Neutral Citation No. [2015] NICty 3

Ref:	**2015NICty3**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**08/09/2015**

IN THE COUNTY COURT FOR THE DIVISION OF BELFAST

Cain McCarthy

(Appellant)

v

Chief Constable of PSNI

(Respondent)

Her Honour Judge P Smyth

Introduction

1. This is an appeal from the decision of District Judge McNally refusing the appellant's application for the return of his property, namely a quantity of tablets identified as so-called legal highs, seized by the PSNI on 17 January 2014.

2. The issues for determination are:

   (1) whether the court has a discretion to refuse an order for the return of the appellant's property

   and if so,

   (2) Whether that discretion should be exercised in the respondent's favour.

The facts

3. The facts are not in dispute. On 17 January 2014, the appellant was stopped and searched by Constable McCallan pursuant to section 23 of the Misuse of Drugs Act 1971. The appellant was found to be in possession of 63 tablets and was arrested on suspicion of possession of drugs. Further analysis of the tablets revealed that they included so-called legal highs, which are not prohibited under the Misuse of Drugs Act and the PPS directed no prosecution.

4. At the relevant time, the appellant was regarded by the PSNI Reducing Offending Unit as a "priority offender". Part of the role of police officers in this unit is to identify triggers for offending behaviour, with a view to achieving the rehabilitation of offenders.

5. A history of the appellant's contact with the PSNI between October 2010 and December 2014 was provided to the court in a document entitled "Appendix A". The appellant takes no issue with its content. In summary, the appendix sets out the details of numerous occasions when the appellant was apprehended for offending behaviour whilst under the influence of substances. The substances included legal highs and prescription drugs as well as aerosols and alcohol.

6. Whilst under the influence of these substances, it is accepted that the appellant has acted aggressively and in a manner likely to cause harm to him and others. An incident of particular concern occurred on 3rd February 2013 when the appellant had consumed legal highs and other substances and his behaviour resulted in an armed response team being tasked to his mother's home. The appellant smashed items of furniture and took a knife to his bedroom, threatening to cut his wrists. On 9th of February 2013 and 8th March 2013, whilst on bail for offences of criminal damage, the appellant was found to be highly intoxicated through legal highs in breach of his bail conditions.

7. Following the decision of the PPS not to prosecute the appellant for possession of the legal highs seized on 17th January 2014, the PSNI made an application to North Antrim Magistrates Court seeking the court's direction regarding the retention of the substances. In a letter to the appellant's solicitor dated 15 March 2015, the basis of the application was explained as follows:

> "It is accepted that police no longer have power to retain these items. However, police have legitimate public policy concerns regarding the health risks associated with the ingestion of legal highs. There were also concerns that your client is nominated as a priority offender in the Coleraine area, with the majority of his offending fuelled by alcohol and

drugs. Therefore, we are seeking the direction of the court as to the appropriate order…"

8. On 20 March 2015, the learned District Judge declined to order the return of the substances to the appellant and instead allowed him a period of six months in which to make his own application pursuant to section 31 the Police (Northern Ireland) Act 1998 ("the 1998 Act"). The appellant brought an application and on 30 March 2013 it was refused by the District Judge.

Grounds of appeal.

9. The appellant relies on 4 grounds of appeal:

(1) He submits that the refusal of the District Judge to return the substances to the appellant is contrary to *section 31 of the 1998 Act* which provides that:

> "where any property has come into the possession of the police in connection with their investigation of a suspected offence, a court of summary jurisdiction, on an application under this subsection, may –
>
> (a) make an order for the delivery of the property to the person appearing to the court to be the owner of the property; or
>
> (b) where the owner cannot be ascertained, make such order with respect to the property as the court thinks fit."

(2) Secondly, the appellant submits that the decision is in breach of Article 7 ECHR which provides that there should be *no punishment without law*. The appellant submits that since possession of legal highs is not contrary to the criminal law, there is no legal basis for refusing to return them.

(3) Thirdly, the appellant submits that the decision is contrary to the principle of the *separation of powers*, and cites Professor Gordon Anthony at paragraph 1.03 *Judicial Review in Northern Ireland* (second edition, 2014) where he observed that the principle:

> "*… Requires that courts should neither legislate in place of the legislature nor interfere with the lawful choices of executive and administrative decision-makers (the legislature and executive likewise should not interfere with the judicial role)*"

(4) Fourthly, the appellant submits that the decision is contrary to Article 1 of the first protocol ECHR which guarantees the right to *peaceful enjoyment of possessions.* The appellant submits that the state may not interfere with this right by depriving the appellant of property, except in accordance with law.

