SHERIFF APPEAL COURT

[2018] SAC (Crim) 3
SAC/2017/000630/AP

Appeal Sheriff A L MacFadyen
Appeal Sheriff A Cubie
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF A L MACFADYEN

in

APPEAL AGAINST SENTENCE

by

JOHN FARRELL

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: J Scott QC (sol adv); Capital Defence Lawyers (for Gallen & Co)
Respondent: A Prentice QC, AD; Crown Agent

13 February 2018

Introduction and Background

[1] This was an appeal against the making of a confiscation order under the Proceeds of Crime Act 2002 ("the 2002 Act") in the amount of £277,382.14 against the appellant by the sheriff at Glasgow on 28 August 2017.

[2] All statutory references in this Opinion are to the 2002 Act, unless stated otherwise.

[3] The procedural history is that the appellant, John Farrell, born 11 August 1992, and his father, also John Farrell, born 22 November 1941, were prosecuted together on summary complaint. That libelled two charges against both of them. The complaint first called on 29 October 2015. Those charges were in the following terms:

> "1. On 30th December 2014 at Flat 3/5 24 James Morrison St Glasgow you JOHN FARRELL AND JOHN FARRELL were concerned in the supplying of a controlled drug, namely Cocaine, a Class A drug specified in Part 2 of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of the aftermentioned Act; CONTRARY to the Misuse of Drugs Act 1971, Section 4(3)(b).
>
> 2. On 30th December 2014 at Flat 3/5 24 James Morrison St Glasgow you JOHN FARRELL AND JOHN FARRELL did have in your possession a controlled drug, namely Cannabis, a Class B drug specified in Part II of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 5(1) of the aftermentioned Act; CONTRARY to the Misuse of Drugs Act 1971, Section 5(2)."

[4] After some sundry procedure the appellant pleaded guilty as libelled to both charges on 26 May 2016. His co-accused pleaded not guilty to both charges. All of those pleas were accepted by the Crown. The appellant admitted as accurate a schedule of his previous convictions. The summary sheriff adjourned the diet for preparation of a Criminal Justice Social Work Report. Once that report was available, the sheriff deferred sentence on the appellant on a number of occasions, for various reasons, the most significant being for the appellant to be of good behaviour. He finally appeared for sentencing on 19 April 2017. On that date the sheriff admonished the appellant on both charges.

[5] Meantime confiscation proceedings were commenced. On 23 June 2016 a statement of information under the Proceeds of Crime Act 2002 section 101 was lodged, answers were ordered and a hearing assigned on 18 August 2016. There then ensued the familiar history in such applications of numerous adjournments, culminating in a proof before the sheriff (a different sheriff from the one who sentenced the appellant on 19 April 2017) on 28 August

2017. That proof proceeded on the basis of a third statement of information by the respondent and answers by the appellant.

[6] The minute of the proceedings on 28 August 2017 is quite detailed as to what occurred on that date. It records that the solicitor for the appellant, speaking as *amicus* (sic) advised that

> "Mr. Farrell Senior, an important figure in the case, had recently been diagnosed with dementia and had been admitted to hospital. Mr. Farrell Senior did not have any representation."

[7] However, the minute then goes on to narrate that:

> "The court having heard from parties and having been advised that they were both in a position to continue to proof and there being no other motion before the court, directed the proof to proceed."

[8] The minute then records that after hearing evidence and from the appellant's solicitor and the Crown, the sheriff was satisfied that a confiscation order should be made and pronounced one, ordering the appellant to pay £277,382.14 within six months. That is the order against which this appeal was taken.

[9] It is convenient here to set out the terms of sections 92 and 96 of the 2002 Act, which set out the steps which the sheriff must follow when requested by the Crown to make a confiscation order under that Act.

> "**92 Making of order**
>
> (1) The court must act under this section where the following three conditions are satisfied.
>
> (2) The first condition is that an accused falls within either of the following paragraphs—
>
> (a) he is convicted of an offence or offences, whether in solemn or summary proceedings, or
> (b) in the case of summary proceedings in respect of an offence (without proceeding to conviction) an order is made discharging him absolutely.

(3) The second condition is that the prosecutor asks the court to act under this section.

(4) The third condition is that the court decides to order some disposal in respect of the accused; and an absolute discharge is a disposal for the purpose of this subsection.

(5) If the court acts under this section it must proceed as follows—

(a) it must decide whether the accused 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.

(6) If the court decides under subsection (5)(b) or (c) that the accused has benefited from the conduct referred to—

(a) it must decide the recoverable amount, and
(b) it must 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 accused to pay the recoverable amount.

