**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2023] HCJAC 47**
**HCA/2023/000442/XC**

Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Appeal against Sentence

by

LAWRENCE PHEE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: McConnachie KC; John Pryde & Co SSC**
**(for O'Curry, Criminal Defence Solicitors, Airdrie)**
**Respondent: Cameron (Sol Adv) KC, AD; Crown Agent**

21 November 2023

**Introduction**

[1] On 18 September 2020 the appellant pled guilty to three charges of contravening section 4(3)(b) of the Misuse of Drugs Act 1971. On 3 December 2020 he was sentenced to 8 years 6 months' imprisonment.

[2] Confiscation proceedings under the Proceeds of Crime Act 2002 followed. The appellant and the Crown entered into a Joint Minute agreeing (i) that the benefit of the general criminal conduct was £7,060,500; (ii) that the available amount was £75,557.41 of tainted gifts (the particular amounts of the gifts and the payees were specified); and (iii) that a confiscation order be made in the sum of £75,557.41. On 16 May 2022 a confiscation order for that sum was made, payment being required within 6 months. Thereafter the sheriff was persuaded that there were exceptional circumstances justifying a final extension of the time within which payment should be made to 15 May 2023 (exercising the power in section 116(4)). No payment was made. On 21 August 2023 the sheriff sentenced the appellant to 2 years' imprisonment in respect of the default in paying the confiscation order, that sentence to be consecutive to the sentence of imprisonment the appellant was serving. He proceeded on the basis that at that time the sum outstanding was £75,557.41 together with interest of £4,040.77 which had accrued since 16 May 2022. The appellant appealed in terms of section 106(1)(b) of the Criminal Procedure (Scotland) Act 1995 against the order imprisoning him.

**Competency of the appeal**

[3] In advance of the appeal hearing the Crown flagged up a possible competency issue. It queried whether the order for imprisonment was a "sentence". If it was not, then an appeal against sentence under section 106(1)(b) was not a competent mode of review. In terms of section 307(1) of the 1995 Act, unless the context otherwise requires:

> " 'sentence', whether of detention or imprisonment, means a sentence passed in respect of a crime or offence and does not include an order for committal in default of payment of any sum of money or for contempt of court;".

The order for imprisonment here appeared to be an order for committal in default of payment of a sum of money. In *Russell* v *MacPhail* 1990 JC 380 a full bench of the High Court had ruled that the period of imprisonment imposed on default of the payment of a fine was not a "sentence" within the meaning of section 462(1) of the Criminal Procedure (Scotland) Act 1975. The definition of "sentence" in that provision was identical to the definition in section 307(1) of the 1995 Act. The court opined (at p 388):

> "…every sentence for the immediate detention or imprisonment of the offender involves an order for committal to prison. But the effect of the definition of "sentence" in section 462(1) in its amended form is that every such order which is made in default of payment, whether or not one cares to call it a sentence according to the ordinary meaning of that word, is excluded from that definition."

The Advocate depute suggested that the appropriate means of redress might be by way of bill of suspension, as in *Russell* v *MacPhail* and *Divers* v *Friel* 1993 SCCR 394. It was recognised however, that those cases had involved summary proceedings and that a bill of suspension might not be competent where the decision appealed against was in solemn proceedings. If that was right then the appropriate means of redress would be by way of petition to the *nobile officium*. In any case, the court might wish to treat the note of appeal effectively as a bill of suspension or a petition to the *nobile officium* as the case may be, and proceed to deal with the merits of the appeal (*cf. Meade* v *Procurator Fiscal, Dunfermline* 2020 SCCR 371, at para [6]).

[4] At the outset of the hearing we indicated that we proposed to deal with the merits of the appeal. In those circumstances senior counsel for the appellant chose not to advance submissions on the competency issue.

[5] There is no doubt that the confiscation order was a "sentence" for the purposes of appeal or review (see section 92(11) of the Proceeds of Crime Act 2002). However, no such express provision has been made in relation to an order for imprisonment made on default

