HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Regina *v.* Knights and another (Appellants) (On Appeal from the Court of Appeal (Criminal Division))

[2005] UKHL 50

LORD STEYN

My Lords,

1. I have had the advantage of reading the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I agree with it. I would also make the order which Lord Brown proposes.

LORD RODGER OF EARLSFERRY

My Lords,

2. I have had the advantage of reading the speech of my noble and learned friend, Lord Brown of Eaton-under-Heywood, in draft. For the reasons which he gives, I too would answer the certified question in the negative and dismiss the appeal.

LORD CULLEN OF WHITEKIRK

My Lords,

3. I have had the advantage of reading the speech of my noble and learned friend, Lord Brown of Eaton-under-Heywood, in draft. For the reasons which he gives, I too would answer the certified question in the negative and dismiss the appeal.

LORD CARSWELL

My Lords,

4. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood. I agree with his reasons and conclusions and I too would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

5. This appeal was conjoined with and heard by your Lordships immediately following that in *R v Soneji and Bullen* ([2005] UKHL 49). Both concern the making of confiscation orders pursuant to the Criminal Justice Act 1988 as amended (the legislation in force prior to the Proceeds of Crime Act 2002). Both raise broadly similar questions as to the need for strict adherence to the requirements of the legislation as a precondition of the court's power to make compensation orders. Does non-compliance with the strict requirements of the legislation disable the court from making such orders?

6. Everything which I wish to say generally with regard to these questions I have said in my opinion in the other appeal and I understand your Lordships to have followed the same course. That being so I propose to deal comparatively briefly with the present case, setting out the facts as shortly as may be, identifying the particular questions they raise and then applying to them the approach indicated in the other appeal. The legislation itself is fully set out in the other appeal (and more fully still in the judgment of the court below in the present case—reported under the title *R v Sekhon* [2003] 1 WLR 1655) and I shall accordingly set out only those very few provisions which lie at the centre of the argument.

7. In the summer months of 2000 these two appellants and four other men stood trial at Kingston-upon-Thames Crown Court upon a charge of being knowingly concerned in dealing with goods which were

chargeable with duty which had not been paid, with intent to defraud, contrary to section 170(1)(b) of the Customs and Excise Management Act 1979. Six separate consignments of cigarettes had been imported from Dubai over a five month period between November 1997 and April 1998, purportedly for transhipment to Nigeria, but instead channelled onto the domestic market. The excise duty thereby lost to the Exchequer amounted to some £3.6m.

8. The trial began on 19 June 2000 and ended with the jury's conviction of Maguire on 12 October 2000. Earlier in the trial, on 10 July 2000, Knights had changed his plea to one of guilty and had been remanded for sentence.

9. The first mention of the case after completion of the trial was on 16 October 2000 when the trial judge, His Honour Judge Haworth, set a timetable for sentencing and for confiscation proceedings (the prosecutor having on 28 September 2000 given notice to all six accused that confiscation orders would be sought). Sentence was fixed for the following day, 17 October, save in the case of one defendant whose counsel was then unavailable. As to the confiscation proceedings, the court directed that the prosecution's statement (under section 73(1A) of the 1988 Act) be served by 11 December 2000 and that the case then be mentioned again on 4 January 2001, with a view to fixing a final hearing at the end of January (the judge noting that for a substantial part of January he was to be away on leave). On 4 January 2001 the confiscation proceedings were again adjourned to 23 January 2001, the judge holding that his own unavailability meantime amounted to exceptional circumstances within the meaning of section 72A(3) of the 1988 Act.

10. On 17 October 2000, as earlier arranged, the appellants were sentenced, Maguire to a term of 42 months imprisonment, Knights to 28 months imprisonment. No question now arises with regard to those sentences. Rather, as already indicated, the appeal concerns the confiscation orders which eventually came to be made on 30 July 2001: against Maguire in the sum of £114,930, against Knights in the sum of £139,260.