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

(8) Before making an order under this section the court must take into account any representations made to it by any person whom the court thinks is likely to be affected by the order.

(9) The standard of proof required to decide any question arising under subsection (5) or (6) is the balance of probabilities.

(10) The first condition is not satisfied if the accused is unlawfully at large (but section 111 may apply).

(11) For the purposes of any appeal or review, an order under this section is a sentence.

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

(13) In this section and sections 93 to 118*"the court"* means the High Court of Justiciary [, the Sheriff Appeal Court] [2] or the sheriff."

"**96 Assumptions to be made in case of criminal lifestyle**

(1) Where the court decides under section 92 that the accused has a criminal lifestyle it must make the following four assumptions for the purpose of—

(a) deciding whether he has benefited from his general criminal conduct, and
(b) deciding his benefit from the conduct.

(2) The first assumption is that any property transferred to the accused at any time after the relevant day was obtained by him—

(a) as a result of his general criminal conduct, and
(b) at the earliest time he appears to have held it.

(3) The second assumption is that any property held by the accused at any time after the date of conviction was obtained by him—

(a) as a result of his general criminal conduct, and
(b) at the earliest time he appears to have held it.

(4) The third assumption is that any expenditure incurred by the accused at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.

(5) The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the accused, he obtained it free of any other interests in it.

(6) But the court must not make any of those assumptions in relation to particular property or expenditure if—

(a) the assumption is shown to be incorrect, or
(b) there would be a serious risk of injustice if the assumption were made.

(7) If the court does not make one or more of those assumptions it must state its reasons.

(8) 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 instituted against the accused, or

> (b) if there are two or more offences and proceedings for them were instituted on different days, the earliest of those days.
>
> (9) But if a confiscation order mentioned in section 94(3)(c) has been made against the accused at any time during the period mentioned in subsection (8)—
>
> (a) the relevant day is the day when the accused's benefit was calculated for the purposes of the last such confiscation order;
> (b) the second assumption does not apply to any property which was held by him on or before the relevant day.
>
> (10) The date of conviction is—
>
> (a) the date on which the accused was convicted of the offence concerned, or
> (b) if there are two or more offences and the convictions are on different dates, the date of the latest."

[10] In this case the three conditions referred to in section 92(1) to (4) were satisfied. That is to say that the appellant was convicted of an offence on summary complaint, that the prosecutor asked the sheriff to act under section 92 and that the sheriff had imposed a disposal (in this case an admonition).

[11] Those conditions being satisfied, the sheriff was obliged to act under section 92. His next task was to decide whether the appellant had a criminal lifestyle. It was conceded by the appellant that he did so. Section 142 and Schedule 4 of the 2002 Act provided that a conviction of, *inter alia*, contravening section 4(3)(b) of the Misuse of Drugs Act 1971 was to that effect.

[12] The next issue was whether the appellant had benefitted from his general criminal conduct, that is if he obtained property as a result of or in connection with the conduct (section 143(4) of the 2002 Act).

[13] When deciding that issue, the sheriff had to make the four assumptions set out in section 96, unless they, or any of them, were shown to be incorrect or there would be a serious risk of injustice if the assumption were to be made.

[14] If the sheriff decided that the four assumptions should be made (as he did in this case), he was obliged, by section 92, to decide the recoverable amount and make a confiscation order requiring the accused to pay that amount [to the state]. However, the confiscation order could only be made if, or to the extent that, it would not be disproportionate to require the accused to pay the recoverable amount.

[15] It was accepted by appellant and respondent that the approach taken by the sheriff had been correct in that he concluded that the burden of proof lay on the accused, in this case the appellant, if he hoped to succeed in displacing any of those four statutory assumptions.

[16] The standard of proof was on the balance of probabilities, section 92(9).

Submissions

[17] The appellant and respondent both lodged and adopted their written submissions.

Appellant

[18] The appellant's principal argument was that, in the particular circumstances of this case, the sheriff had erred in failing to find that there had been a serious risk of injustice if he found that the four assumptions should be made, as provided in section 96(6)(b). That risk was present because of the involvement in the case of the appellant's father. The father had originally been a co-accused on the complaint. His not guilty plea had been accepted by the Crown (although it was not known what the reason for that decision had been). He had been the source of the money and property in the appellant's possession, in respect of which the order had been made. He had not given evidence. It was said that he was unable to do so, in light of his now suffering from dementia.

[19] Taking all of those factors together, there was a risk of serious injustice in the sheriff deciding to find that the assumptions should be made. He ought not to have done so and erred in making the confiscation order which he pronounced.