The discretion conferred by section 31 (1) of the 1998 Act.

10. The appellant submits that section 31 (1) confers a discretion on the court to refuse an order returning property only in circumstances where the owner cannot be ascertained. It is not in dispute that the appellant is the owner of the substances. He refers to paragraph D1.181 of Blackstone's Criminal Practice (2015), which states:

> "*the police cannot retain items seized because they may be used to cause physical injury, or to damage property, or to interfere with evidence, or to assist in escape from lawful custody, when the person from whom they were seized is no longer in police detention or the custody of the court or has been released on bail…*

11. At D1.181, Blackstone concludes, having reviewed the applicable provisions of the police and Criminal Evidence Act 1984 that "*the only permitted use of seized material is for the purpose of investigating and prosecuting crime after which it must be returned to its true owner*".

12. However, in *Chief Constable of Merseyside Police v Owens* [2012] EWHC 1515 (admin), which concerned police fears that the return of a seized CCTV video would lead to an assault on an identified person, a Divisional Court in England and Wales considered that "*the court could refuse to grant relief and refuse to order the return, if on the facts, It could be established that the return of the property would directly or indirectly encourage or assist a person in his criminal act*". No sufficient basis for such a conclusion was established on the facts of that case. The court said:

> "*It cannot be sufficient that the police reasonably suspect that the respondent might use the tape to commit a criminal act, for that would give the Executive power to retain property without legislature or authority. It can only be, if the court itself is satisfied that the use of this process would in fact indirectly assist in or encourage a crime, that the court could refuse to allow its processes to be used to that end.*"

13. In *Jackson v Chief Constable of the West Midlands Police,* delivered 22nd of October 1993 (unreported), Laws J considered whether the court was entitled

to refuse to return property to its owner on public policy grounds. The facts were that the appellant was convicted of possessing cannabis resin with intent to supply. Upon his arrest, police had found the sum of £1221 along with the cannabis resin. The trial judge ordered a financial investigation with a view to a confiscation order being made but failed to follow the correct procedure. The mistake could not be rectified and the judge indicated to police that they should make an application under section 1 of the Police (Property) Act 1897 (equivalent to S31) for an order permitting the police to return the money to the defendant. The police failed to do so and the defendant brought an application on his own behalf. The magistrate declined to make an order on the grounds that he was satisfied that the money was the proceeds of drug sales, and was owned by the defendant. In his view, it would be "*repugnant and contrary to public policy*" to order delivery of that sum to the defendant and accordingly he made an order that the money should be paid to the West Midlands police fund.

14. Laws J concluded that the magistrate was not bound to return the money to its owner in circumstances where pressing public policy considerations suggested that he should not do so. Since a public policy defence would be available in the civil courts for an identical claim, he considered that the court would have to be satisfied that there was a distinction of principle between the considerations available in the civil courts and those available to the magistrate. He found no such distinction to exist.

15. Laws J relied on an obiter dictum in a decision of the Divisional Court in *Chief Constable of the West Midlands v White* delivered 13th of March 1992 (unreported), in which the Court approved the trial judge's conclusion that "*whilst it cannot be doubted that the magistrate would be legally entitled to decline to make an order on to the Police (Property) Act where it is clear that it would be contrary to public policy to do so, in my judgement that is not shown to be the case here*."

16. However, in *Gough and another v Chief Constable of West Midlands Police* [2004] EWCA Civ 206, the Court of Appeal took a contrary view. Park J, sitting with Carnwath and Potter LJJ relied on two judgments of the Court of Appeal, *Webb v Chief Constable of Merseyside police* [2000] 1 All ER 209 and *Costello v Chief Constable of Derbyshire Constabulary* [2001] 3 All 150, decided after *White* and *Jackson*, in which it was held that the genuine and well founded suspicions of police that money and property derived from crime did not provide them with a public policy defence and orders was made for its return.