11. The quantum of these orders is easy to explain. Maguire was concerned in five of the six consignments, Knights in all six. As is well known, the amount to be paid by an offender under a confiscation order is the amount by which he has benefited from his wrongdoing or, if less,

the amount of his realisable assets. These orders were based on the benefits received, the judge having "no doubt whatsoever that each has his nest egg salted away" (in other words that each appellant's realisable assets were no less than the benefits received). As for the calculation of the benefits received, this was based entirely upon what became known during the trial as "the smoking gun document", a sheet of paper in Knights' handwriting found in Maguire's Ferrari showing how each had benefited from one of the consignments to the extent of £25,290, a figure based on the profit being realised from each imported carton less the sums payable to the drivers.

12. Although, as earlier indicated, the confiscation orders were not finally made until 30 July 2001 (at the conclusion of a six-day hearing), nothing turns on the further postponements and delays between 23 January 2001 and the final hearing. These later delays were either at the appellants' request and for their benefit or because of the need to deal with their arguments as to the validity of the prosecutor's original notice (a point to which I shall briefly return). Rather the appellants' principal complaint is directed to the postponements of the confiscation proceedings, first from 16 October 2000 to 4 January 2001 and then from 4 January 2001 to 23 January 2001. This second postponement, of course, took the hearing date beyond the six months provided for by section 72A(3), at least so far as Knights was concerned (he having been convicted on his plea of guilty on 10 July 2000).

13. I must now set out the first three sub-sections of section 72A of the 1988 Act as amended:

> "(1) Where a court is acting under section 71 above but considers that it requires further information before—
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> (a) determining whether the defendant has benefited from any relevant criminal conduct; or
>
> (b) . . .
>
> (c) determining the amount to be recovered in his case . . .,
>
> it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.
>
> (2) More than one postponement may be made under subsection (1) above in relation to the same case.

(3) Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) above which—

(a) by itself; or

(b) where there have been one or more previous postponements under subsection (1) above or (4) below, when taken together with the earlier specified period or periods,

exceeds six months beginning with the date of conviction."

14. As I understand the appellants' central argument on the appeal it is this. Section 72A(1) allows the court to postpone the making of a relevant determination within confiscation proceedings but only on terms that it specifies the precise period of such postponement. It must in other words stipulate the date when the actual determination is to take place. If it fails to do so the postponement is invalid. In that event the court will not properly have exercised its power to postpone and will not have been entitled to proceed to sentence under subsection (7). Having done so, the court will have disabled itself from continuing further with the confiscation proceedings.

15. What is said on the facts of this case is that the court's initial postponement of the confiscation proceedings on 16 October 2000 was not for a specified period. True, it was to be listed again on 4 January 2001, but that was merely for further mention and not for a substantive determination. It was, in short, clearly recognised on 16 October that there would later have to be a further postponement at least until late January 2001. For good measure, moreover, this inevitable further postponement would take the hearing beyond the six month time limit provided for by section 72A(3) and, this being so, the initial postponement (although itself, of course, to a date within the six months) should not have been made without the court expressing itself satisfied that there were exceptional circumstances to justify such a course. This, at least, is how I understand the appellants' argument to run.

16. Quite how the argument was put below is not easy to discern from the Court of Appeal's judgment. Paragraph 70 of that judgment records a challenge to the confiscation orders on the ground that they were "made in the course of [confiscation] proceedings which were invalid by reason of the circumstances of their initiation and

postponement." Having then set out the facts of the case the court continued [2003] 1 WLR 1655, 1676, paras 71-73:

> "71 … Much argument took place before us as to whether there was postponement to a specific date because the date which was being selected was a date for, in effect, further directions. However, in our judgment as long as the parties are clearly envisaging that the process was to take place within the timescale provided for by section 72A, that is sufficient.
>
> 72 On 4 January 2001 it was common ground that the parties were not in a position to deal with matters then and sensibly and appropriately the judge adjourned the matter to the last date on which he would be sitting in January, namely 23 January.
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> 73 Where, as here, there have been complex proceedings, it would be wholly inappropriate for any judge but the trial judge to deal with the confiscation proceedings unless that was unavoidable. In our judgment the judge was entitled to postpone the confiscation proceedings in the way that he did bearing in mind his availability."