[20] Further, it seemed that the sheriff had adopted a blanket approach to the various items of property in the possession of the appellant. That was not the correct approach. An example of the correct approach was to be found in the High Court decision of *HM Advocate* v *McAllister* [2014] HCJ 112. He should have, when determining what, if anything, was the recoverable amount, considered each item of property discretely. He had again fallen into error in not doing so. Mr Scott QC referred us to the decision of *R* v *Deprince* [2004] EWCA Crim 524 as authority for the proposition that the court could make a percentage deduction from any particular item of property to guard against the possibility that a part of the fund under consideration was legitimate, and thereby prevent the possibility of a serious miscarriage of justice occurring.

[21] The confiscation order should be quashed and replaced either with no order at all or an order for the restricted sum of £35,575.00, a figure identified by the appellant's forensic accountant.

Respondent

[22] In reply the Crown argued that this case had raised nothing of any novelty or speciality. It was commonplace for evidence not to be led, for whatever reason. That did not have any impact on the correctness of the sheriff's decision. Other evidence might have been led. Documents might have been produced. If appropriate, an application under section 259 of the Criminal Procedure (Scotland) Act 1995 to admit the hearsay evidence of James Farrell Senior might have been made. No such steps had been taken. Before the proof

commenced the sheriff had enquired of Crown and defence if they were ready to proceed and both had replied in the affirmative. Against that background, it could not be said that any injustice had occurred as a result of the sheriff deciding that the four assumptions were correct.

[23] The sheriff had not taken a blanket approach. Rather the same explanation appeared to have been given by the appellant and rejected by the sheriff in respect of each asset. He said that the sheriff had been entitled to be sceptical about, and to reject, the appellant's evidence: an example of that evidence for which the appellant did not have any credible explanation had been the fact that, by his own admission, he had been the holder of ten bank accounts.

[24] There was no flaw in the sheriff's reasoning and the appeal should be refused.

Discussion

[25] The route to the sheriff's decision to make the confiscation order is set out in the provisions of the 2002 Act. The index offence, being concerned in the supply of cocaine, a contravention of section 4(3)(b) of the Misuse of Drugs Act 1971, triggered the finding that the appellant had a criminal lifestyle. He had assets. The sheriff decided that, without incurring the risk of serious injustice, he could make the four statutory assumptions as to the source of those individual assets. Then, so long as the decision was proportionate in respect of each asset considered separately, the sheriff had to make a confiscation order in respect of each asset to which the assumption applied.

[26] As already noted, the sheriff made the assumptions, having decided that to do so did not risk serious injustice, decided that it was proportionate to make the confiscation order in

respect of each item of property described in the statement of information and therefore made it.

[27] With regard to the submissions, we preferred the argument of the respondent.

Recoverable Amount

[28] On the issue of the extent of the recoverable amount, we note from the sheriff's report that during his submission at the conclusion of the proof the solicitor for the appellant conceded that there was no middle ground for the calculation of an appropriate figure. The sheriff writes that,

> "There was no submission that I should proceed on the basis of the figures spoken to by [the forensic accountant]. Mr. Shields [the solicitor for the appellant at the proof] did not challenge the calculation of the recoverable amount. The question was whether a confiscation order should be made or not."

[29] Before us, Mr Scott QC did not develop his written argument that a fall-back position should be for a restricted sum beyond his reference to *R* v *Deprince* (*supra*). Standing that, and having regard to our view, mentioned *infra*, that the sheriff did not adopt a blanket approach to the calculation of the recoverable amount, we can see no justification for making a confiscation order for a restricted sum. In *Deprince* the court at first instance had considered whether to make the assumptions in respect of all or only part of certain items of property and decided that he could do the latter. The Court of Appeal upheld the judge's decision that he could do so, in order to avoid the serious risk injustice. The position in this case differed from that in *Deprince* in that here the sheriff had no difficulty in rejecting the entirety of the appellant's evidence as to the source of each of the items of property. Thus there was no room for the argument of a broad brush or percentage approach being justified

in order to prevent the serious risk of injustice. Standing his view of the evidence, the sheriff was obliged to make all of the assumptions in respect of all of the assets in question.

Joint Minute

[30] It did not seem to us that the evidence agreed at proof between the Crown and the appellant in a joint minute advanced the appellant's position. Insofar as relevant to the grounds of appeal, it simply narrated parties' agreement that certain assets were held in the name of the appellant. Such evidence was neutral as to the source of those assets.