17. Park J also relied on the judgment of Maurice Kay J in *R (on the application of Carter) v Ipswich Magistrates Court* [2002] EW HC 332, which concerned an application with the return of monies used to secure the services of a contract killer. Mrs Carter was convicted of soliciting to commit murder, having paid money to a man whom she believed to be the killer but he was in fact an undercover police agent. Mrs Carter disclaimed all interest in the money in favour of her husband, and he applied to the court under the Police (Property) Act for the return of the money. The magistrates refused the application on the basis that "*the money had been intended to bring about the death of a human being*". Their decision was quashed on judicial review. Although the decision in *Jackson* was not cited to the court, Park J considered that the judgment of Maurice Kay J was correct. In his opinion, the decisions in *Webb* and *Costello* confirmed that despite the use of the word "may" in the Police (Property) Act, and despite the fact that the Act refers to ownership rather than to possession, it would not be a proper exercise of discretion by the magistrates to refuse to order a return of property to the only known person who is entitled to possession of it at common law. Those decisions prevented any public policy justification being considered. It should be noted that *Webb* and *Costello* were not concerned with applications under the Police (Property) Act but with civil actions brought to recover the property from police.

18. Although Carnwath and Potter LJJ concurred with Park J's decision, they did so with reservations and qualifications. Carnwath LJ distinguished proceedings under the Act from civil proceedings on the basis that in the county court a possessory title would be sufficient to justify a claim whereas the term "owner" in the Act entitles the magistrates to refuse to return property to the claimant if they are satisfied that there is someone else with a better legal title. To that extent the magistrates do have discretion to refuse an order. Secondly, and for the purposes of this case more importantly, Carnwath LJ expressed some reluctance in concluding that *Jackson* was wrongly decided, without further argument. He concluded that it was unnecessary to decide it in the instant case. He noted that in the *Carter* case, there was no detailed discussion of the public policy issue. Potter LJ pointed out that the court was bound by the decisions in *Webb* and *Costello*, but expressed some concern that the effect of those decisions would allow a person to recover property even though the court may be satisfied that he is not the true owner and has acquired the property illegally, albeit a true owner is not identifiable. In such circumstances, he considered that there may be a discretion to refuse an order in favour of such a claimant. He

pointed out that the decision in *Jackson* did not appear to have been considered or cited.

The remaining grounds of appeal

19. The respondent concedes that the decision whether the court has a discretion to refuse an order for the return of the appellant's property, and if so, whether that discretion should be exercised in the respondent's favour, depends on the availability of a public policy defence. In the absence of such a defence, the appeal must succeed.

Discussion

20. It is clear from the divergence of judicial opinion in England and Wales that the question whether a public policy defence to applications for the return of property is available may not yet be settled. Although by custom judges in Northern Ireland do follow decisions of the English Court of Appeal and accord them, when appropriate, due deference, we are not bound by them. In this case, the reservations expressed by Carnwath and Potter LJJ that the issue requires further consideration and legal argument is carefully noted. Having reflected on the case law I am inclined to the view that the District Judge would be entitled to decline to make an order under section 31(1) of the 1998 Act where it is clear that it would be contrary to public policy to do so.

21. The issue to be determined is whether, on the facts of this particular case, the court should refuse the appellants' application on public policy grounds. In my view, public policy exceptions to legislation enacted to ensure that possessions are returned to their rightful owner after legitimate interference by police for the purpose of a criminal investigation should be narrowly construed.

22. The court takes judicial notice that legal highs are inherently dangerous and have resulted in the death of a number of individuals. The fact that injunctions have been granted banning traders in Northern Ireland from selling such products following their conviction for failing to comply with safety regulations is evidence of society's concern that such substances are readily available.

23. There is overwhelming evidence in this case that the appellant has caused harm to himself and to others whilst under the influence of legal highs. The undisputed contents of appendix A demonstrates the dangerous effects of

these substances. The appellant is a young person whose prolific offending has resulted in him becoming subject to the police reducing offending unit. It is part of the function of this unit to identify particular triggers for offending in order to achieve rehabilitation. The use of legal highs has been identified as a trigger in this case. The court is being asked to overturn a decision of the PSNI which has been taken in order to safeguard the appellant's health and welfare and to protect the public. In my view, it would be utterly repugnant to compel the police to return dangerous products which have caused harm to the appellant, members of his family and the community in which he lives. There is no benefit to the appellant in having these substances returned. I consider that this case falls within one of the narrow public policy exceptions which justifies the police withholding the appellant's property.

24. The appeal is therefore dismissed.