of payment of a confiscation order. We are conscious that the submissions which we had on competency were not fully developed. It is clear from the decision of the full bench in *Russell* v *MacPhail* that an order for committal for imprisonment made in default of payment of a fine is not a "sentence" within the meaning of section 106(1)(b) and section 307(1) of the 1995 Act (*cf*. section 219(6) (re-enacted in the same terms as its predecessor, section 407(2) of the Criminal Procedure (Scotland) Act 1975) which refers to the period of imprisonment inserted in default of payment of a fine as a "sentence": see also the position in relation to compensation orders, where section 250(3) (re-enacting section 62 of the Criminal Justice (Scotland) Act 1980) provides that for the purposes of any appeal or review a compensation order is a sentence). Although the confiscation order was made in the High Court, the order for imprisonment was made by the sheriff (exercising the powers conferred upon him by section 118 of the Proceeds of Crime Act 2002). The confiscation order had been remitted for enforcement by him and was enforceable as if it had been a fine imposed by him (s 118 of the 2002 Act read together with section 211(4) of the 1995 Act). Since no payment had been made the sheriff was empowered to impose a period of imprisonment for such failure (section 118 of the 2002 Act read together with section 219(1)(b) of the 1995 Act). It follows that the present challenge is to a decision of an inferior court. Accordingly, a bill of suspension would not fall foul of the rule that the High Court does not have power to review its own orders by suspension (*Reilly* v *H M Advocate* 1995 SCCR 45). So far so good. However, section 130 of the 1995 Act provides that it is incompetent to appeal to the High Court by bill of suspension against any conviction, sentence, judgment or order pronounced in proceedings on indictment in the sheriff court. The order made would appear to have been made in such proceedings: but the court did not have the benefit of submissions on that issue. It seems therefore that the appropriate means of redress ought to have been a

petition to the *nobile officium*. The court is content to treat the note of appeal as effectively a petition to the *nobile officium* and to excuse the want of form.

[6] While orders for committal in default of payment are specifically excluded from the definition of "sentence" in section 307(1), as a matter of ordinary language they are sentences. For that reason, we find it convenient to refer hereafter to the order which the sheriff made as a sentence.

**Part 3 of the Proceeds of Crime Act 2002**

[7] Part 3 of the Proceeds of Crime Act 2002 makes provision for confiscation in Scotland. The court is empowered to make a confiscation order where the requirements of section 92 are met. There is no dispute that they were in this case. The appellant had a criminal lifestyle and he had benefited from his general criminal conduct (section 92(5)(a) and (b)). The sheriff was obliged to decide the recoverable amount and to make a confiscation order requiring the appellant to pay that amount "only if, or to the extent that, it would not be disproportionate to require the accused to pay the recoverable amount" (see the proviso to section 92(6)). In the present case the recoverable amount was the available amount (as to which see section 93(2)). For the purposes of deciding the recoverable amount, the available amount is the aggregate of the total of the values (at the time the confiscation order is made) of all the free property then held by the accused minus the total amount payable in pursuance of obligations which then have priority, and the total of the values (at that time) of all tainted gifts (section 95). Tainted gifts and their recipients are defined in section 144. Section 145 provides that the basic rule is that the value of property is its market value. Broadly speaking, the effect of section 147 is that the value of a tainted

gift is the greater of the value at the time of the gift and the value at the (later) time when it is found.

[8] Section 116 provides that the amount ordered to be paid under a confiscation order must be paid on the making of the order unless the court allows a specified period to pay, which must not exceed 6 months from the date of the order. If payment within a specified period has been ordered the offender may also apply to the sheriff within that time for the period to be extended if there are exceptional circumstances, but the extended period must not exceed 12 months from the date of the order.

[9] Section 117 states:

> **"117 Interest on unpaid sums**
>
> (1) If the amount required to be paid by a person under a confiscation order is not paid when it is required to be paid (whether when the order is made or within a period specified under section 116), he must pay interest on the amount for the period for which it remains unpaid.
>
> (2) The rate of interest is the rate payable under a decree of the Court of Session.
>
> …
>
> (4) In applying this part the amount of the interest must be treated as part of the amount to be paid under the confiscation order."

[10] Section 118 provides that certain provisions about fine enforcement in the Criminal Procedure (Scotland) Act 1995 apply, with some qualifications, in relation to a confiscation order as if the amount ordered to be paid were a fine imposed on the accused by the court making the confiscation order. Section 118(2A) states:

> "(2A) In its application in relation to confiscation orders, subsection (2) of section 219 of the Procedure Act is to be read as if for the table in that subsection there were substituted the following table:

| Amount to be Paid under Compensation Order | Maximum period of imprisonment |
|---|---|
| £10,000 or less | 6 months |
| More than £10,000 but no more than £500,000 | 5 years |
| More than £500,000 but no more than £1 million | 7 years |
| More than £1 million | 14 years |

"

The Table in section 219(2) of the 1995 Act which is applicable in relation to imprisonment following non-payment of a fine is:

"

| Amount of Fine or Caution | Maximum period of imprisonment |
|---|---|
| Not exceeding £200 | 7 days |
| Exceeding £200 but not exceeding £500 | 14 days |
| Exceeding £500 but not exceeding £1,000 | 28 days |
| Exceeding £1,000 but not exceeding £2,500 | 45 days |
| Exceeding £2,500 but not exceeding £5,000 | 3 months |
| Exceeding £5,000 but not exceeding £10,000 | 6 months |
| Exceeding £10,000 but not exceeding £20,000 | 12 months |
| Exceeding £20,000 but not exceeding £50,000 | 18 months |
| Exceeding £50,000 but not exceeding £100,000 | 2 years |
| Exceeding £100,000 but not exceeding £250,000 | 3 years |
| Exceeding £250,000 but not exceeding £1 million | 5 years |
| Exceeding £1 million | 10 years |

"

**The appeal**

[11] It was accepted that the sheriff required to impose a sentence of imprisonment, but it was maintained that 2 years was excessive and was a miscarriage of justice. The purpose of the sentence was to incentivize payment not to punish the offender further (*R* v *Johnson (Beverley)* [2016] EWCA Crim 10, [2016] 4 WLR 57, [2016] 2 Cr App R (S) 38). The sheriff ought to have modified the period of imprisonment because there was no prospect of the tainted gifts being recovered. That was clear from correspondence between the appellant

and his wife and some of the recipients of tainted gifts. The sheriff had also erred in his calculation of the interest which had been due. He had calculated interest from the date of the order, but interest did not begin to run until 12 months later. More importantly, 2 years' imprisonment was excessive because the sum ordered to be repaid was towards the lower end of the band "More than £10,000 but no more than £500,000". The sentence ought to have reflected that. It did not - it was nearer the middle of the band. That was disproportionate.

**Decision and reasons**

[12] In *R* v *Johnson (Beverley)* the court observed at paragraphs 25 and 26:

> "25 … The tainted gift regime is designed to deprive offenders of the proceeds of crime which have been apparently given away so that they are apparently beyond the control of the offender and owned by an apparently innocent third party. Scepticism about arrangements of this kind underlies the statutory approach. Offenders do not commonly risk the commission of offences in order to give away the proceeds. It is far more likely that assets have been disposed of in order to shield them. The prison sentence in default exerts a pressure on the offender to recover the value of the "gift" from its recipient. Parliament no doubt expected that there would be cases where that was not possible, either because the value of the gift had fallen before the date when the order was made or because the recipient refuses to co-operate and the offender has no right of action to recover the value of the gift. That will involve hardship if there is no other way of paying the confiscation order because the default term will be imposed.
>
> 26 *R* v *Kim Smith* [2014] 1 WLR 898 supports the proposition that this is the purpose of the tainted gift regime. The statutory policy is to apply pressure to those who have dissipated (or more usually laundered) their assets during a period when they were benefiting from crime. The aim is coerce them into making good the losses they have caused by all means at their disposal. If they were always able to defeat confiscation proceedings by relying of [*sic*] gifts of assets which cannot be recovered this would undermine the efficacy of the scheme. Such transactions may be difficult to investigate. The recovery of gifts by legal proceedings against the recipient is a matter which is unlikely to be capable of easy determination in confiscation proceedings and may raise complex issues of civil law. Legal proceedings against the recipient may only rarely actually be required if the offender faces a term of imprisonment unless the gift is returned by the recipient. The recipient will return the value of the "gift". Protestations about the difficulty of proceedings which will never happen should carry little weight. This is why the tainted gifts regime is as it is."

The court went on (at para 31) to discuss the requirement in section 6(5) that the court should make a confiscation order only if, or to the extent that, it would not be disproportionate to require the offender to pay the recoverable amount (the equivalent provision in England and Wales to section 92(6)). It opined that where an order was sought to recover the value of a tainted gift which appeared to be worthless at that date the court should carefully consider the robustness of the evidence of the value of the tainted gift at the time of the gift, the proportionality of making a confiscation order in that sum, and the appropriate term of imprisonment to be imposed in default. In relation to the last mentioned matter it observed:

> "The stipulated scale provides for maximum sentences relating to various amounts payable under the order. Although there is an obligation to impose a term of imprisonment in default … the court is required to consider all of the circumstances of the case when doing so in accordance with *R* v. *Castillo [2011] EWCA Crim 3173.* There is no minimum term which must be imposed. The purpose of the term is enforcement not further punishment, and where the court is affirmatively satisfied that enforcement is impossible that may be a reason to make a substantial reduction in the term imposed in default. *This will inevitably be a wholly exceptional course because the court will usually have limited confidence that an asset which has been apparently given away cannot be recovered by the offender or that the offender cannot satisfy the order by other means.*" (emphasis added).