Serious Injustice

[31] The principal issue for us to determine was whether the sheriff had erred in deciding that there was no risk of serious injustice if the section 96 assumptions were made.

[32] Plainly at the proof the focus was on the first two assumptions set out in section 96, namely (read short): Whether any property transferred to the appellant at any time after the relevant day (being the first day of the period of six years ending with the day when proceedings for the index offence concerned were instituted against him) was obtained by him as a result of his general criminal conduct; and whether any property held by the appellant at any time after the date of conviction was obtained by him as a result of his general criminal conduct.

[33] The sheriff correctly dealt with the matter by considering the evidence led before him at the proof . Having decided that the appellant had failed to lead any evidence which could persuade him to take a different attitude towards the assumptions, the sheriff's decision to find that they could be made is beyond criticism. It was for the appellant to displace the

assumptions made in the first instance by section 96. A consequence of the sheriff disbelieving his evidence was that he failed to do so.

[34] We cannot see any factor which might have justified a finding of a risk of serious injustice. The appellant gave evidence. The fact that it was of short duration (fifteen minutes) is irrelevant. It is clear from his report that the sheriff gave it careful consideration. We cannot find any ground to justify any criticism of the sheriff's assessment of that evidence. The sheriff sets out, at paragraph [44] of his report a summary of the appellant's account of how he came to possess the assets in question. He then goes on to explain that he found that evidence "utterly unconvincing" and concludes that the appellant was endeavouring to protect, for the family, the benefit which he had obtained through criminal activities. In our view, that is a reasonable explanation of the approach taken to the appellant's evidence by the sheriff. We can find no reason to fault his approach, far less to question his conclusion.

[35] The sheriff found that the evidence of Mr Adamson, the forensic accountant led by the appellant had been of limited value and incapable of advancing the defence position. That was because that witness's evidence was predicated entirely on that of the appellant, all of which the sheriff had disbelieved. As the sheriff observes, at paragraph [33] of his report,

> "[The appellant's forensic accountant's] conclusions, as he had plainly made clear, relied on the truth and accuracy of the information provided to him by the appellant's solicitor."

[36] The sheriff rejected the evidence of the appellant. Accordingly it could not be said that the appellant's father had received money as a result of an accident claim, an inheritance or that he had been good with stocks and shares. Neither could those, rejected, assertions play any part in deciding what the source of the funds had been.

[37] The argument most heavily relied on by the appellant before us at the hearing of the appeal was that the making of the order led to an injustice because of the presence or involvement in the proceedings of the appellant's father. In our view, that argument cannot succeed. The appellant cannot invite or expect the court to speculate about what his father may have said. The appellant's case stands or falls by the facts relevant to him, not any other party, including his father. The appellant periled his case on the evidence he chose to call, or not to call. Steps could have been taken to identify and vouch the legitimacy of the source of the father's funds. Such steps could have been taken, but were not. In the face of the appellant electing not to recover and produce vouching of the claimed legitimacy of the source of the property, it cannot be said that the sheriff erred in making the statutory assumptions. The appellant pleaded guilty to an offence which triggered the criminal lifestyle provisions of section 92. The statutory assumptions related to him, his assets and his lifestyle. The burden of proof to disapply any or all of the assumptions rested on him. That burden is not affected by the court's responsibility to avoid a serious risk of injustice. A critical factor in coming to that conclusion is that the sheriff did not believe the appellant's evidence.

[38] It cannot be said whether the father would have been believed or not by the sheriff as to the legitimacy of the provenance of the appellant's property. What can be said is that, other than the evidence of Mr Adamson, which relied entirely on information given to him by the appellant, no relevant supporting evidence, whether oral testimony from another witness, such as a solicitor or bank manager, or documentary, such as correspondence regarding the damages claim referred to by the appellant in evidence, letters or statements from stockbrokers, copy wills or correspondence from executors, whatsoever was produced.

[39] Against that background, we struggle to see how it can be said that the sheriff's decision to decline to make the statutory assumptions on the basis of the appellant's bald assertions alone led to an injustice or the risk thereof.

[40] Another factor pointing away from the risk of injustice in finding the assumptions made is that the standard of proof incumbent on the appellant was simply the balance of probabilities.

[41] We have therefore decided that the sheriff's decision that there was no risk of serious injustice in the making of the assumptions was one which he was entitled to make on the evidence before him and there is no warrant for us to interfere with that decision.

