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Neutral Citation Number: [2023] EWCA Crim 1568

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202201671/B1

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 12 December 2023

Before:

LORD JUSTICE LEWIS
MRS JUSTICE McGOWAN DBE
SIR ROBIN SPENCER

REX
V
MIROSLAV PESKO

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NON-COUNSEL APPLICATION

J U D G M E N T

SIR ROBIN SPENCER:

1. This is a renewed application for leave to appeal against a confiscation order, following refusal by the single judge.
2. The confiscation order was made on 28 April 2022 in the Crown Court at Norwich following a two-day hearing on 7 and 8 April 2022 before Mr Recorder Simon Taylor KC. The applicant was represented by counsel and solicitors at the hearing. The judge took time to consider the matter and handed down a very full and careful, closely-reasoned written judgment running to 28 pages.
3. The confiscation order was made in the sum of £211,259.50, that being the extent of the "available amount" as found by the judge. The order was to be paid within three months. The judge imposed a period of two years' imprisonment in default.

The issues in the proposed appeal

4. There is a great deal of background to the case but the issues in the proposed appeal are fairly narrow. First, it is said that owing to poor representation by his lawyers, the judge was not provided with all the documents he should have had. It is said that the "available amount" should have been around £73,000 less as a result. Second, it is said that the period of imprisonment in default was excessive and did not take account of the ill-health of the applicant and his father. Third, it is said that the amount of the order should be reduced because the applicant is unable to access funds in Russia in view of the restrictions and sanctions flowing from the conflict in Ukraine.

The background to the application for leave

5. This is a non-counsel application because the applicant dispensed with the services of his

counsel and solicitors for the purpose of lodging his appeal. He is representing himself. He had indicated that he wished to attend the hearing of his renewed application for leave but he has not attended today.

6. We should record that this application was listed to be heard before a different constitution of the Full Court on 20 June 2023. The day before that hearing the applicant emailed the List Office asking that the hearing be adjourned. He said he had not had time to instruct a barrister. He said he had broken both his legs and submitted photographs of a pair of bandaged legs apparently in a hospital bed. He provided no medical certificate or supporting medical information. Stuart-Smith LJ directed that the hearing next day be vacated and that the applicant must file a certificate or other medical evidence by 28 June confirming the medical position and indicating when he would be fit to attend court.

7. Despite several chasing emails from the Criminal Appeal Office, no such medical information has been provided, nor has any barrister been instructed. In an email dated 10 November the applicant requested that the hearing be not relisted for three or four weeks so he could "get everything ready" for the appeal.

8. Yesterday morning, 11 December, some 24 hours before this hearing, the Criminal Appeal Office received a further email from the applicant explaining that he would be unable to attend today's hearing unless he could arrange for someone to give him a lift into London because he was unable to travel on public transport "due to bad legs". He did not seek a further adjournment of today's hearing. In his email he summarised briefly the main points of his appeal and asked that the email be placed before us.

9. We have taken into account the content of that email along with all the very extensive material which the applicant has submitted over many months in support of his application for leave to appeal. We also have the benefit of a respondent's notice and

written submissions from prosecuting counsel who appeared at the confiscation hearing.

The factual background to the confiscation proceedings

10. We need not recite the history of the criminal trial which led to the confiscation proceedings. Suffice it to say that in 2020, along with others, the applicant was convicted by the jury of a very substantial conspiracy to steal Mercedes Sprinter vans across East Anglia as a member of an organised crime group, part of which was based in Lowestoft. He was sentenced on 5 November 2020 to a term of five years four months' imprisonment. His renewed application for leave to appeal against that sentence was refused by the Full Court on 7 May 2021: see [2021] EWCA Crim 747.
11. There were significant delays in complying with the directions in the confiscation proceedings. The applicant served only a very brief section 18 statement. The prosecution's section 16 statement was dated 8 April 2021. The applicant's section 17 response was served on 28 May 2021. In October 2021 his solicitors supplemented this with a further statement from the applicant producing a large number of documents, some 123 pages in total.
12. Eventually the matter came on for hearing before Mr Recorder Taylor on 7 April 2022. The court bundle ran to some 650 pages, including the applicant's statements and documents. However on the morning of the hearing, the applicant produced further documents not previously seen by the prosecution. Valuable court time was taken up in copying them.
13. There was no dispute that the applicant had benefited from his criminal conduct and no dispute that he had a "criminal lifestyle" within the meaning of the Proceeds of Crime Act 2002. The total benefit figure found by the judge, as to which there is no complaint,

was £2,247,527.60.