17. The question certified by the Court of Appeal for your Lordships' decision is this:

> "Does a failure by a court to specify a period of postponement under section 72A of the Criminal Justice Act 1988 deprive that court of jurisdiction to make a confiscation order?"

This question, of course, presupposes both that the statute requires the court to specify a period of postponement and that Judge Haworth, in initially postponing the confiscation proceedings in the present case to 4 January 2001 for further mention, failed to do so. Neither supposition, I have to say, seems to me self-evident. In *R v Copeland* [2002] 2 Cr App R(S) 512, the court rejected the contention that the postponement order must specify the period of postponement. It was pointed out that the word used by the statute was "may", not "must": "there is no mention there of 'must': no mandatory provision. If it had been thought

desirable then the statute could have been worded in words such as "for such period as the court shall specify": p 516.

18. In *R v Davies* [2002] 1 WLR 1806 the trial judge had set a timetable for the service of statements but no further hearing date. The court there held that the failure to specify a period for the postponement was fatal to the confiscation order subsequently made.

19. In *R v Pisciotto* [2003] 1 Cr App R 68, in which the judge had made an open-ended postponement without specifying a period or a new date or any timetable, the court preferred the reasoning in *Davies* (which, at p 75, para 21 it found "highly persuasive") to that in *Copeland*. Giving the judgment of the court, Keene LJ said, at p 76, para 25:

> "We emphasise that no particular form of wording is needed so long as the judge at the time of passing sentence (1) makes clear that he has exercised his discretion to postpone and (2) makes clear the period for which the determination is postponed. If at that stage a judge sets out a timetable for service of prosecution and defence statements and also specifies a hearing date for the determination (or even a band of dates within which the determination hearing is to take place, provided that the band of dates falls within the six-month period beginning with the date of conviction) that doubtless would suffice: although we think that it would even then be greatly preferable for the judge first to have specified the precise period he has selected. What is not acceptable, however, is for the judge either to fail to specify any period at all (as happened here); or for the judge to give directions in such a way that it cannot clearly be discerned what period, if any, he has specified (as happened in *Davies*)."

In *R v David Ruddick* [2004] 1 Cr App R(S) 52, a decision following that of the Court of Appeal in the present case, the court addressed the question of specifying a period of postponement at p 59, para 30(4)(b) of its judgment:

> "Must the court specify a new date for the resumed hearing? The period of postponement ('for such period as

> [the court] may specify') does not mean that a fixed date must be specified. Parliament cannot have intended that result, since it is obvious that in many cases it is simply not possible or practical to determine a new date then and there. Again, it is the fact that the defendant knows that the sentencing process is not yet over and that there may be more to come that is the essence of the requirement; he is not so concerned to know when, precisely, the matter will come back. Thus, the inability or failure to specify the "return" date does not make the postponement a nullity or render null any order made thereafter."

20. In my opinion the legislation should be applied as follows. When postponing the determination of one or other of the critical questions for decision in confiscation proceedings, the judge is required to specify the particular period of the postponement: he cannot simply adjourn the proceedings generally. I do not accept, however, that he is bound to specify the very date when the substantive hearing is to begin, still less the date when it is to end (the date, in other words, when the actual order, assuming there is to be one, will be made). To my mind it is sufficient, when postponing the proceedings, to give directions for the service of statements and to specify a date when the proceedings are next to be listed, whether for disposal, or for such further directions as may be needed, or to fix a final hearing date. Section 72A(2) expressly envisages that "more than one postponement may be made". Of course the court should bear in mind Parliament's manifest concern that only in exceptional circumstances should the need for postponement(s) take the final date of any confiscation order beyond the six months limit and the timetabling throughout must properly reflect that concern. It does not follow, however, that exceptional circumstances must exist before the case can properly be postponed for further mention rather than for final hearing. It is only if the timetable initially set makes it likely that the six months limit will ultimately be exceeded that the court must on the occasion of the first postponement address itself to the question whether exceptional circumstances exist to justify the directions proposed.