Proportionality

[42] We considered the question of proportionality, as the sheriff was obliged to before deciding whether to make a confiscation order. We did not understand the appellant's solicitor advocate to disagree with the sheriff's analysis of what the term "proportionality" means in cases of this nature. In any event, we agree with and endorse what the sheriff says about that in paragraphs [50] to [54] of his report, namely, under reference to in *R* v *Waya* [2013] 1 AC 294 , that in considering whether it would be disproportionate to require the appellant to pay the recoverable amount, he had regard to the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in the deprivation of property as a form of penalty and the legitimate aim which is sought to be realised by the deprivation, namely the aim of ensuring that criminals do not profit from their crime. The sheriff said, correctly, that the question of proportionality did not relate to any relationship between the originating offence and the confiscation order.

[43] As a result of the Supreme Court's decision in *Waya* any confiscation order made under section 96 must be proportionate. A requirement to that effect is now contained within the section itself (see section 96(6)(b) *supra*).

What Does "Proportionality" Mean?

[44] It is important to note that **p**roportionality in the context of this case does not relate to any question arising out of, on the one hand, the nature of the index offence and the apparently lenient disposal and, on the other, the sum, confiscation of which is sought by the state. Rather it is that

> "there must be a reasonable relationship of proportionality between the means employed by the State in, *inter alia*, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation.'
> (Lord Walker and Sir Anthony Hughes in *Waya*, at paragraph 12.)

Was it Proportionate to Make this Order?

[45] In this case the appellant was convicted of being concerned in the supply of a Class A drug. £3,659.96 in cash was found in the house occupied by him. Drugs to the value of £940 were found. He had a criminal lifestyle. He was also found to be in possession of significant assets. His explanation as to how he came to be in possession of those assets did not persuade the sheriff on the balance of probabilities to displace the statutory assumptions, in particular that the property in his possession had been obtained by him as a result of his general criminal conduct.

[46] In our view it is clear that the deprivation of the appellant of that criminally obtained property was a legitimate aim. To seek an order from the court in the form of a confiscation order was entirely proportionate to that aim. If the effect of removing assets or cash to the value of £277,382.14 from him will be to restore the appellant to the position he would have

been had he not enjoyed a general criminal lifestyle, that would seem to us to be entirely just and appropriate. The sheriff, in our view, was correct to find that it was proportionate to make this confiscation order.

Did the Sheriff Consider Each Item of Property Separately?

[47] In our view, it is clear that the sheriff followed the approach taken by Lord Boyd of Duncansby in *McAllister* (supra) and considered each item of property separately. He decided whether the statutory assumptions had been displaced in respect of each item. It would appear from his report that the appellant's account of how he had come to be in possession of the assets had been expressed in general terms. However, the account in respect of each item appears to have been broadly similar, namely the source had been the appellant's father. The sheriff's decision to reject that account in its entirety does not convert his decision to a blanket approach to all of the appellant's property. There is no merit in this ground of appeal.

Unavailability of Evidence Due to Restraint Order

[48] The note of appeal, at paragraph 2(iii) is in the following terms:

> "That the said financial evidence could not be vouched by the appellant outwith the appellant's own financial records, since the corresponding accounts are those of a third party and were subject to restraint by order of the court at the instance of the Crown.."

[49] We do not consider that there is any substance in that ground. The appellant could have sought to recover any evidence or documents to assist in the presentation of his case. He having elected not to do so, we fail to see the relevance of this ground.

Decision

[50] While at first blush, there might seem to be an imbalance between an admonition on summary complaint and a confiscation order for £277,382.14, the order made was competent and the sheriff had regard to all of the factors which he was obliged to have regard to. His approach cannot be faulted or his decision criticised.

[51] This appeal is refused.

Postscript

[52] The sheriff who imposed the confiscation order in this case was under the disability of not having clear information about the basis upon which the plea had been tendered and the case had been presented. Having regard to the sentence imposed he accepted the apparent inference that supply was social. In the circumstances of this case it cannot be said that the lack of clear information about the basis of the plea has prejudiced this appellant, but as is clear from the authorities, just what was said at the narration or sentencing stage can in some cases be significant as regards the statutory assumptions, particularly where the question arises of concessions made by the Crown (see, for example, *R* v *Kirman* [2010] EWCA Crim 614 at [8] and [9] and *R* v *Lunnon* [2004] EWCA Crim 1125, [2005] 1 Cr App R (S) 24). Those responsible for programming the business of the courts should take into account the desirability of the sentencing sheriff dealing with any confiscation proceedings in the event that the making of an order is ultimately opposed. It is undesirable for an opposed confiscation order to be made by the court in any degree of ignorance as to the basis upon which the case was presented to the sentencer.