



HIGH COURT OF JUSTICIARY

[2024] HCJ 1  
IND2021-2435

OPINION OF LORD TYRE

in the application by

HIS MAJESTY'S ADVOCATE

Prosecutor

against

GRANT ROBERT BROADFOOT

Accused

for a confiscation order under section 92 of the Proceeds of Crime Act 2002

**Prosecutor: Heaney, AD, Crown Office**

**Accused: N Shand; Bridge Legal**

4 June 2024

**Introduction**

[1] At a preliminary hearing on 5 April 2022 the accused pleaded guilty to the following charge:

“Between 13 November 2019 and 3 June 2020, both dates inclusive, at [addresses in Glasgow and Paisley], HM Naval Base, Faslane and elsewhere you GRANT ROBERT BROADFOOT were involved in serious organised crime and did do something you knew or suspected or ought reasonably to have known or suspected would enable or further the commission of serious organised crime, in that you were concerned in the purchase, sale and supply of cannabis, did offer to supply ammunition, were concerned in the transfer, possession and use of criminal property, namely money, and did use encrypted and non-encrypted electronic devices and the encrypted communication platform Encrochat to send and receive messages in connection therewith, use motor vehicles registered numbers [numbers specified] and motor vehicles belonging to the Ministry of Defence to transport said cannabis and money,

have in your possession a cash counting machine and a vacuum sealing machine and other items for counting criminal property and packaging drugs: CONTRARY to Section 28(1) of the Criminal Justice and Licensing (Scotland) Act 2010”.

Guilty pleas were accepted at the same time from two co-accused, Stuart Bryant and Ian Broadfoot (the accused’s father), to lesser charges relating to the same course of criminal conduct. On 10 May 2022, the accused was sentenced to imprisonment for a period of 5 years and 3 months, discounted from 7 years to reflect his guilty plea. Stuart Bryant was sentenced to a shorter period of imprisonment and a community payback order was imposed on Ian Broadfoot.

[2] The advocate depute tendered statements of information under section 101 of the Proceeds of Crime Act 2002 (“the Act”) in respect of each of the accused. After sundry procedure, settlements were reached between the Crown and each of the two co-accused. In the case of Stuart Bryant, the court made a confiscation order on 1 February 2024 assessing the value of the proceeds of his general criminal conduct at £115,000 and the available amount as nil.

[3] The application for a confiscation order against the accused proceeded to a determination hearing. For the purposes of the hearing it was agreed by joint minute:

- that the accused had been convicted of an offence which satisfied the test for the definition of a criminal lifestyle under section 142(1) of the Act;
- that he had benefited from criminal conduct and that a confiscation order fell to be made; and
- that the available amount was £29,309.15.

It was further agreed that the benefit to the accused, calculated in accordance with the Act, was £62,500 exclusive of the value of drugs recovered. The issue for decision at the determination hearing was whether some or all of the value of the drugs recovered should

be included in the benefit to the accused. That is a matter which would have practical significance should the Crown decide in future to make an application under section 107 for recalculation of the available amount.

### **Circumstances of the offence**

[4] The following is derived from the agreed narrative presented to the court when the guilty pleas were tendered.

[5] At the time of the offences the accused and Stuart Bryant were serving Royal Marine Commandos based at Faslane. On Wednesday 3 June 2020, the police received information that drugs would be transported from England to Scotland in a Ford Transit van belonging to the MOD. The van, driven by Stuart Bryant, became the subject of surveillance as it travelled north. At about 8pm it came to a halt in Glasgow in front of a Renault Kangoo van. The two vehicles were driven in convoy to an address in Mount Vernon, Glasgow, where they stopped close to one another. Police officers formed the view that a drugs handover was taking place. They detained the accused, Stuart Bryant and Ian Broadfoot.

[6] When the Ford Transit van was searched, 11 vacuum packed bags each containing 1kg of cannabis were found. A further 19 such bags were found in the Renault Kangoo van. When the accused's home was searched, a box containing cash totalling £27,370 was found. A search of Ian Broadfoot's home produced a number of items including a cash counting machine with an invoice for it in the accused's name, more cash, a vacuum sealer machine, and another bag containing cannabis. Cannabis plants were found in a garage. When the accused's quarters at Faslane were searched, a bag containing live ammunition was found.

