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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202003035/B3

[2021] EWCA Crim 1369

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 10 September 2021

Before:

LADY JUSTICE SIMLER DBE
MRS JUSTICE CHEEMA-GRUBB DBE
MR JUSTICE ANDREW BAKER

REGINA
V
ADAM WARING

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MR C QUINN appeared on behalf of the Appellant

MR D MCNEIL appeared on behalf of the Crown

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**J U D G M E N T**
(As Approved)

LADY JUSTICE SIMLER:

**Introduction**

1. This appeal concerns confiscation proceedings brought under the Proceeds of Crime Act 2002 ("the 2002 Act") and in particular the tainted gift provisions in that Act.

2. Following his conviction and sentence for the offence of fraud by false representation and theft of a high value Audi motorcar, the appellant was ordered to pay a confiscation order of £65,390 pursuant to section 6 of the 2002 Act within a period of three months, or in default, serve a sentence of eight months' imprisonment. The order was made on 19 June 2020 by His Honour Judge Field in the Crown Court at Manchester.

3. At the confiscation hearing the benefit figure was agreed by the appellant on the basis that he agreed that he had obtained the car and the benefit figure (agreed in the sum of £65,390) represented the value of the stolen car. The judge concluded that this was also the recoverable amount because the appellant's transfer of the car was a "tainted gift". It is this treatment of the car as a tainted gift for the purposes of the confiscation order that has led to this appeal. There was and remains no dispute that the appellant himself had no assets beyond a small amount in his bank account.

4. In his written grounds of appeal, Mr Quinn, who appeared on the appellant's behalf both below and before this court, contended by ground 1 that in finding that the Audi was a tainted gift within the meaning of section 78 of the 2002 Act the judge made an error of law. It was said that the Audi did not represent the transfer of property to another person for a consideration but was simply delivery to another person in performance of a service for a fee. This ground is no longer pursued. In oral submissions Mr Quinn abandoned this argument. Instead he advanced ground 1 in this way: the concession that the appellant obtained the vehicle was wrongly made and it was wrongly conceded that he

obtained the benefit. Instead, the appellant was a person who merely delivered the car to another in performance of a service for a fee and never obtained any beneficial interest in or sufficient control over the car to constitute obtaining it. In the alternative, on the particular facts of this case it was disproportionate to make a confiscation order because to do so was inconsistent with the aims of the tainted gift provisions. The mischief that those provisions are designed to address is to prevent offenders from shielding assets by transferring them to others who hold them on their behalf and that is not what happened here. The appellant has not shielded this asset in any way.

5. The appeal is resisted by the prosecutor, the Chief Crown Prosecutor in this case. On his behalf, Mr McNeil submitted that the judge properly applied sections 76 to 78 of the 2002 Act. The appellant accepted that he benefited by obtaining the vehicle as a result of criminal conduct and any attempt to withdraw that concession would be bound to fail in light of the guilty plea on full facts and the appellant's actions in deceiving the parking attendant and driving off alone in the vehicle. It was for the appellant to persuade the judge that he was a mere courier who lacked any power of disposition or control and since the argument was not advanced on that basis and no findings of fact were made to support that conclusion, the first ground must fail. So far as proportionality is concerned, Mr McNeil submitted that the regime is deliberately severe and that there was no basis on which the judge could properly have found that the proposed order was disproportionate as that concept is properly understood in this context.

**The facts**

6. The owner of the Audi motorcar stolen in this case pre-booked parking with a “meet and greet company” at Manchester Airport and left the motorcar in accordance with that arrangement on 14 September 2018. On 18 September the appellant pretended to be the

owner of the Audi and having done so and having obtained the keys to the vehicle, drove it away. The theft was discovered the following day when the true owner returned from holiday. A tracking device in the Audi was activated on 19 September and the last known tracking location was the Great Harwood area of Blackburn. However, the vehicle was not able to be recovered and has not been recovered since.

7. The appellant was captured on CCTV footage paying for the parking at Manchester Airport with the token given to him and driving the vehicle away. Those images were released to the press as part of the investigation into the theft and in response to seeing the press images, the appellant attended the police station on 1 February 2019.

8. In the course of his police interview he said he had been asked to collect the car by an Asian male whom he met in a bookmaker's in Bolton. He said that the man offered him £300 for collecting the car. He went on to say that when he delivered the car the man refused to pay him £300 or any sum at all. He did not provide the police with any information that could help identify the Asian male or enable the car to be traced or tracked.

