the
Respondent (Caron Westbrook)

Ms Helen Dawson (instructed by The Registrar of Criminal Appeals) on behalf of the
Respondent (Martin Richardson)

Hearing date : Tuesday 25th August 2020

Approved Judgment

Lord Justice Haddon-Cave:

1. On 19th January 2017, in the Crown Court at Isleworth before His Honour Judge Dennis QC, the first applicant, Caron Westbrook, pleaded guilty to transferring criminal property (count 2) and theft (count 6) and the second applicant, Martin Richardson, pleaded guilty to possessing criminal property (count 8), converting criminal property (count 9) and fraud (count 12) (see further below). The applicants were married. The second applicant has changed his name by deed poll to Martin Richardson but for convenience we will refer to him as Martin Westbrook.
2. On 10th March 2017, before the same Court, Caron Westbrook, was sentenced to a total of 66 months' imprisonment. Martin Westbrook was sentenced to a total of 40 months' imprisonment. Their respective applications for leave to appeal against sentence were refused by a judge on paper and were not renewed.
3. Confiscation proceedings were commenced under the Proceeds of Crime Act 2002 ("POCA"). A trial of those proceedings took place before HHJ Dennis QC at Isleworth Crown Court between 2nd and 5th October 2018. Both applicants were represented by counsel. Caron Westbrook gave evidence but Martin Westbrook did not. The judge heard from other witnesses including the officer in the case, DC Simon Allen, and accountants called for the prosecution and the first applicant.
4. We are grateful to counsel for their able submissions. Mr Francis McGrath appeared on behalf of Caron Westbrook. Ms Helen Dawson appeared on behalf of Martin Westbrook. Ms Laura Brickman appeared on behalf of the Prosecution.
5. The applicants each apply for leave to appeal against the confiscation order and extension of time. Their applications have been referred to the full Court by the Registrar.

FACTS

6. Caron Westbrook was employed as a personal assistant to David Hogan, a successful and well-known photographer. She eventually became the 'book-keeper' for his business and photography companies. Mr Hogan entrusted all bookkeeping and financial affairs to the applicant. In 2003, Mr Hogan sold his photography business for over £2.5m. Caron Westbrook introduced her husband, Martin Westbrook, to the Hogan family, representing him to be a successful businessman. Martin Westbrook also came to be employed by the Hogan family, his role was to manage the rental properties owned by Mr Hogan and collect the rent payments for those properties.
7. Through sophisticated frauds, carried out over many years and principally by Caron Westbrook, Caron and Martin Westbrook began diverting monies from Mr Hogan's personal and business accounts to the Westbrooks' own accounts. Matters came to light in 2014 when Mr Hogan discovered one of his bank accounts was £50,000 overdrawn. The Hogan family contacted an accountant friend, Janice Lingwood, and asked if she would examine the affairs of their companies on a pro bono basis. Ms Lingwood agreed and reported to the Hogan's that they had suffered losses of some £840,000, which included charges and other losses.

8. Caron Westbrook had previous convictions for 44 offences, spanning between 1990 and 2003; Martin Westbrook was of previous good character.
9. Caron Westbrook pleaded guilty to the following counts:
 - (1) Count 2: Transferring criminal property. Between 01 January 2009 and 17 December 2014, the applicant transferred monies belonging to David Hogan to her and Martin Westbrook's personal bank account.
 - (2) Count 6: Theft. Between 01 January 2009 and 17 December 2014, Caron Westbrook stole £463,661.28 from David Hogan.
10. Martin Westbrook pleaded guilty to the following:
 - (1) Count 8: Possessing criminal property. Between 01 April 2012 and 17 December 2014, the applicant possessed monies belonging to Hogan Media paid to (a company) belonging to Martin Westbrook.
 - (2) Count 9: Converting criminal property. Between 01 January 2009 and 17 December 2014, the applicant converted monies belonging to David Hogan for his own personal use.
 - (3) Count 12: Fraud. Between 05 June 2012 and 12 June 2012, the applicant dishonestly made a false representation to Barclays Partner Finance that he was earning £90,000 per annum intending to make a gain (purchase of a Range Rover vehicle).