14. The real issue was the extent of the "recoverable amount" and consequently the "available amount". In round figures the Crown contended that the “recoverable amount” was just under £367,000. Only £4,555 in cash had been recovered and the applicant contended that this was the extent of the “recoverable amount”. On the basis of transactions on the applicant's bank accounts, the prosecution contended that in addition to this cash there were "hidden assets" of £362,404.50 represented by the unexplained transfer of monies from the applicant's bank accounts.

15. The applicant's case was that the sums said to be "hidden assets" were in fact monies expended from his bank accounts in legitimate business transactions and that those monies were not recoverable. They represented monies paid out for a known purpose to legitimate business entities. They had been disbursed legitimately to others and could not therefore be recovered.

16. The applicant claimed to have run a legitimate business, through the company VM Diagnostics Ltd, which involved buying vehicles and vehicle parts at auctions and selling them on. Substantial funds were transferred from the applicant's bank accounts to a bank account in the name of Nadezda Vingolts, the applicant's girlfriend. His case was that he also ran a successful business importing vehicle parts into the UK from Russia and that the funds transferred out of the jurisdiction were in lieu of monies owed to his supplier in Russia.

17. Having heard the appellant give evidence, the judge concluded that VM Diagnostics Ltd was not a wholly legitimate business. He said at paragraph 59 of the judgment:

> "... the messy state of the evidence relating to his business is partly a function of the way it was presented to me. It is also, I am sure, a

> function of the Defendant's dishonesty. The chaotic nature of his dealings was, I am sure, a way of integrating his criminal and legitimate enterprises. The evidence of his dishonesty comes from a number of parts of the evidence, not just from his conviction. There are, for example, his tax returns. Having heard his evidence I am sure that any understatement of his business' turnover and profit was deliberate and not because of some misunderstanding between him and his accountant. Then there was the use of personal bank accounts to make payments to Russia. I doubt very much that that was done simply to secure the best exchange rate. I think that even insofar as the money paid to Ms Vingolts was used to finance purchases as part of a legitimate business, the fact of using personal accounts for this purpose was very likely for some purpose to do with evasion of the law or taxes. I regard it with suspicion and am not satisfied it was for legitimate reasons. I simply do not accept, without more, that it was just to obtain a favourable exchange rate. I believe the Defendant lied to me about that. Moreover the evidence relating to loans from his brother, and the evidence from Mr Makarov all has the look of manufactured rather than genuine evidence. In the time the Defendant has had available, even given the constraints of prison life, and bearing in mind that he has had solicitors acting for him, proper evidence could have been produced. And finally the Defendant's possession of multiple accounts with opaque transfers and transactions, are, in my view, very much in tune with the deliberate covering up of a criminal enterprise."

18. Despite this, the judge was prepared to accept that there had been some legitimate business going on. In support of this proposition the applicant had presented the court with a mass of material on the first day of the hearing. Overnight, before the second day, his counsel undertook the task of reducing this to a spreadsheet identifying bank transfers that were said to have been in respect of specific invoices for the purchase of vehicle parts from Russia.

19. The judge reproduced this spreadsheet at paragraph 85 of his judgment. The total amount expended by way of foreign exchange transactions in purchasing such vehicle parts, supported by invoices matching bank statements, came to £160,401.

20. The judge concluded with some hesitation that on the balance of probabilities this

represented legitimate trading in car parts delivered to the UK which had generated payments abroad and which were now monies "beyond reach". He therefore excluded that sum from the "recoverable amount" of £371,660.50 in determining the "available amount".

The grounds of appeal

21. In his first ground of appeal, the applicant complains that there were other invoices evidencing legitimate purchases which were in existence and which could and should have been presented in evidence. Copies, he said, had either been supplied previously to his solicitors and counsel, or had not previously been obtained and supplied to them only because he had been advised this was unnecessary. The applicant has produced a revised spreadsheet which, he says, includes all the invoices matching payments from the bank accounts and which, he says, should all have been taken into account by the judge. He says these invoices would have justified a further reduction of nearly £73,000 from the "available amount" with the result that the confiscation order should have been that much less.
22. In his grounds of appeal, and again in the email he sent to the court yesterday, the applicant identifies six such invoices by their serial numbers. It is unclear to us how that list is said to correspond with his revised spreadsheet, as the sums in the six invoices appear to come to far less than £73,000.
23. In view of the complaints he has made about his counsel's conduct of the hearing, the applicant was invited to waive privilege and he has done so. We have seen counsel's response to the applicant's complaints; we have also seen counsel's negative written advice on appeal. Counsel disputes that most of the invoices now relied on by the

applicant had been provided to him before the day of the hearing or that the applicant was ever told that he needed to provide such documents.