[7] The police obtained further evidence against the accused and Stuart Bryant by successful infiltration of an encrypted communications platform called Encrochat, used by

persons involved in organised crime. The accused's user "handle" was active from 27 March to 3 June 2020, during which time he conducted a number of chats which demonstrated his involvement in serious and organised crime, including transportation of drugs and collection of money. In certain conversations he appeared to be offering to supply ammunition, to which he had access as a storeman at Faslane. Messages leading up to 3 June included arrangements for the transportation that was intercepted by the police.

[8] According to the police STOP unit, the cannabis in the 30 vacuum packed bags recovered from the two vans would be bought/sold as 1kg weights with a value of approximately £3,800 each, giving a total value of about £114,000. The bag recovered from Ian Broadfoot's address contained 182.52 grams of cannabis, which was not a recognised weight/deal. It might have been the remainder of a larger amount and had a value of approximately £1,000.

[9] At the determination hearing the accused gave evidence. He confirmed that he had been involved in making arrangements on Encrochat for the transportation of the 30 kilo bags. His intention was to pass 20 bags to a friend in Edinburgh as a favour, and to retain the other 10 bags himself for resale in Glasgow in quantities of 1 kilo. He was not required to pay up front for the cannabis; he would be expected to pay for the bags which he retained, at a price of £3,000 per kilo, out of the proceeds of his resales. He would not have had any financial interest in the resale of the 20 kilos in Edinburgh. These bags would have been taken to Edinburgh by Stuart Bryant. When it was put to him in cross-examination that this was not his first contact with suppliers in Liverpool, or the first time he had used an MOD van to transport drugs, his answers were evasive. He accepted that in relation to the 3 June transaction he was a middle man.

[10] Evidence was led on behalf of the accused from Mr Kenneth Lee, a retired detective sergeant with many years' experience of drug related crime, who is now a director of Expert Drug Witness Services Ltd providing expert evidence on matters such as "street" and wholesale prices of drugs in Scotland. His opinion, which accorded with that of the STOP unit noted above, was that at the material time the 30 kilo bags of cannabis would have had an individual value of £3,800 if marketed in the west of Scotland. Large quantities of drugs would benefit from a discount by the supplier of the order of 10 to 20%. Supplying drugs "on tick" was standard practice.

**Benefit from criminal conduct: the law**

[11] In terms of section 92(5)(b) of the Act, where the court has decided that the accused has a criminal lifestyle, it must decide whether he has benefited from his general criminal conduct. If it so decides, the court must then, in accordance with section 92(6), (a) decide the recoverable amount and (b) make a confiscation order requiring him to pay that amount, subject to the proviso that (b) applies only if, or to the extent that, it would not be disproportionate to require the accused to pay the recoverable amount. Section 93(1) defines the recoverable amount as an amount equal to the accused's benefit from the conduct concerned. If, however, the accused shows that the available amount is less than that benefit, then under section 93(2) the recoverable amount is the available amount, or a nominal sum if the available amount is nil. As already noted, the issue in this case is not the available amount but rather the amount of the accused's benefit from his general criminal conduct.

[12] As regards the meaning of benefit, section 143 provides as follows:

“... (4) A person benefits from [criminal] conduct if he obtains property as a result of or in connection with the conduct.

(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and in some other.

(7) If a person benefits from conduct his benefit is the value of the property obtained.”

[13] In *R v May* [2008] 1 AC 1028 at paragraph 48, the House of Lords made the following observations on the exercise of the power of the court to make confiscation orders. The legislation is intended to deprive defendants of the benefit they have gained from criminal conduct, whether or not they have retained such benefit, within the limits of their available means. The benefit gained is the total value of the property or advantage obtained, not the defendant’s net profit after deduction of expenses or shares paid to co-conspirators. A defendant ordinarily obtains property if in law he owns it, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of 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.

[14] In *R v Ahmad and Fields* [2015] AC 299, the UK Supreme Court emphasised at paragraphs 41-51 that the word “obtains” did not connote ownership of an item or money but rather control over its use. Where there were two or more co-conspirators, they might be regarded as having jointly obtained the item or money concerned, so that it would often be appropriate to hold that each had obtained the whole of the property. On the other hand there might be cases where a conspirator was able to show that he was only involved to a

limited extent, and did not obtain the property which was obtained as a result of the crime. Where however an item was jointly obtained, each of the co-conspirators was to be treated as having obtained the item or money concerned, and the value of each's benefit was the whole value.

