Neutral Citation No: [2021] NICA 33 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **MOR11531** *ICOS No:* *Delivered:* **27/05/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

SHAKIR ULLAH

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Ms Auret (instructed by PPS) for the Prosecution
Mr Greene QC with Mr Heraghty (instructed by Trevor Smyth & Co Solicitors) for the Defendant

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Before: Morgan LCJ, Maguire LJ and Scoffield J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is a renewal to the full court of an application for leave to appeal, refused by Keegan J, against an order by His Honour Judge Lynch QC made on 17 December 2019 when, upon an application pursuant to section 172 of the Proceeds of Crime Act 2002 ("POCA"), he increased a confiscation order made against the appellant by £39,666.66.

The Statutory Regime

[2] Section 156 of POCA provides for the making of a confiscation order upon conviction. Section 156(4)(c) states that the court must decide whether the offender has benefited from his particular criminal conduct. If so, it must decide the recoverable amount and make an order requiring him to pay that amount. The recoverable amount is an amount equal to the defendant's benefit from the conduct concerned but section 157(2) provides that if the defendant shows that the "available amount" is less than that benefit the recoverable amount is the available amount. On that issue the burden of proof is on the defendant and the standard is the balance of probabilities.

[3] The available amount as defined by section 159 is the total of the values of all the free property then held by the defendant minus the total amount payable in

pursuance of obligations which then had priority, together with the total of the value of all tainted gifts. Section 232(2)(a) provides that property is held by a person if he holds an interest in it. Section 227(3) provides that if another person holds an interest in the property its value in relation to the offender is the market value of his interest.

[4] Section 172 requires the court to reconsider the available amount at the request of the prosecutor. Where this section applies the court must make a new calculation as if references to the time the confiscation order is made were to the time of the new calculation and as if references to the date of the confiscation order were to the date of the new calculation.

[5] Section 172(4) provides that if the available amount found under the new calculation exceeds that amount as previously calculated, the court may vary the order by substituting for the amount required to be paid such amount as it believes to be just but which does not exceed the amount found as the defendant's benefit from the conduct concerned.

Background

[6] The applicant was the sole director of a company which traded as Digital Circles. The company operated in 11 retail merchandising units located in shopping centres around Northern Ireland selling mobile phone accessories. On 24 April 2015 he was convicted of seven counts of assisting unlawful immigration to a member State contrary to section 25(1) of the Immigration Act 1971 as a result of his unauthorised employment of those without the correct immigration status. He said that he was overwhelmed in starting the business and had overlooked the requirements. He received a sentence of three years imprisonment suspended for three years.

[7] On 14 October 2016 a confiscation order was made and the benefit to the accused from his criminal conduct was assessed at £558,690.53. His realisable assets were assessed at £54,246.39 and a confiscation order was duly made in that sum. On 24 October 2017 the applicant applied for a certificate of inadequacy as a result of a shortfall in the amount which had been expected to be received from the sale of his cars. That application was resisted by the prosecution as the amounts allegedly recovered for the cars were suspiciously low. The application was withdrawn and the available amount was paid in full in November 2017.

[8] As a result of enquiries made about the applicant's finances following his application to reduce the available amount, the prosecution investigated whether the applicant had an interest in a dwelling house at 8 Chalfont Drive, Manchester. The property was registered in the applicant's wife's sole name and the applicant lived there with his wife and young children.

[9] It is common case that the property was purchased on 10 August 2017 for £115,000. As a result of its investigation the prosecution established that amounts totalling £120,854 were lodged to the Bank of Scotland account of the applicant's wife between 1 June 2017 and 9 August 2019. Three sums of money comprising £89,000, £15,000 and £11,000 respectively were paid over to the solicitor acting on behalf of the applicant's wife in July and August 2015 to satisfy the purchase price of the property.

[10] The applicant has been refused leave to remain in the United Kingdom but is in the process of appealing that decision. He has no legal right to work in the UK and his known bank accounts are subject to a restraint order. The declared earnings of his wife show that she earned £3,246.99 in the tax year 2015/16; £10,083.32 in the tax year 2016/17; and £9,000 in the tax year 2017/18.

[11] Following the making of the confiscation order in October 2016 the applicant's wife became a director of Shak Shak Ltd on 6 June 2017 in place of the applicant who had been a director until that date. The business activity of that company is unclear. A total of £19,000 by way of salary and loans was paid by that company to the applicant's wife subsequent to her appointment. The amounts received by way of salary have not been included in the total amounts lodged to the Bank of Scotland account set out at paragraph [9] above.