JUDGE'S RULING ON CONFISCATION

11. On 7th October 2018, HHJ Denniss QC issued a detailed 8-page written ruling on confiscation carefully analysing the evidence and the issues. The following is a brief summary of the main elements of his ruling.
12. The applicants lived in rented accommodation; neither had any property registered in their name with the Land Registry (page 2). They were listed as directors of a company known as 'North 10 Ltd' (formerly 'Sweet Pea Direct'). The company was incorporated in March 2010 and dissolved in 2015. There were minimal transactions in the company's bank accounts and the average balance was around £2,000. Caron Westbrook also had her own photography business but no income had been declared (page 3).
13. Personal bank accounts ascribed to the applicants during the period of offending provided an overall picture of accumulating debt. A list of bank accounts held by the applicants had been identified and examined. The transfers from those accounts highlighted extravagant spending by the couple on disposable items such as holidays or high-end points of sale (page 3).
14. The report prepared by the Prosecution expert accountant, Ms Lingwood, the methodology of which was agreed by Moore Stevens accountants for the applicants,

calculated the losses to the Hogans to be £840,639. The judge made deductions totalling £316,982 from that figure in light of the report of Moore Stevens, including deducting for VAT and tax relief reclaimed. The judge considered the final benefit figure to be £523,657.00 (page 5).

15. In respect of assets, neither applicant had any tangible property, chattels, shares or money. Caron Westbrook stated she had debts of £65,000 with rent arrears of £7,000. She asserted that she had spent all of the monies fraudulently obtained on expensive holidays and rent payments. The only asset she had was a storage container, the contents of which had a nominal value of £1,000. The judge did not take those items into account as realisable assets for the purposes of confiscation. Caron Westbrook had not disclosed the existence of the storage facility until late in proceedings and access to it was only provided in September 2018. Cheap items of clothing and accessories were found therein. The judge found it impossible to believe there were no substantial electrical items or camera equipment or other type of goods in that facility; the late disclosure and access to the facility was cause for suspicion (page 6).
16. The judge found Caron Westbrook's evidence to be untrue and took into account her previous convictions. She had been imprisoned for similar offences in the past and was aware it was likely she would be arrested and imprisoned for the instant offences. In light of that knowledge, it was likely she had hidden assets away for use when she was released (page 6). Martin Westbrook had elected not to give evidence.
17. While there was no direct evidence of available assets, the judge noted the parties had previously had access to funds to enable them to satisfy County Court judgments, including one in the sum of £3,400 in 2014.
18. The judge did not accept the applicants had spent the monies from which they had benefited and considered there "must be hidden assets". The judge found Caron Westbrook to be "dishonest" and that Martin Westbrook had failed to engage in the confiscation proceedings by not giving evidence; it was for the defendants to establish they had no hidden assets (*R v Summers* (2008) 2 Cr. App. R (S) 101) (page7).
19. The judge considered the levels of annual expenditure of the applicants to be £50,000 per year; over the 5 ½ year indictment period this amounted to £250,000. The judge calculated the available assets (hidden) to be £248,657 (being the benefit figure of £523,657 less expenditure of £250,000).
20. The judge summarised his conclusions as follows:

"I therefore assess and order:

*received benefits for both defendants jointly and severally
£523,657*

available assets (hidden) £248,657

*a confiscation order in respect of both defendants jointly and
severally: £248,657"*

21. He further stated: in respect of each defendant “I order a default period of 2 years”; to avoid double-recovery “any payment made in satisfaction of the confiscation order by either applicant was to be set off against the total sum owing”; in respect of time to pay “I allow a period of 3 months”; and in respect of the costs of the confiscation proceedings, they be taxed if not agreed and “paid jointly and severally by each applicant”.
22. The judge electronically signed and dated the judgment 7th October 2018 and added the following postscript:

“This judgment is dated 7 October 2018 but will be embargoed until I have heard from each of the 3 counsel to deal with any errors or corrections or at the latest Friday, 12 October 2018. If the case need to be relisted at the request of any counsel, a mutually convenient date should be obtained from the Isleworth Crown Court listing office.”