[15] The English cases, including *R v May* and *R v Ahmad and Fields*, were considered in *Mooney v HM Advocate* 2020 JC 1, where the Lord Justice Clerk, Lady Dorrian, observed at paragraph 7 that the determination of whether there was a "benefit" for the purposes of the Act was highly fact sensitive. The extent to which an individual might have exerted a power of control or disposition over the assets in question in such a way that they may be described as having obtained a benefit therefrom might be relevant, as might the distinction between someone who acted only as a courier and someone who took a more central role, although this too would not be determinative. The essence of "benefit" was to be found in the word "obtain", which covered both securing and procuring (ibid paragraphs 12 and 13).

### **Argument for the Crown**

[16] On behalf of the Crown it was submitted that the accused had "obtained" all of the drugs seized and that his benefit was the whole value of those drugs. He had had joint power of disposition or control over them. There was no basis for apportionment of benefit among the co-accused. It was clear from the agreed narrative and from the accused's evidence that he had not been a mere courier; he controlled the movement of the drugs, including sending some to Edinburgh. This was not analogous to the situation of an individual who participated in a drug supply operation through duress. It was not a one-off event; the accused was accustomed to acting as a middle man. Because this was a lifestyle offence the focus was not merely on the intercepted transaction. The proportionality proviso

to section 92(6) was irrelevant: it related to the recoverable amount, not the assessment of benefit.

### **Argument for the accused**

[17] On behalf of the accused it was submitted that no sum should be added to the benefit figure in relation to the value of the drugs. In the circumstances of this case it would not be proportionate to do so. According to the accused's evidence he had not paid for the cannabis recovered from the vans and he had obviously not had an opportunity to realise its value. Alternatively, if that argument were to be rejected, he should be found to have obtained only the 10 kilos of cannabis which he was entitled to dispose of for his own profit. So far as the other 20 kilos were concerned, he was no more than a courier with no right of disposal. There was no reference in the calculation in the statement of information to the remaining bag valued at £1,000, and so on any view it should be excluded.

### **Decision**

[18] I am satisfied, having regard to the whole circumstances of the case, that the property obtained by the accused in connection with his criminal conduct included all of the drugs recovered by the police, including the 20 kilos destined for Edinburgh and the bag found at his father's home. As the case law makes clear, the critical word in section 143 is "obtains" which, as the Lord Justice Clerk observed in *Mooney*, encompasses both securing and procuring. On the basis of the agreed narrative, including the content of the Encrochat messages, there is no doubt that the accused was much more than a courier. He played a central role in a serious crime operation for the transportation of cannabis to Scotland, including use of MOD vehicles. The fact that he stood to gain no personal benefit from a



portion of the particular load intercepted by the police is neither here nor there. He, along with his co-accused Stuart Bryant, procured and thus obtained the drugs recovered from the two vans in the course of criminal conduct. The smaller amount of cannabis recovered from Ian Broadfoot's house was clearly also obtained by the accused and his co-accused in connection with that conduct.

[19] The accused's proportionality argument is misconceived. Section 92(6) is not concerned with the assessment of benefit obtained, and there is therefore no statutory requirement to address proportionality in that context. Proportionality must be addressed by the court when deciding whether to require the accused to pay the amount which it has decided is the recoverable amount, which will not be more than the available amount. In the circumstances of this case, proportionality may have a role to play if the Crown seeks at some future date to recalculate the available amount, but it has no part to play in assessing the amount of the accused's benefit as defined by section 143.

[20] In terms of section 143(7), the benefit from criminal conduct is the value of the property obtained. The value of the 30 bags discovered in the vans is agreed to have been £3,800 per bag, ie £114,000 in total. At one stage it was argued that this figure should be reduced to reflect the discount which would be given for bulk sales. That argument cannot be sustained, because the accused's evidence was that he intended to sell the kilo bags individually. The relevant value is the value on sale and not the purchase price (cf *R v Elsayed* [2014] 1 WLR 3916) which on the basis of the agreed narrative was £3,800 per kilo bag. The value of the bag recovered from Ian Broadfoot's house is also agreed as being £1,000. The total value of the benefit of the accused's criminal conduct is therefore £177,500, being the agreed benefit of £62,500 plus £115,000.

**Disposal**

[21] I shall make an order in terms of section 92(6) assessing the value of the accused's benefit from general criminal conduct at £177,500. Subject to any application which may be made on behalf of the accused under section 116 (time for payment), I shall make a confiscation order in the sum of £29,309.15.