[12] The substantial remaining sums used to satisfy the purchase of the property were stated to be loans from friends and relatives in Pakistan and in one case a previous landlord of the applicant's wife in the United Kingdom. Statements were submitted on behalf of these people indicating that the provision of the funds was by way of loan and in various cases the dates when repayment was expected, usually within five years.

The hearing before the learned trial judge

[13] The application came before the learned trial judge in January 2019. He directed that since the property was registered in the name of the applicant's wife she should be informed that she was entitled to attend the proceedings and make representations if she wished. Both the applicant and his wife appeared at the confiscation hearing with the benefit of separate counsel and solicitors.

[14] The applicant and his wife relied on the statements which had been submitted in respect of the various payments which had been lodged to the applicant's wife's account but neither of them gave evidence. The learned trial judge concluded that the evidence demonstrated that the applicant's wife had very limited financial means. She had no realistic capacity to repay the amounts from her own assets or earning capacity, nor could any creditor believe that she would be able to do so. The judge concluded that the monies that had been lodged into the applicant's wife's account were advanced on the basis of and for the benefit of the applicant.

[15] Having so concluded he then addressed what inference if any he should draw in relation to the money. He noted that neither the applicant nor his wife had given evidence and relied solely on the replies to prosecution statements which had been advanced. No evidence had been introduced by either the applicant or his wife as to any capacity or ability to repay any of the monies advanced. In those circumstances the judge inferred that the monies used to purchase the house were from means available to the applicant. In order to legitimately account for the family home it was purchased in the name of his wife but financed exclusively from funds available to the applicant.

[16] The judge adjourned the case to allow the parties to make submissions as to what further order was just in the circumstances. The value of the property at the time of the hearing was agreed at £119,000. Given his determination that the property was paid for by the applicant and not by any funds accessed by the applicant's wife, he considered that the court was not bound by the fact that the applicant's wife was the legal owner of the property. He considered, however, that since this was matrimonial property the applicant's wife had a 50% beneficial interest in the property.

[17] He then noted that there was a balance to be effected between the principle that criminals must repay the benefit that they have achieved from criminal conduct and the fact that the property at issue was a family home, was not of excessive value and that there were children involved. He noted that the family lived somewhere else before they acquired this property and could do so again if necessary. He considered that he should readjust the available amount and increased it by one third of the value of the property rather than assessing value by the entirety of the 50% share attributed to the applicant. He varied the confiscation order accordingly.

Consideration

[18] Section 30(3) of the Criminal Appeal (Northern Ireland) Act 1980 provides that "sentence" includes any confiscation order or a variation thereof. The test in this appeal is, therefore, whether the Order made by the judge in this case is either manifestly excessive or wrong in principle (see R v Padda [2013] EWCA 2330 at [27]). There is separate provision for an appeal by the prosecutor in section 181 of POCA.

[19] The second general matter to consider is the question of the burden of proof. Section 156 of POCA provides that the court must decide on the balance of probabilities whether the defendant has benefited from criminal conduct before it decides the recoverable amount. The onus of establishing that there has been benefit falls on the prosecutor. The prosecutor must also prove the recoverable amount as a result of that benefit.

[20] Section 157 deals with the amount available to the defendant and where the offender demonstrates that the available amount is less than the benefit from the

criminal conduct the recoverable amount is accordingly reduced. The onus on this issue lies on the offender and the standard is the balance of probabilities.

[20] Section 172 does not contain any express indication of where the burden of proof lies in a variation case. It does, however, refer the court back to sections 157 and 159 dealing with the available amount. Section 172(1)(c) enables the prosecutor to apply to the Crown Court to make a new calculation of the available amount, which is the amount found as a result of the exercise under section 157(2). That would suggest a burden is once again placed on the defendant on the balance of probabilities.

[21] In our view these provisions suggest that in order to sustain an application under section 172(1)(c) the prosecutor must introduce at least *prima facie* evidence of the offender's interest in property which has not previously been taken into account. If the prosecutor fails to do so there is nothing for the defendant to refute. Once such evidence has been introduced, it is then for the defendant on the balance of probabilities to prove either that the asset is not an asset of the offender or that it has no or very limited value or that it is unjust to take it into account. We consider that this approach is supported by the approach of the courts in England and Wales in R v Lily Lee [2012] EWCA Crim 954 at [32] and R v O'Flaherty [2018] EWCA Crim 2828 at [16].