23. The ruling was then circulated to counsel. There was no request from counsel to relist the matter.

POST-HEARING

24. On 8th November 2018, Caron Westbrook lodged an appeal against confiscation. Isleworth Crown Court and Crown Prosecution Service (“CPS”) were asked to provide a copy of the confiscation order. The CPS were specifically invited to address whether or not s.6(5)(b) Proceeds of Crime Act 2002 had been satisfied. No order was provided.
25. On 28th February 2019, prosecution counsel, Ms Brickman, wrote a Note on Confiscation and a Note on s.6(5)(b) POCA, in response to the grounds of appeal which were sent to the Crown Prosecution Service. The Note on Confiscation stated:

“No application was made to relist the case by the Defence for either Mrs Westbrook or her husband. However, the order was not made as an oversight or misunderstanding. It should have been made by the Court.

In the circumstances, neither Mrs Westbrook [n]or her husband have suffered prejudice. The Court should be contacted and the matter relisted for the making of the order or it can be done administratively by agreement.”

26. On 18th March 2019, a letter was sent by the Criminal Appeal Office to Carol Westbrook’s solicitors suggesting that the appeal was unnecessary since it appeared that no judgment had handed down in open court and no confiscation order drawn up.
27. On 30th August 2019, confiscation orders were drawn up (on Form 5050 (06.19)) in respect of each applicant which ordered them to pay a confiscation order in the sum of £124,328.50 within three months. These documents were defective in at least three

respects. First, they bore the wrong case number. Second, they ordered the applicants to pay half the sum referred to in the written ruling when the confiscation order should be made for the whole value of the benefit obtained (*c.f. R v Ahmad and Fields* [2014] UKSC 36 at [74]). Third, they ordered payment within three months of the date of the document itself rather than the date of the written ruling.

28. However, the Court log from Isleworth Crown Court for 3rd September 2019 correctly showed the “*disposal amended...to Confiscation Order under s.1(5) DTOA 1986 Drug Trafficking Confiscation Order for £248,657.00*” in respect of each applicant.
29. On or about 11th or 15 September 2019, the applicants each received a letter from the London Regional Confiscation Unit, HMCTS seeking payment of £125,328.50, to be paid in full by 30 November 2019. Enquiries were made by those representing the applicants and a confiscation order dated 30 August 2019 was provided. Those representing the applicants made enquiries of Isleworth Crown Court and it appeared no hearing was listed on that date nor on any other date following the confiscation proceedings in October 2018.
30. On 29th October 2019, Caron Westbrook lodged fresh application seeking leave to appeal against the confiscation order. On 11th March 2020, Martin Westbrook lodged application seeking leave to appeal against the confiscation order.

SUBMISSIONS

31. Two grounds of appeal were put forward on behalf of the applicants:
 - (1) First, the purported confiscation orders dated 30 August 2018 are a nullity (Ground 1).
 - (2) Second, alternatively, if the orders of 30th August 2018 are valid, the Judge erred in concluding the available amount was £248,657.00 (Ground 2).
32. As regards Ground 1, Mr McGrath and Ms Dawson submitted in summary that: (1) The date of the confiscation orders was significantly after the 2-year permitted period of postponement allowed under s.14 of the Proceeds of Crime Act 2002 (the 2-year period expired on 19th January 2019) and no relevant extension application had been made. (2) There was no evidence to suggest the applicants’ case was listed in Isleworth Crown Court on 30th August 2018. (3) Moreover, the orders dated 30 August 2018 were defective because they bore an incorrect case number of T20190348 (the correct indictment number being T20160661).
33. As regards Ground 2, Mr McGrath and Ms Dawson submitted in summary that: (1) The judge’s conclusion that there were hidden assets was inconsistent with the unchallenged evidence of a financial investigation officer, DC Allen, who gave evidence that money transferred out of the relevant accounts was spent on disposable items such as holidays and rent. (2) The Prosecution did not ask Caron Westbrook any questions about the transactions revealed in seven years’ worth of bank statements.
34. In response, Ms Brickman submitted as regards Ground 1 in summary as follows: (1) It was accepted that there were procedural and administrative errors but (a) these did not render the judge’s ruling or the confiscation order a nullity; and (b) the applicants had