At paragraph 35 the court discussed the categories of disproportionality which had been recognised so far by the courts (in *R* v *Waya* [2013] 1 AC 294, *R* v *Harvey (Jack)* [2016] 2 WLR 37, and *R* v *Jawad* [2013] 1 WLR 3861), noting that they had all been cases where after the date of the gifts the conduct of the offender had extinguished or reduced the loss. By contrast, in *R* v *Johnson* none of the factors relied upon had effected any reduction in the amount which the defendant had obtained from the crime. The court concluded:

> "The statutory aim is the recovery *of that amount* and the means used, a confiscation order calculated in accordance with the provisions of the 2002 Act, are proportionate to it". (emphasis added).

[13] In *R* v *Box (Linda Mary)* [2018] 4 WLR 134 the defendant, a solicitor, had been convicted of theft and fraud of very large sums and had been sentenced to 7 years' imprisonment. A confiscation order in the sum of £1,929,295.88 was made. The judge found that there were tainted gifts which had a value of nearly £1 million when they were made. However, she held it would be disproportionate to include the whole value of those gifts in the recoverable amount because she was persuaded that in relation to a substantial portion (£470,000) the defendant had no way to legally compel repayment by the recipients. The prosecutor appealed. The Court of Appeal allowed the appeal, holding that there had been no proper basis for the judge to conclude that including all of the tainted gifts in the confiscation order would be disproportionate. At paragraph 21 of the judgment the court referred to *R* v *Johnson* and noted:

> "… A court making a confiscation order will treat protestations that the case before it is such a case with scepticism and will require the clearest, most complete and unassailable evidence before avoiding the usual statutory order on this ground. This is because, necessarily, the court is dealing with criminals whose mere assertion is unlikely to carry much weight. The ease with which criminal property may be concealed by being passed to others was emphasised in the judgment of the court in *Johnson* and requires such an approach to the facts."

The court continued:

> "22 In this case there was no evidence from the respondent or her family. Accordingly, it was not possible for the judge to come to the conclusion that the order, unless adjusted, would not result in the recovery of the proceeds of crime. Therefore, there was no proper basis on which that order could be held to be disproportionate. All cases are different and this is a fact specific area where generalisations are to be avoided, but it is hard to conceive of a case where it would be proper to reduce the amount in a confiscation order in the tainted gifts regime without hearing oral evidence from the respondent and called on her behalf, and without full disclosure of documents concerning the financial circumstances of all relevant persons. On this ground alone we would respectfully disagree with the judge and allow this appeal. The factual basis on which she proceeded was not properly made out on the evidence."

The court also criticised the judge for seeking to identify assets which the recipients had which were related to tainted gifts. It explained:

> "24 For all the reasons explained in *Johnson*, the tainted gifts regime operates by the imposition of an order on the convicted person as an incentive for her to recover the proceeds of her crime from persons to whom she has passed them by whatever means are available to her. What those persons have done with them, or whether they received them knowing of their criminal origin, are likely to be largely irrelevant factors. What matters is whether the court is satisfied that the resulting order is disproportionate in the sense which we have explained above. If not, then the order must be made in the full value of the tainted gifts."

[14] This court respectfully agrees with these *dicta*. When a court considers the section 92(6) proportionality issue at the time of making a confiscation order it should have in view the statutory aim of recovering the amount which the offender has obtained from crime. In general, the making of an order in the full amount is likely to be proportionate to that aim unless there are factors which have effected a reduction in the amount which the offender has obtained from the crime.

[15] In this case the parties agreed the value of each of the tainted gifts and the total value of those gifts. The values were the values at the times of the gifts (there was no suggestion that there was property found with greater values). The total value of the tainted gifts was agreed to be the available amount. It was agreed that a confiscation order should be made in that sum. Therefore, it was common ground that at the time the order was made it would not be disproportionate to require the accused to pay the recoverable amount of £75,557.41 (section 92(6)). Otherwise it would not have been agreed that the confiscation order in that sum be made. That is the context of the present appeal.

[16] The fact that a confiscation order representing tainted gifts was proportionate (in the sense in which that term is used in the proviso to section 92(6)) does not necessarily preclude the court concluding at a later date, on the basis of satisfactory evidence, that there is no

prospect of some, or even all, of the recoverable amount being recovered. Borrowing the language of *R* v *Johnson* (at para 31), if the court is affirmatively satisfied that enforcement is impossible that may be a reason to make a substantial reduction in the term of imprisonment imposed following non-payment. However, as the court said in the same passage, it is likely to be a wholly exceptional course because usually it will have limited confidence that an asset which had been given away cannot be recovered by the offender or that the order cannot be satisfied by other means.