21. Was Judge Haworth's order of 16 October 2000 made consistently with that approach? He certainly cannot be criticised for having failed to specify the period of the postponement: the proceedings were specifically postponed until 4 January 2001 and, indeed, with a view to a final hearing at the end of that month. Given, however, that the end of January took the total period of postponement beyond the six months limit, the judge should have addressed the question of exceptional circumstances not merely on 4 January but at the time of the

original hearing on 16 October. His non-availability during mid-January was, of course, known to him on 16 October. At that date, therefore, he should also have considered whether or not it was practical to have accelerated the timetabling so as to allow for a substantive hearing before, instead of after, his January leave.

22. It follows from all this that the question as certified implicitly overstates the extent of the judge's non-compliance with section 72A in the present case. But put that thought aside and assume that a judge were indeed to postpone confiscation proceedings in a particular case without specifying any return date at all. Would the court in those circumstances be precluded from restoring the proceedings to the list for hearing and thereafter making an appropriate order? Applying the approach now laid down by your Lordships in the linked case of *Soneji* the answer must surely be in the negative. Provided only that in postponing the proceedings the judge had acted in good faith and in the purported exercise of his section 72A power, I cannot think that Parliament would have intended such an error to disable the court from discharging its statutory duty to complete the confiscation proceedings against the offender.

23. I come finally to a quite different argument advanced by Mr Glen QC on this appeal. It was not certified for consideration by this House, is wholly without merit and can be disposed of very briefly indeed. It relates to the particular terms in which the notice of proposed confiscation proceedings was given by the prosecutor to the various accused on 28 September 2000:

> "I write to give you formal notice in accordance with section 72 of the Criminal Justice Act 1988, as amended by the Proceeds of Crime Act 1995, that it appears to the prosecution that were the court to consider that it ought to make a confiscation order against the defendants pursuant to Part IV of the Criminal Justice Act 1988, as amended by the Proceeds of Crime Act 1995, it would be able to do so."

24. The deficiencies of this notice are obvious. Although purportedly given in accordance with the 1988 Act as amended, it refers to section 72 of the Act, the relevant part of which (the requirement for a prosecutor's notice as a precondition of confiscation proceedings) had been repealed by the 1995 Act to which the notice also refers. The

notice should have referred instead to section 71(1) of the Act as amended (a new subsection substituted for the original one by the 1995 Act) which imposes upon the court a duty to pursue confiscation proceedings:

> "(a) if the prosecutor has given written notice to the court that he consider that it would be appropriate for the court to proceed under this section, or
>
> (b) if the court considers, even though it has not been given such notice, that it would be appropriate for it so to proceed … "

25. Although the notice clumsily appears to conflate the language of both those sub-paragraphs it is perfectly obvious that the prosecutor was intending to give notice in accordance with section 71(1)(a). Can it seriously be said that the ineptness of the drafting invalidated all that followed? In my judgment plainly not. In the first place it should be noted that, even without an effective notice from the prosecutor, the court would have been under a duty to proceed with confiscation proceedings had it considered them, as plainly it did, appropriate. Furthermore, now that the Court of Appeal's decision in *R v Palmer*, The Times, 5 November 2002, has been held to be wrongly decided at pp 1672-1673, paras 51-56 of the present case, subsequently affirmed by a five-member court in *R v Simpson* [2004] QB 118), the present argument becomes more hopeless still. The defective prosecutor's notice in *Palmer* was, after all, given under section 72(1) of the unamended Act which forbade the court making a confiscation order unless a prosecutor's notice was given. Moreover, the notice in *Palmer* was if anything more defective than that in the present case. Yet still it should not have been found to nullify all that followed. How much less so should the notice in the present case.

26. None of the remaining arguments which Mr Glen optimistically sought to urge upon your Lordships are to my mind worthy even of separate mention.

27. In the result I would answer no to the certified question and dismiss this appeal.