suffered no prejudice as a result. The applicants and their lawyers were at all material times fully aware of the Judge's ruling and order. (2) The confiscation proceedings were within the prescribed period, as was the ruling and order made by the Judge. (3) In any event, there are 'exceptional circumstances' for extending the period of postponement beyond the 2 year period pursuant to s.14(4) POCA), including the facts that £248,000 of assets were concealed by applicants and that confiscation proceedings were delayed by the Caron Westbrook's conduct. (4) It cannot have been Parliament's intention that a nullity should be the consequence of an administrative or procedural breach (*R v Guraj* (2017) 1 WLR 22 at paragraphs 14, 16 and 22; *R v Johal* [2013] EWCA Crim 647; *R v T* [2010] EWCA Crim 2703).

35. As regards Ground 2, Ms Brickman submitted in summary as follows: (1) The judge was correct to conclude the applicant and her husband had hidden assets. (2) It was not necessary to cross-examine the applicant on the transactions contained in the bank statements as she had admitted her criminality by her guilty pleas. (3) The judge was entitled to accept the evidence of an accountant called by the prosecution, Ms Lingwood. There evidence to suggest valuable items, *e.g.* photographic equipment and lithographs, had been deliberately removed to a storage unit. (3) The applicant had the opportunity to call witnesses in support of her contentions. (4) Large sums of money were transferred by the applicant into her bank account, it would be an affront to common sense to suggest the applicant and her husband had not withdrawn some for use after sentence.
36. In response to Ms Brickman's submissions on Ground 1, Mr McGrath and Ms Dawson further submitted that under the legislation a "confiscation order" was a formal written document which had to be drawn up within the prescribed 2-year period in order for a valid confiscation to take place. In the present case, no such formal written document was drawn up in time and, accordingly, the matter was a nullity.

LEGISLATION

37. The relevant provisions of POCA are as follows:

"6 Making of order

- (1) The Crown Court must proceed under this section if the following two conditions are satisfied.
- (2) The first condition is that a defendant falls within any of the following paragraphs—
- (a) he is convicted of an offence or offences in proceedings before the Crown Court;
 - (b) he is committed to the Crown Court for sentence in respect of an offence or offences under of the Sentencing Act;
 - (c) he is committed to the Crown Court in respect of an offence or offences under section 70 below (committal with a view to a confiscation order being considered).
- (3) The second condition is that—

- (a) the prosecutor asks the court to proceed under this section, or
- (b) the court believes it is appropriate for it to do so.

(4) The court must proceed as follows—

- (a) it must decide whether the defendant has a criminal lifestyle;
- (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
- (c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—

- (a) decide the recoverable amount, and
- (b) make an order (a confiscation order) requiring him to pay that amount.

(6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.

(6A) The court must also treat the duty in subsection (5) as a power if—

- (a) an order has been made, or it believes an order may be made, against the defendant under section 4 (criminal unlawful profit orders) of the Prevention of Social Housing Fraud Act 2013 in respect of profit made by the defendant in connection with the conduct, or
- (b) it believes that a person has at any time started or intends to start proceedings against the defendant under section 5 (civil unlawful profit orders) of that Act in respect of such profit.]

(7) The court must decide any question arising under subsection (4) or (5) on a balance of probabilities.