[22] Long after the decision of the learned trial judge on 17 December 2019 the applicant sought to pursue a further ground of appeal by notice served on 28 October 2020 that the Crown Court had no power under section 172 to determine that the applicant freely held an interest in the dwelling house. The basis for this contention was that provision was made in section 160A of POCA for a court making a confiscation order to make a conclusive determination as to the extent of a defendant's interest in property. That power, it was contended, was not available when considering a variation of a confiscation order under section 172. It was submitted that the court could not, therefore, find that the applicant freely held any share of the relevant property in this case so as to enable a reconsideration of the available amount.

[23] We do not consider that this submission is well founded. Section 160A was not mentioned by the learned trial judge, nor did he purport to make a binding determination of the applicant's interest in the property. That did not, however, prevent the learned trial judge from computing a figure for the statutory debt. As the Supreme Court explained in R v Hilton [2020] UKSC 29 at paragraph [19], the assessment of the recoverable amount does not involve any assessment of the way in which that debt may ultimately be paid. It is at the enforcement stage that third party's rights must be both taken into account and resolved.

[24] The learned trial judge approached the question of whether the applicant had been responsible for the funding of the purchase of the dwelling house on the basis that the onus rested upon the prosecution to establish that he had done so. We

consider that once the prosecution had introduced *prima facie* evidence of the applicant's interest in the property the burden of demonstrating that there was not a further available amount rested upon the applicant. The approach of the learned trial judge to the burden of proof was to the applicant's advantage.

[25] We do not accept in any event that the learned trial judge did not have an adequate evidential base for his conclusion that the funding for the dwelling house came from funds available to the applicant. There was overwhelming evidence that the applicant's wife did not have the capacity to make any repayment of any loan. Neither the applicant nor his wife gave evidence. The judge was entitled to take that into account in considering the weight (if any) that he should give to the documentary material upon which the applicant relied. The inference which he drew was plainly available to him.

[26] The substantive point made by the applicant was that the loan offers were provided in part by family members of the applicant's wife. We accept that the origin of the offers is a relevant circumstance but the fact remained that these were loans and no evidence was provided of any basis upon which the applicant or his wife could repay them. If there was an answer to this it could have been provided by evidence from the applicant (or indeed his wife) but no such answer was provided.

[27] R v Mundy [2018] EWCA Crim 105 was a prosecution appeal against a decision by the judge to refuse a variation application principally on the basis of the passage of time. The court noted that it was concerned with the reasonable exercise of discretion or an error in principle. That is largely the same here. It considered that the passage of time may be relevant to the exercise of the discretion to consider the available amount but noted that there was no express time limit on the reconsideration of benefit.

[28] In considering what was just the court gave guidance at paragraphs [29] and [30] in the following terms:

> "29. Fourth, an assessment of an amount which is "just", extends beyond what is just to a defendant. In *Leon John* [2014] 2 Cr App R(S) 73, it was held that an award of general damages for personal injuries, made after the initial hearing, was an amount available for the purposes of section 22. Equally, the fact that the available amounts may have been acquired by hard work in a legitimate enterprise does not preclude an order, although that fact is a matter to be taken into account (see *Padda* at [47]). The word "just" means just in all the circumstances, bearing in mind that the purpose of such orders is the advancement of the public interest in confiscating the proceeds of crime.

30. Fifth, in *Leon John* at 24, the court said this:

> 'We do wish to stress that it is important for judges when determining applications under section 22 of POCA to assess carefully in each case the competing considerations in order to decide what course is truly just. In cases such as the present, not involving a 'windfall' gain the consideration should be particularly anxious.'"

[29] In this case the variation application was made approximately four years after the conviction. This was not a "windfall" gain but, on the findings of the learned trial judge, was a case where available assets had been hidden. The trial judge recognised the competing interests of the applicant's wife in terms of her property rights and the interests of the family including the children. He provided an opportunity for the parties to make separate submissions on these issues. He was persuaded that he should not include the full extent of the applicant's interest in calculating the recoverable amount.

[30] All of this demonstrates that the learned trial judge paid careful attention to the competing interests in this case, including that the purpose of these orders is the advancement of the public interest in confiscating the proceeds of crime. We detect no error of principle on the part of the learned trial judge and the conclusions he reached were plainly well within the area of discretionary judgement available to him.

Conclusion

[31] For the reasons given we are satisfied that leave to appeal should be refused.