9. The appellant was summonsed to appear at Manchester City and Salford Magistrates' Court on 25 September 2019 and did so. He entered guilty pleas to the offences which were sent to Manchester Crown Court for sentence.

10. On 23 October 2019 he applied to vacate his guilty pleas, but that application was subsequently abandoned and on 20 November 2019 he was sentenced on a full facts basis to a term of 58 weeks' imprisonment.

11. The appellant had an extensive criminal record with 26 convictions, ranging from offences against the person, against property, theft, firearms and motoring offences.

**The confiscation order**

12. The confiscation hearing took place on 19 June 2020 before His Honour Judge Field. The appellant gave evidence at the hearing. He described meeting a man who he named as "Arfan", to whom he handed over the vehicle because he expected to receive £300 for picking it up from the airport. He said that he did not receive the money and that having handed the vehicle over to Arfan he had not seen him since. He said that he did not know Arfan well before the events in question, having only met him three times, and that he had remembered his name for the first time at the hearing as Arfan Khan, saying he had been told that was his name having been released from prison but had not been able to remember who told him. He said he had not been hiding the car himself since September 2018 and that he had given it to Arfan because "it was a job he was supposed to be paying me for".

13. In the course of cross-examination it appears he repeated an earlier suggestion that he believed that the car in fact belonged to Arfan. That suggestion was inconsistent with his guilty pleas and the judge rejected the appellant's account so far as it was inconsistent with his guilty pleas.

14. In rejecting the defence arguments and accepting the prosecution arguments, the judge concluded that section 78 of the 2002 Act was apt to cover the situation in this case. He concluded that the section is clear on its face and not in any way limited in its application. He was referred to a number of authorities addressing the overall statutory purpose of the 2002 Act and he found as a fact that:

> "... having stolen the vehicle as the defendant admitted when he pleaded guilty to theft, the defendant then transferred it to Arfan when he gave it to Arfan and on any view, and I so find, the consideration was significantly less than the value of the property at the time. It follows that this was a gift within the meaning of section 78 of the Act and must be regarded pursuant to the provisions of section 77 as a tainted gift and thus must come into the

> reckoning as I am directed to bring it into the reckoning by section 9(1)(b). I should also say at this stage that for the avoidance of doubt I reject the defendant's evidence that he believed the vehicle was Arfan's."

15. In relation to proportionality, the judge described the defence case as having been put powerfully by Mr Quinn to the effect that the imposition of the confiscation order would inevitably result in a default period of imprisonment having to be imposed and would also mean that this offender's 19 month old son would once again have to be placed into care. Such an outcome was submitted to be disproportionate. The judge accepted that there was no doubt that a confiscation order would be capable of visiting significant hardship upon the appellant. However, in light of the authorities, including in particular R v Linda Box [2018] EWCA Crim 542 and R v Beverley Johnson [2016] EWCA Crim 10, [2016] 4 WLR 57, significant hardship of this sort was not akin to a finding that the confiscation order would be disproportionate. He went on to hold that this was a case where there had been no assertion that the appellant had made any efforts to recover the car or its value and nor did he assert that he could not do so or that there was no prospect of recovery. He concluded that the court was without any evidence to support an assertion that the confiscation order would inevitably result in the default term having to be served. He recognised that the order would have difficult consequences for the appellant and others but was satisfied that it was proportionate to the aims of the statute and therefore that he had no discretion but to make it.

**The 2002 Act**

16. The approach required by the 2002 Act can be summarised shortly as follows. First, the court must decide whether the offender has benefited from the relevant criminal conduct. If so, secondly, the court must decide what is the value of the benefit that he has obtained. Thirdly, the recoverable amount must be determined.

17. Here there was no dispute that the appellant had a criminal lifestyle and benefited from his criminal conduct. The value of the benefit he obtained was agreed before the judge at the confiscation hearing. Section 7 deals with the recoverable amount and in essence is the lower of the benefit obtained or the available amount.

18. As to the recoverable amount, section 9(1) of the 2002 Act provides as follows:

> "**9 Available amount**
>
> (1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and.
>
> (b) the total of the values (at that time) of all tainted gifts."

In other words, the court is required to assess the value of any tainted gift and to include it in the available amount.