(8) The first condition is not satisfied if the defendant absconds (but section 27 may apply).

(9) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2).

“13 Effect of order on court’s other powers

(1) If the court makes a confiscation order it must proceed as mentioned in subsections (2) and (4) in respect of the offence or offences concerned.

(2) The court must take account of the confiscation order before—

- (a) it imposes a fine on the defendant, or
- (b) it makes an order falling within subsection (3).

(3) These orders fall within this subsection—

- (a) an order involving payment by the defendant, other than;
- (b) an order under section 27 of the Misuse of Drugs Act 1971 (c. 38) (forfeiture orders);
- (c) an order under section 143 of the Sentencing Act (deprivation orders);
- (d) an order under section 23 of the Terrorism Act 2000 (c. 11) (forfeiture orders).

(3A) In this section “priority order” means any of the following—

- (a) a compensation order under section 130 of the Sentencing Act;
- (b) an order requiring payment of a surcharge under section 161A of the Criminal Justice Act 2003;
- (c) an unlawful profit order under section 4 of the Prevention of Social Housing Fraud Act 2013.

(4) Subject to subsection (2), the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant.

(5) Subsection (6) applies if—

- (a) the Crown Court makes both a confiscation order and one or more priority orders against the same person in the same proceedings, and
- (b) the court believes the person will not have sufficient means to satisfy all those orders in full.

(6) In such a case the court must direct that so much of the as it specifies is to be paid out of any sums recovered under the confiscation order; and the amount it specifies must be the amount it believes will not be recoverable because of the insufficiency of the person’s means.

“14 Postponement

- (1) The court may—
 - (a) proceed under section 6 before it sentences the defendant for the offence (or any of the offences) concerned, or
 - (b) postpone proceedings under section 6 for a specified period.
- (2) A period of postponement may be extended.
- (3) A period of postponement (including one as extended) must not end after the permitted period ends.
- (4) But subsection (3) does not apply if there are exceptional circumstances.
- (5) The permitted period is the period of two years starting with the date of conviction.
- (6) But if—
 - (a) the defendant appeals against his conviction for the offence (or any of the offences) concerned, and
 - (b) the period of three months (starting with the day when the appeal is determined or otherwise disposed of) ends after the period found under subsection (5), the permitted period is that period of three months.
- (7) A postponement or extension may be made—
 - (a) on application by the defendant;
 - (b) on application by the prosecutor [...] ¹ ;
 - (c) by the court of its own motion.
- (8) If—
 - (a) proceedings are postponed for a period, and
 - (b) an application to extend the period is made before it ends, the application may be granted even after the period ends.
- (9) The date of conviction is—
 - (a) the date on which the defendant was convicted of the offence concerned, or
 - (b) if there are two or more offences and the convictions were on different dates, the date of the latest.
- (10) References to appealing include references to applying under section 111 of the Magistrates' Courts Act 1980 (c. 43) (statement of case).
- (11) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.
- (12) But subsection (11) does not apply if before it made the confiscation order the court—

- (a) imposed a fine on the defendant;
- (b) made an order falling within section 13(3);
- (c) made an order under section 130 of the Sentencing Act (compensation orders);
- (ca) made an order under section 161A of the Criminal Justice Act 2003 (orders requiring payment of surcharge);
- (d) made an order under section 4 of the Prevention of Social Housing Fraud Act 2013 (unlawful profit orders).

