



29 January 2014

## PRESS SUMMARY

**R v Mackle (Appellant) (Northern Ireland)**  
**R v Mackle No 2 (Appellant) (Northern Ireland)**  
**R v Mackle No 3 (Appellant) (Northern Ireland)**  
**R v McLaughlin (Appellant) (Northern Ireland)**

*On appeal from [2011] NICA 31*

**JUSTICES:** Lord Neuberger (President); Lord Mance, Lord Kerr, Lord Hughes, Lord Toulson

### BACKGROUND TO THE APPEALS

This appeal concerns the validity of confiscation orders made with the appellants' consent.

On 23 November 2007, three brothers, Patrick Mackle, Plunkett Jude Mackle (commonly known as 'Jude') and Benedict Mackle, all pleaded guilty to having been knowingly concerned in the fraudulent evasion of duty on cigarettes, contrary to Section 170(2)(a) of the Customs & Excise Management Act 1979. In a separate trial, on 18 November 2008, Henry McLaughlin pleaded guilty to a similar offence. He was also convicted of a second offence, on his plea of guilty, but that is not relevant to this appeal.

On 13 December 2007 Deeny J sentenced Patrick Mackle to three years' imprisonment, and Jude Mackle and Benedict Mackle to two and a half years' imprisonment. All three sentences were suspended for five years. At a later hearing, on 29 October 2008, confiscation orders were made against Patrick Mackle for £518,387.00, and against Jude and Benedict Mackle for £259,193.00 each. The aggregate sum produced by these three amounts was equal to the amount of duty and Value Added Tax which had been evaded. The confiscation orders were made with the consent of each of the Mackle brothers.

Henry McLaughlin was sentenced by Weatherup J on 19 November 2008 to one year's imprisonment suspended for two years. The judge also imposed a serious crime prevention order for a period of five years. A confiscation order for £100,000 was made against Mr McLaughlin on the same date. This sum, taken together with other confiscation orders made against his co-defendants, represented the total amount of duty and VAT said to have been evaded. The confiscation order against Mr McLaughlin was also made with his consent.

Messrs Mackle and McLaughlin appealed against the consent orders on the grounds that they were made on the wrong legal basis. Confiscation orders must be made to recover the amount by which a defendant has benefited financially from the offence. The appellants argued that they could not have benefited financially from the offences if they were not liable to pay the duties they were concerned in avoiding. While they might have been liable under the previous duty regime, the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992, they did not fall within any of the categories of persons liable under the present regime, the Tobacco Products Regulations 2001.

The Court of Appeal dismissed their appeals but certified that the following points of law of general public importance arose from its judgment:

1. Is a defendant who pleaded guilty to being knowingly concerned in the fraudulent evasion of duty and who consents, with the benefit of legal advice, to the making of a confiscation order in an agreed amount in circumstances which make clear that he does not require the Crown to prove that he obtained property or a pecuniary advantage in connection with the charged criminal conduct bound by the terms of the confiscation order?
2. Does a defendant who knowingly comes into physical possession of dutiable goods in respect of which he knows the duty has been evaded and plays an active role in the handling of those goods so as to assist in

the commercial realisation of the goods benefit from his criminal activity by obtaining those goods for the purposes of section 158 of the Proceeds of Crime Act 2002?

## JUDGMENT

The Supreme Court unanimously allows all four appeals. Lord Kerr gives the judgment of the Court, with which the other Justices agree.

## REASONS FOR THE JUDGMENT

As to the first question, the prosecution had firmly espoused the case that the benefit obtained by the appellants took the form of a pecuniary advantage derived from evasion of the duty on the cigarettes. This basis of benefit was, unsurprisingly, accepted uncritically by the sentencing judges. But since the appellants' liability to pay duty could not be established this was not a correct legal basis on which to find that the appellants had obtained a benefit [47].

In holding that they might nonetheless be bound by the orders, since they were made with the appellants' consent, it appears that the Court of Appeal had not been referred to decisions of the House of Lords and the Court of Appeal of England and Wales which established that an appeal ought to be available to defendants who had made a plea on a mistaken legal basis [48–49].

It is to be remembered that a court must itself decide whether the convicted person has benefited from his particular criminal conduct. The power to make a confiscation order arises only where the court has made that determination. A defendant's consent cannot confer jurisdiction to make a confiscation order. This is particularly so where the facts on which such a consent is based cannot as a matter of law support the conclusion that the defendant has benefited. On the other hand, if it is clear from the terms on which a defendant consents to a confiscation order, that he has accepted facts which would justify the making of an order, a judge, provided he is satisfied that there has been an unambiguous acceptance of those facts from which the defendant should not be permitted to resile, will be entitled to rely on the consent. This is not because the defendant has consented to the order. It is because his acceptance of facts itself constitutes evidence on which the judge is entitled to rely [50].

It would be manifestly unfair to require the appellants in this case to be bound by their consent to the confiscation orders when the only possible explanation for the consent was that it was given under a mistake of law. That was the explanation they had put to the Court of Appeal, and the prosecution had not challenged it [53]. And the confiscated amounts corresponded exactly to the duty and VAT evaded.

Lord Kerr would therefore reframe the first certified question to reflect the circumstances of this case: 'Is a defendant precluded from appealing against a confiscation order made by consent on the ground that the consent was based on a mistake of law, as a result of wrong legal advice?' The answer is, 'No.' [54]

As to the second question, the Court of Appeal dismissed the appeals because it considered the appellants could, have been found to have benefited from their admitted criminal conduct. But it advanced this view only on the basis of findings that *might* have been made by the trial judge, but were not in fact. The trial judge would have had to have been satisfied that the appellants had in fact benefited from the offences in such a way, having given them the opportunity of responding to that suggestion [55–56].

In any event it was clear from previous House of Lords authority that merely handling goods or being involved in a joint criminal enterprise does not in itself confer a benefit. Lord Kerr would therefore answer the second question, 'Not necessarily. Playing an active part in the handling of goods so as to assist in their commercial realization does not alone establish that a person has benefited from his criminal activity. In order to obtain the goods for the purposes of section 156 of POCA 2002 or article 8 of the Proceeds of Crime (Northern Ireland) Order 1996, it must be established by the evidence or reasonable inferences drawn therefrom that such a person has actually obtained a benefit.' [57–68].

The Court therefore quashes the confiscation orders and remits the cases to the trial courts to proceed afresh in light of this judgment [69].

## NOTE

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at <http://www.supremecourt.uk/decided-cases/index.shtml>.**