[17] The question for this court is whether the sheriff was entitled to impose an order for 2 years' imprisonment, or whether in making that order he erred in law in any material respect.

[18] We deal first with the interest issue. We were not referred to any authority dealing with the interpretation of section 117(1) or of the corresponding provisions for England and Wales (section 12(1)) and Northern Ireland (section 162(1)). Section 117(1) provides that if the amount required to be paid "is not paid when it is required to be paid (whether when the order is made or within a period specified under section 116), he must pay interest on the amount for the period for which it remains unpaid". On an ordinary and natural reading of the provision an amount only "remains unpaid" if the required date for payment is reached and payment is not made. Here the amount did not require to be paid until 12 months after the date of the order - the end of the extended period. The period for which it remained unpaid began on that date. It follows that we agree with the appellant that the sheriff erred in deciding that interest ran from the date of the confiscation order rather than from the end of the extended period. We note that the sheriff in *HM Advocate* v *Cheung* 2013 SLT (Sh Ct) 131, at paragraph [11], opined, correctly in our view, that in that case interest

ought to have begun to run from the end of the specified period (which in that case had been 6 months after the order was made).

[19] If the sheriff had construed section 117 correctly the interest due at the time he made the order of imprisonment would have been about £3,000 less. In his report the sheriff observes that the £4,040.77 interest due made no difference to his decision on the appropriate custodial period. We accept that. It follows that his error in relation to interest was not a material error.

[20] We turn next to the submission that there was no possibility of the appellant satisfying the confiscation order by recovering the tainted gifts or by any other means. We were told that the correspondence with recipients of tainted gifts was lodged in the sheriff court, but the sheriff's report does not suggest that the submissions to him on behalf of the appellant placed a great deal of reliance upon it: the submission on this aspect of the case appears to have been brief, and merely to the effect that the appellant had been unable to recover the value of the tainted gifts in order to satisfy the order (para 3).The correspondence comprises brief letters written by the appellant or his wife to 8 of the 19 recipients of tainted gifts, and brief letters in response from 6 of the 8. The total of the tainted gifts received by those 8 recipients was £54,204.41. At least 4 of the 8 were family members or the spouse of a family member. One of them, who had received a tainted gift of £3,900, offered to pay £2,500. Another, who had received a tainted gift of £4,153, denied that any sum was owed to the appellant but offered to pay £500. The other two family members indicated that they had no funds to make any payment. One of the other persons written to, who received a tainted gift of £400, offered to pay £200. Another, who had received a tainted gift of £11,561, stated that he would not repay anything because the sum received

had been wages which he had earned. No reply was received from the final two recipients who were written to, who had received tainted gifts of £10,205 and £3,945.

[21] The correspondence was very far from being cogent evidence of the impossibility of payments being made towards satisfaction of the confiscation order. Only 8 of 19 recipients had been written to. Three of the 8 had offered some payment, and no explanation was provided as to why payments of the offered amounts had not, or could not, be made. Such replies as were received were brief. There was no oral evidence from the appellant or anyone else, and no disclosure of documents vouching the full financial circumstances of the recipients. Given the limitations of the evidence relied upon it would have been very surprising indeed had the sheriff not approached it with scepticism and given it little, if any, weight. It is not uncommon for protestations about the impossibility of payment to be followed by payment (see *eg R* v *Johnson*, paras 21 and 36).

[22] That brings us to the submission that 2 years' imprisonment was excessive because the sum ordered to be repaid was towards the lower end of the band "More than £10,000 but no more than £500,000". The sheriff's report suggests that this was the principal argument before him. He explained (paragraphs 8 and 9) that he chose 2 years as that recognised that the amount owed was firmly in the lower half of the relevant band, but was also a significant continuing incentive to satisfy the confiscation order. He took account of the fact that the substituted table set alternatives very much in excess of the table for fines under section 219, which he considered reflected the will of Parliament that the alternatives in a confiscation proceeding may be significantly greater than those which would be attracted for non-payment of a fine. He pointed out that 2 years was the maximum for the fines band "Exceeding £50,000 but not exceeding £100,000". He noted the very wide range of the

"More than £10,000 but no more than £500,000" band, and observed that had Parliament wished a pro-rata approach a larger number of narrower bands might have been expected.

[23] We are satisfied that this ground is ill-founded. The sheriff was not obliged to follow the sort of mathematical approach which the appellant suggests was appropriate. He could approach matters more broadly. It was open to him to have regard to what the maximum sentence would have been had the confiscation order been a fine. We are not persuaded that he fell into any error. He was entitled to reach the view that 2 years was appropriate. The sentence was not disproportionate or excessive.

**Disposal**

[24] For the foregoing reasons the appeal is refused.