14 December 2016

PRESS SUMMARY

R v Guraj (Respondent) [2016] UKSC 65
On appeal from [2015] EWCA Crim 305

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Reed, Lord Hughes, Sir Declan Morgan

BACKGROUND TO THE APPEAL

The Respondent, Lodvik Guraj, pleaded guilty to offences involving the supply of heroin and money laundering and was sentenced in July 2012 to a custodial sentence and forfeiture and deprivation orders. The judge did not make a confiscation order, but postponed the determination of that issue to take place after sentence, as he was entitled to do under s.14 Proceeds of Crime Act ("POCA"). The judge gave directions setting a procedural timetable for a hearing to be listed in November 2015, for the Respondent to provide certain information, and for the Crown first and then the Respondent to serve statements of case. The timetable slipped badly. The Respondent provided the required information late, the Crown did not serve its statement of case until over a year later, and two hearings were aborted due to the Crown's failure to be ready.

There was eventually a properly attended hearing in May 2014, at which the Respondent's counsel argued that the procedural requirements under POCA had been breached with the effect that the court no longer had jurisdiction to make a confiscation order. The Respondent argued there had been two procedural breaches. The first was that the judge had made forfeiture and deprivation orders before the confiscation proceedings, in breach of s.15(2) POCA which prohibits the court from dealing with the financial or property aspects of sentence (including deprivation and forfeiture orders) until after any confiscation proceedings have been concluded. The second breach was the Crown's failure to make an application for an extension of the postponement of the confiscation hearing, before the postponement expired by November 2012 (as required by s.14(8)).

The judge accepted that there had been serious procedural error, but found that no unfairness had occurred as a result. It could not be Parliament's intention that any procedural error removed the court's jurisdiction to make an order. A confiscation order was made in a sum which had by then been agreed (subject to the jurisdiction point). The Court of Appeal took the opposite view on the jurisdiction point and quashed the confiscation order. The Crown now appeals and seeks the quashed order to be restored.

JUDGMENT

The Supreme Court unanimously allows the Crown's appeal. Lord Hughes gives judgment, with which the rest of the Court agrees.

REASONS FOR THE JUDGMENT

The judge's approach was correct. No unfairness had arisen in consequence of the irregularities which occurred, and there was no obstacle to the making of the confiscation order.

S.14 allows confiscation proceedings to be postponed until after sentence, for up to two years from conviction. Postponement may be applied for by the parties or may be granted by the court of its own motion. If there is a defect in procedure relating to postponement, as there was here, s.14(11) states that this alone is not sufficient to require a confiscation order made in the defective proceedings to be quashed. However, s.14(12) dis-applies s.14(11) where, before the making of a confiscation order, an order has been made which s.15(2) says should not precede a confiscation order. Therefore, where forfeiture and deprivation orders have been made prior to confiscation proceedings, the rule under s.14(11) – that the court is not prevented from making confiscation orders solely because there was a defect in the procedure relating to postponement – does not apply **[9-14]**. The issue in this case was whether the dis-application of the s.14(11) bar had the consequence that a confiscation order made with a defect in postponement procedure must always be quashed **[18]**.

Preceding the insertion of ss.14(11) and (12), there was some uncertainty as to the legal consequences of procedural errors. This was clarified in *R v Soneji* [2005] UKHL 49 and *R v Knights* [2005] UKHL 50, where the House of Lords held that the dominant purpose of POCA was to make confiscation the duty of the court. It would defeat the purpose of the confiscation legislation if orders were treated as bad simply because there had been a failure to comply with procedural provisions laid down for postponement. The correct approach was to question whether the duty to make a confiscation order was removed by procedural errors which caused injustice or unfairness to the defendant. S.14(11) was subsequently introduced with the effect of clarifying on a statutory footing that a procedural error in postponement does not on its own invalidate the confiscation procedure **[15-17]**.

The trial judge's interpretation of the operation of ss.14(11) and (12) was correct. The fact that the bar to quashing a confiscation order in certain circumstances is dis-applied does not give rise to a requirement to quash in those circumstances. Where s.14(11) applies, no procedural defect relating to postponement can on its own justify quashing. Where s.14(11) does not apply, and there has been a procedural defect relating to postponement, an order may be quashed, or it may not be. Applying the principles in *Soneji* and *Knights*, the position is that a procedural defect (not limited to postponement) will have the effect of making it wrong to make a confiscation order if unfairness to the defendant would ensue. If the order would give rise to no unfairness, or to none that cannot be cured, there can be no obstacle to making the order **[19-30]**.

The Court of Appeal's interpretation of s.14(12) as prescribing that an order will be invalidated for a procedural error was wrong. This was to approach s.14(11) as if it restored the position to the pre-*Soneji* case law which regarded procedural errors as going to the court's jurisdiction to make a confiscation order. The trial judge was correct to continue to follow the *Soneji* and *Knights* approach, whose analysis still holds good **[22]**.

That unfairness has resulted from a procedural error may be inferred in the event of a very long period of inactivity. If the statutory permitted two-year postponement period is exceeded without there being exceptional circumstances, it is likely that unfairness will ensue. The present case is one where it has been accepted that the Respondent cannot point to unfairness, injury or injustice resulting from the making of the order after the prescribed timetable. The order was eventually made within the permitted period of two years. As there is no unfairness in this case, the question of curable unfairness does not arise. If it were to arise, a potential unfairness might be cured for example by adjusting a confiscation order, or by quashing a forfeiture order. Each case must depend on its own facts **[31-4].**

References in square brackets are to paragraphs in the judgment