

Enforcement

Default Terms

R v Mulholland [2011] EWCA Crim1546

20th May, 2011

1. The appellant was convicted of being knowingly concerned in fraudulently evading the duty payable on road fuel. He was subsequently made subject to a confiscation order in the sum of £550,000, being the sum of his realisable assets, after his criminal benefit had been determined in the sum of £3,672,640.
2. The Court set a period of 5 years in default of payment and allowed the appellant 6 months to pay. Prior to imposing the default term the Judge had referred to the appellant's "arrogance" in breaching his Restraint Order and appeared to take into account this conduct when fixing that term. It was contented on appeal that the default period was manifestly excessive.
3. The ground for the appeal was that the sum of £550,000 fell between the sum of £250,000, for which the maximum default period is 3 years, and the sum of £1 million, for which the maximum default period is 5 years and, in those circumstances, the default sentence ought to have fallen somewhere between 3 and 5 years.
4. The Court of Appeal found, following *R v Smith [2009] EWCA Crim 344*, that, whilst the court must take into account intransigence, the court must also have regard to the maximum sentence where the confiscation order falls short of the figure justifying that maximum sentence. In all of the circumstances the Court agreed that 5 years was too long and, in its place, substituted for it a default term of 4 years.

R v Watson and Green [2011] EWCA Crim 1485

25th May, 2011

5. The appellants were convicted of conspiracy to supply Class A drugs and associated offences. A confiscation order was made in the sum of £1,617,263.12 against Watson and £2,378,650.80 against Green. A period of 10 years was set in default. On appeal it was argued both that the confiscation order and the default term were manifestly excessive.

6. For the purposes of this review only the latter of these grounds of appeal need be addressed. A review of the transcript of the proceedings in the Crown Court demonstrated that the judge had been under the impression that 10 years represented a standard term and that she had not made any judgment as to the appropriate length of the default term which could have been anywhere between 5 years (the maximum period for orders up to £1 million) and 10 years, which was the maximum for confiscation orders in excess of £1 million.
7. The Court referred to the leading case of *R v Smith [2009] EWCA Crim 344* and acknowledged that an appellant's conduct might be relevant in determining the length of the default term to be imposed. The Court noted that the judge had found both appellants to be dishonest and, in the case of Green, that he had lied throughout the evidence that he gave on oath in the confiscation proceedings and had called witnesses to lie on his behalf.
8. However, whilst the Court acknowledged the necessity of bringing home to the appellants the importance of complying with the confiscation order, in the circumstances of that case it was appropriate to reduce the default term to 8 years for each appellant.

Article 6 Rights: Representation

9. A clear message was sent out to Magistrates responsible for enforcing Confiscation Orders in the case of *R (On the Application of Agogo) v North Somerset Magistrates' Court [2011] EWHC 518 (Admin)*, in which the High Court considered the refusal of an adjournment for the purpose of obtaining legal representation.
10. The applicant had been made subject to a confiscation order in the sum of £454,292.11 with 5 years imprisonment set in default. Shortly prior to his release date from the sentence imposed for the offences of which he was convicted, the applicant received notification that there was an enforcement hearing at the Magistrates Court several days later.
11. Having received this notification the applicant had contacted his solicitor who was not in a position, due to the shortness of time available, to secure legal aid prior to the hearing. An adjournment was requested by letter and, subsequently, by fax in which detailed reasons for the applicant's predicament were given. This application was refused and the applicant was duly produced at Court.
12. The applicant proceeded to represent himself at the hearing. He was offered assistance from the Duty Solicitor but, for professional reasons, the Duty Solicitor was unable to represent him. When asked about his position the applicant stressed

that his case was complex and that his own solicitor, who was not in attendance, knew the case better than anyone.

13. Having considered the applicant's position the Magistrates refused the application for an adjournment and issued a warrant of commitment, activating the default term.
14. Allowing the applicant's application for Judicial Review, the Divisional Court found that the Magistrates' decision amounted to a breach of the common law principles of natural justice and Article 6 of the ECHR.

Warrants of Commitment

15. Spring, and specifically the 31st March, 2010, saw the High Court (Administrative Division) hand down an extremely significant judgment in relation to the enforcement of confiscation orders: *Revenue and Customs Prosecutions Office v Taylor [2010] EWHC 715 (Admin)*.
16. The issue was whether a warrant of commitment could be made but then its effect postponed until the end of a defendant's sentence for a substantive offence that was not the same one in relation to which that confiscation order had been made.
17. The defendant had received lengthy periods of imprisonment for drug trafficking offences on two separate occasions (1995 and then 2005), which meant that his earliest date of release fell well into 2013.
18. At the conclusion of the 1995 proceedings he was made the subject of a confiscation order in the sum of £633,530.45, with a period of 5 years imprisonment in default of payment (reduced on appeal to 4 years). In light of the earlier order no further confiscation order was made in 2005.
19. Once he was released from his first term of imprisonment it would appear that he made substantial payments towards his order. This prevented RCPO from seeking the imposition of the warrant of commitment at that stage, no doubt eager to recoup the full amount owed.
20. After his second arrest and subsequent conviction in 2005 his lawyers invited the enforcing Magistrates' Court to issue a warrant of commitment, in order that he could serve the default term prior to his release from the substantive sentence on that second matter.
21. Being aware that delay in seeking enforcement through a warrant of commitment could lead to a position in which they were prevented from using this as an

enforcement tool, RCPO sought a warrant of commitment, but with the default period postponed until 2013 (to begin at the conclusion of the substantive sentence).

22. The District Judge in the Magistrates' Court made the postponed order, as requested, but then stated a case for the opinion of the High Court, at the request of RCPO, asking whether she had, had the power to do so.
23. Where a defendant is still serving as a result of a conviction, which also led to a confiscation order, there is provision in the relevant statutes as to the proper approach.
24. Under the Drug Trafficking Offences Act 1986 ("DTA"), section 6(2) provides that the default term *shall not begin to run* until that term of custody has finished. Section 38 of POCA has identical effect.
25. In the absence of any express provision as to the situation they encountered in *Taylor* Mr. Justice Blair turned, as the District Judge had, to the Magistrates' Court Act 1980.2 Section 77(2) provides:-

"77(2) Where a magistrates' court has power to issue a warrant of commitment under this Part of this Act, it may, if it thinks it expedient to do so, fix a term of imprisonment [or detention under section 108 of the Powers of Criminal Courts (Sentencing) Act 2000 (detention of persons aged 18 to 20 for default)] and postpone the issue of the warrant until such time and on such conditions, if any, as the court thinks just."
26. Mr. Justice Blair found that section 77 empowered the District Judge to postpone the order and the question stated was answered in the affirmative.
27. It is important for all practitioners to take note that the court did *not* make any comment or decision in respect of the *merits* of this case. Section 77 provides no more than a *discretionary* power and consequently practitioners should be prepared to address the court as to why the discretion ought to be, or ought not to be, exercised.
28. In practice, it is likely that there will be a great number of cases in which it would be disproportionately oppressive, even in the context of the Draconian proceeds of crime regime, to postpone the effect of the default term. Practitioners must be alive to this and identify them as soon as they arise.

Quinton Newcomb Barnaby Hone

Chambers of Michael Hubbard Q.C. and Karim Khail Q.C.

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