24. In his response, counsel acknowledges that by oversight, in the onerous task of preparing the spreadsheet from scratch overnight, he omitted to include one invoice that had been provided at the start of the hearing, namely invoice number 0101161 in the sum of £6,500. He maintains that the fault for late disclosure of the documents the applicant wished to rely upon was the applicant's. He also explains in his response that of the six invoices listed by the applicant in his grounds of appeal, two were in fact included in the spreadsheet albeit under different numbers or notation. As we understand it the applicant takes issue with that as well. He takes issue in fundamental terms with counsel's response. He exhibits, for example, emails to and from the solicitors which he says show that documents described as "invoices from Russia" had been supplied to the solicitors and passed on to counsel a month or so before the hearing.

Discussion and conclusion

25. We have to consider whether it is arguable that the judge's factual findings and conclusions were wrong on the evidence he was presented with. By definition, the material which the applicant now seeks to put forward on appeal is material which was not before the judge at the hearing and is therefore fresh evidence. The provisions of section 23 of the Criminal Appeal Act 1968 apply. This court will only receive fresh evidence if it is necessary or expedient in the interests of justice to receive it, having regard in particular to the factors specified in section 23(2), including whether there is a reasonable explanation for the failure to adduce the evidence in the proceedings under appeal.

26. In our judgment, it is not arguable that it is necessary or expedient to adduce this further material. All the material was in existence prior to the confiscation hearing and was known to the applicant. We are not concerned as to where the blame lies for its not being produced and relied on at the hearing, as it is now said it should have been. The fact is that the applicant had ample opportunity to provide and explain the material in good time before the hearing, and at the hearing, but failed to do so. The judge's disquiet at the state of the documentation expressed in the passage from paragraph 95 of the judgment which we have already quoted is telling. The way in which the applicant conducted his business with deliberate dishonesty, with a view to covering up the contemporaneous criminal enterprise, was the root cause of the non-disclosure and confusion.
27. We agree with the single judge that there is no new evidence that would satisfy the statutory requirement for the admission of fresh evidence on appeal. The judge had to proceed on the material before him. To the extent that the material was produced haphazardly and at the last minute, that appears to have been largely the applicant's fault. Any minor errors that resulted from that haphazard process would have made no material difference to the outcome of the confiscation hearing. It is not arguable that the hearing was unfair or that, based on the evidence before the judge, the conclusions in the judgment were unsafe. Accordingly, the first ground of appeal is not arguable.
28. We can deal much more briefly with the other two grounds of appeal.
29. The period of imprisonment the judge fixed in default was two years. Because the confiscation order was for a sum between £10,000 and £500,000, the maximum period in default set by the statute was five years. The order was for £211,259.50. That is just under half the upper figure in the range and entirely appropriate.
30. The applicant complains that the judge failed to take into account the poor health of the

applicant and the applicant's father in fixing the period of imprisonment in default. As the authorities make clear, the purpose of the period in default is not to impose additional punishment but to secure payment of the confiscation order. For that reason the court is not concerned with the personal circumstances of the offender in the way it would be if passing sentence for criminal offences. That is why, for example, no pre-sentence report is required or appropriate. The period in default here was unarguably just and proportionate. There is no merit in this second ground.

31. The third ground of appeal is that the confiscation order should be reduced to some unspecified extent because the applicant cannot get any of his money out of Russia, owing to the sanctions flowing from the war in Ukraine.

32. As is pointed out in the respondent's notice and written submissions, the monies transferred by the applicant to Russia were sent there long before the current sanctions were imposed. In his section 18 statement the applicant claimed to hold no realisable assets anywhere in the world. By advancing this ground of appeal he appears now to accept that monies do exist in Russia but that sanctions are preventing him realising those funds. This is a most unattractive change of position.

33. If there were any genuine difficulty in realising assets to discharge the confiscation order as a result of such a change of circumstances since the making of the order, the applicant's remedy would be to apply to the Crown Court under section 23 of the Proceeds of Crime Act 2002 for a "certificate of inadequacy". The applicant has no such remedy in this Court. We emphasise that we are in no way encouraging such an application, far from it. It is not open to the applicant to seek by such an application in the Crown Court to challenge the judge's finding in the confiscation proceedings that the applicant had “hidden assets”.

34. In any event this ground of appeal amounts to a further attempt to introduce "fresh evidence" which was not before the judge at the confiscation hearing and which must have been known to the applicant then.

35. For all these reasons we are quite satisfied that there is no merit in the proposed appeal and the renewed application for leave to appeal is refused.