19. The provisions dealing with tainted gifts are in sections 77 and 78 and so far as material these provide:

> "**77 Tainted gifts**
>
> (1) Subsections (2) and (3) apply if—
>
> (a) no court has made a decision as to whether the defendant has a criminal lifestyle, or
>
> (b) a court has decided that the defendant has a criminal lifestyle.
>
> (2) A gift is tainted if it was made by the defendant at any time after the relevant day.
>
> (3) A gift is also tainted if it was made by the defendant at any time and was

of property—

(a) which was obtained by the defendant as a result of or in connection with his general criminal conduct, or

(b) which (in whole or part and whether directly or indirectly) represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct.

(4) Subsection (5) applies if a court has decided that the defendant does not have a criminal lifestyle.

(5) A gift is tainted if it was made by the defendant at any time after—

(a) the date on which the offence concerned was committed, or

(b) if his particular criminal conduct consists of two or more offences and they were committed on different dates, the date of the earliest.

(6) For the purposes of subsection (5) an offence which is a continuing offence is committed on the first occasion when it is committed.

(7) For the purposes of subsection (5) the defendant's particular criminal conduct includes any conduct which constitutes offences which the court has taken into consideration in deciding his sentence for the offence or offences concerned.

(8) A gift may be a tainted gift whether it was made before or after the passing of this Act.

(9) The relevant day is the first day of the period of six years ending with—

(a) the day when proceedings for the offence concerned were started against the defendant, or

(b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days.

**78 Gifts and their recipients**

(1) If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift.

(2) If subsection (1) applies the property given is to be treated as such share in the property transferred as is represented by the fraction—

(a) whose numerator is the difference between the two values mentioned in subsection (1), and

(b) whose denominator is the value of the property at the time of the transfer.

(3) References to a recipient of a tainted gift are to a person to whom the defendant has made the gift."

20. Finally, section 6(5) of the 2002 Act provides:

"…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.

Paragraph (b) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount" (Emphasis added)

**The appeal**

21. We have summarised already the rival submissions in this case. In developing his argument in relation to what is now the first ground, Mr Quinn accepted the principles established by the authorities on whether a defendant has obtained benefit in confiscation cases, beginning with R v May [2008] 1 AC 1028, R v Allpress [2009] 2 Cr.App.R (S) 58 and R v Ahmad [2015] AC 299 (in particular the summary provided by Lord Neuberger at paragraphs 41 to 42). He nonetheless contended that the court is required to consider whether when an offender takes possession of an asset, such as a vehicle in this case, he truly obtains some form of beneficial interest, or whether he is merely receiving it for the benefit of another. He submitted that R v Clark [2011] EWCA Crim 15 is perhaps the most helpful parallel. In Clark, the offender, Clark, assisted with the storage and transport

of stolen vehicles as part of a conspiracy involving a larger criminal organisation. The Court of Appeal held that the first instance judge erred by concluding that just because he was an "essential cog in the wheel" he must have obtained the benefit of the stolen vehicles. Rather, the case was remitted to determine the benefit question in light of this feature. Mr Quinn submitted that this is analogous to the facts in this case. In the same way as Clark was a cog in a wider conspiracy to handle goods, the appellant was merely performing a service for a fee and the car simply passed through his hands. It was a theft carried out on behalf of another to whom the goods were transferred and he obtained no true beneficial interest in it and therefore did not obtain any benefit.

22. In the alternative, he submitted on the particular facts of this case that it would be disproportionate to make any order. There is no closed category of cases that are disproportionate in this context. The focus must always be on whether an order is disproportionate to the statutory aim. Here an order would not address the mischief intended by the statutory provisions because this appellant was not shielding the asset in any way but was simply passing it on to Arfan Khan.

23. Concisely and clearly as they were advanced, we do not accept the submissions made by Mr Quinn in this case and agree with the cogent submissions, both written and oral, made by Mr McNeil.

24. At the outset we make clear that we consider Mr Quinn was correct to abandon the argument advanced in his written submissions that this transaction was not within the scope of the tainted gift regime. It seems to us, in light of the authorities to which the judge was referred and to which we have been referred, that the transaction plainly fell within the scope of those provisions which are designed to deter "attempts to render confiscation orders ineffectual by gifting away assets" (see R v Hayes [2018] EWCA Crim

682 at [25]).

25. The terms of section 78 are clear on their face. The provision is not limited to sophisticated or organised criminals, nor is it restricted to those who simply shield assets in the way Mr Quinn had previously submitted. A confiscation order is an *in personam* order and extends to those who steal assets and then transfer them for less than their value, how ever that is done. Nothing in the terms of section 78 excludes those who are only in possession of criminal property for limited periods of time. This is a deliberately widely drafted scheme.