ANALYSIS

Ground 1

38. In support of his argument that a confiscation order had to be a formal written document, Mr McGrath drew attention to the following: (a) s.11(6) of POCA which used the language “under the confiscation order”; (b) s.39 of POCA which permits the default period of imprisonment to varied by the Court in circumstances where “a confiscation order” is varied under sections 21-33 of the Act; (b) Part 33.21.(4) of the Criminal Procedure Rules which requires “a copy of the order” to be sent to the parties where an order is made increasing the term of imprisonment in default; and (c) parallels with Sexual Harm Prevention Orders and Restraining Orders under Part 31 of the Criminal Procedure Rules.
39. Section 6(5) of POCA imposes on the court a positive duty to decide the recoverable amount and to make a “confiscation order” in that amount. However, there is nothing in the wording of that section or any other section which suggests that the a “confiscation order” is invalid (in the sense of being a nullity) unless made in writing. The fact that, *e.g.*, the Criminal Procedure Rules contemplate that a formal order will be drawn up and a copy sent to the parties does not mean that an order solemnly made by a judge has no legal existence unless and until draw up in a formal written document. In this regard, orders made by judges under POCA are no different from any other orders. The fact that there may be administrative delays or failures in resulting or drawing up the order, does not mean that no order exists or came into existence when uttered by the judge.
40. In any event, the judge did make a written confiscation order which substantively complied with all the strictures of s.6 of POCA since his judgment set out his relevant findings, decided the recoverable amount and duly made a confiscation order in that amount. Indeed, the judge clearly intended to make a confiscation order because he stated in crystal clear terms: *“I therefore assess and order... a confiscation order in respect of both defendants jointly and severally: £248,657”* (see above).
41. Section 174 of the Criminal Justice Act 2003 stipulates that sentences shall be pronounced in open court. The fact that by oversight or error a sentence or order is not pronounced in open court (as appears to be the case here) may be “a failure of good practice” as explained by Green J in *R v. Billington* [2017] EWCA Crim 618, does render the sentence or order a nullity.
42. It is axiomatic that not every administrative or procedural breach renders every sentence or order a nullity (see *R v Guraj* (2017) 1 WLR 22 at paragraphs 14, 16 and 22; *R v*

Johal [2013] EWCA Crim 647; *R v T* [2010] EWCA Crim 2703). It is only if the administrative or procedural breach would give rise to real prejudice or unfairness.

43. This is manifestly not the case here. There was no prejudice flowing from any of these administrative or procedural errors. At all material times, both applicants and their lawyers were immediately and fully aware of the decision of the judge and the imposition of a confiscation order since a copy of his judgment was served on them. Indeed, proof-in-the-pudding is that Carol Westbrook filed an appeal against the order a month later on 8th November 2018 (see above).
44. We are also satisfied that a confiscation order was made by the court within the prescribed period of two years of the sentence under s.11(5) of POCA. Section 11(11) of POCA makes it clear that the fact there may have been an omission in the procedure connected with the application for or the granting of a postponement does not mean that the confiscation order should be quashed. There has to be prejudice. There was none here (see above).
45. For the sake of completeness, if an in so far as relevant, we would mention that the drafting defects in the confiscation order that was eventually drawn up in August 2019 did not invalidate the order that judge had made.
46. For these reasons, we grant an extension of time and permission to appeal on Ground 1 but dismiss the appeal.

Ground 2

47. The gravamen of the defence case under Ground 2 was the judge's conclusion that there were hidden assets could not stand because it was inconsistent with the unchallenged evidence of the investigation officer, DC Allen, that money transferred out of the relevant accounts was spent on disposable items such as holidays and rent. It was also argued that Caron Westbrook was not cross examined about her bank statements.
48. We can deal with this matter shortly. As Ms Brickman pointed out, DC Allen made it clear that he believed the applicants had hidden assets. He said so in terms in re-examination:

“Q. So far as both parties were concerned are you of the view that there are secret assets hidden away?”

A. Yes, just from the amount of money that they've stolen, and the amount of money they appear to have now, it doesn't add up.”

49. The judge found the evidence of Caron Westbrook to be “dishonest” and gave cogent reasons for doing so (see above). He was plainly entitled to do so.
50. For these reasons, we regard Ground 2 as unarguable and refuse and extension of time and permission to appeal in relation to it.

SUMMARY

51. In summary, for the reasons set out above, we grant an extension of time and permission to appeal on Ground 1 but dismiss the appeal; and we refuse an extension of time and permission to appeal on Ground 2.