26. As Edis J made clear at paragraphs 25 and 26 of R vJohnson, a prison sentence in default is liable to exert at least some pressure on an offender to recover the value of the gift from its recipient, and although that might involve hardship for an offender who has no means and cannot recover the gift, if a confiscation order could be resisted by arguing that offenders were simply performing services for a fee in respect of assets that they now cannot recover, that would run a coach and horses through the efficacy of the tainted gift regime.

27. So far as the alternative submission now advanced by Mr Quinn is concerned, we do not consider there is any merit in the argument. The appellant pleaded guilty in the Magistrates' Court to theft on a full facts basis. The plea stood at the time of the confiscation hearing. The judge rejected his evidence that he believed the vehicle belonged to Arfan, which would have been inconsistent with that guilty plea. Moreover, his concession that he benefited by obtaining the car was a concession that he had a power of disposition and control over it. The concession was consistent with the evidence and the facts as found by the judge, and not arguably one that was so obviously wrong that it should have been rejected.

28. The car was stolen by the appellant himself, having falsely represented to the garage

attendant that he was its true owner. The appellant cannot but have been fully aware of the criminal scheme in which he was directly and critically involved. Having stolen the car in what was, as the judge described, an audacious theft involving trickery, sophisticated and planned as it was, there is no evidence to suggest anything other than that he obtained absolute power of disposition and control over it. He had no contractual, moral or other duty to transfer the car to Arfan or anyone else. His case is distinguishable from that of R v Clark. Having taken all the risk to steal it and once in control over it, he was in a position to hide it, keep it for himself, sell it for a significant sum or give it to somebody else. The fact that on his own account he transferred it to Arfan for a consideration that was significantly less than the value of the property at the time does not detract from any of that. He was the thief and we can see no distinction in principle between the facts of this case and any other theft to order of high value goods which are disposed of immediately for less than their true value. This was a case where the judge was both entitled and right to accept the appellant's concession that he obtained the benefit reflected by the value of the car as a tainted gift within the plain meaning of section 78.

29. Once that conclusion is reached, the proportionality argument under section 6(5) is a difficult one for the appellant in light of the authorities. As Singh LJ made clear in R v Morrison [2019] EWCA Crim 351, [2019] 2 Cr.App.R (S) 25, the proportionality exception is

> "not to be equated with a general discretion in the court; nor even with a provision requiring or permitting the court to avoid the risk of serious injustice. It does not call for nor does it permit a general balancing exercise, in which various interests are weighed on each side of a balance, including the potential hardship or injustice which may be caused to third parties by the making of an order which includes a tainted gift. The proportionality exception in section 6(5)(b), although important, has a more limited scope."

30. We recognise that a confiscation order in the circumstances of this case might be an unusual one for the prosecution to have sought. We also recognise, as the judge did, that the order may gave rise to potential serious hardship for the appellant. But all that is entirely different from a conclusion that such an order is disproportionate. Indeed, the hardship for the appellant and others is immaterial to the proportionality question as Mr Quinn in his oral submissions implicitly recognised.

31. We accept that the category of cases that are disproportionate is not closed. However, on the question of proportionality, it seems to us that the judge's findings of fact were clear. On the appellant's case taken at its highest, the only way of tracing this car or recovering its value was through "Arfan". However, he failed or refused to provide any details relating to Arfan beyond simply his first name, mentioning a surname for the very first time at the hearing itself. It is unsurprising in those circumstances that the judge was not satisfied by the appellant's evidence that he had made any effort to recover the vehicle, or indeed that he would be unable to do so. This regime is a severe one designed to encourage or coerce those who dissipate the proceeds of crime into making good the losses thereby caused. In all the circumstances of this case, it seems to us that the judge's conclusion that the appellant's assertion that an order would lead inevitably to the imposition of a default sentence was mere assertion and unsupported by evidence, was justified on the facts. There was no reason not to expect him to make such efforts; nor was it unrealistic to expect him to do so. For all these reasons, the judge was entitled to conclude that an order in this case was proportionate to the aim of the 2002 Act and to the tainted gift regime.

32. In those circumstances, and notwithstanding the able submissions made by Mr Quinn on the appellant's behalf, we conclude that this appeal must fail, and it is dismissed.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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