

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

Delivered: 30/6/08

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

THOMAS LESLIE AND GERALD MOONEY

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GIRVAN LJ

**The applications for leave to appeal**

[1] Thomas Leslie and Gerald Mooney ("the applicants") apply for leave to appeal against the making of confiscation orders in the sum of £32,000 against each of them under section 156 of the Proceeds of Crime Act 2002 following their convictions for the theft of eleven quad bikes. A combination order of 2 years probation and 100 hours community service was also imposed on each of the applicants though there is no application to appeal against the making of those orders. Leave to appeal was refused by the single judge Stephens J on 11 December 2007.

[2] The applicants together with three others were charged with theft contrary to section 1 of the Theft Act (Northern Ireland) 1969 in July 2004. On 20 July 2004 at approximately 2.20 am police on duty stopped two lorries and a car following the lorries. The vehicles contained a number of quad bikes. These items were identified as eleven quad bikes which had been stolen a short time previously from a farm machinery business at Ballynaleckagh, County Fermanagh.

[3] On 31 January 2006 the applicants and the three other accused were convicted of the theft of the bikes on their pleas of guilty. They were sentenced by Judge McFarland on 31 March 2006 following Rooney hearings which took place on 30 and 31 January 2006. As noted the sentencing judge sentenced each of the applicants to 100 hours community service and 2 years probation. In the Rooney hearing and at the time of the imposition of the

combination orders no reference was made to the imposition of any confiscation order under the Proceeds of Crime Act 2002.

[4] Before the trial of the defendants Coghlin J on 20 August 2004 issued restraint orders against the applicants prohibiting them from dealing with their assets. The applications for the restraint orders arose out of the evidence in relation to the applicants' involvement in the theft in July 2004. Following sentencing of the applicants the Crown applied for confiscation orders under the 2002 Act against each of the applicants in the sum of £32,000. Evidence of the available assets of the applicants was provided to the court in support of the applications the court being bound to have regard to their assets and means when exercising its powers to make a confiscation order.

[5] The sentencing judge made an order on 30 March 2007 against each of the applicants ordering the sum of £32,000 to be the amount recoverable from the defendants for the purposes of the Proceeds of Crime Act 2002. He ordered each applicant to pay the recoverable amount within 4 weeks failing which they would be subject to imprisonment for 12 months. He concluded that for the purposes of the 2002 Act the relevant figure for the recoverable amount in the value of the goods to the victim was £32,000 even though the resale value to the thieves would have been considerably less. The goods had been stolen from a retailer and the retail value of the goods was the relevant value. He rejected the applicant's argument that because of the recovery of the goods in transit from the scene of the theft the defendant's had obtained no benefit. In his view the calculation of the benefit was concerned with what passed through the applicant's hands not what they had retained. He rejected the suggestion that they had permitted the goods to be recovered by the police and that this should be regarded as a form of restitution. He also rejected the argument that he should direct an apportionment of the £32,000 between the two applicants or between those applicants and the other defendants who were not the subject of an application for confiscation orders.

[6] It is apparent from the Crown's application and from the judge's remarks when he made the confiscation orders against the applicants that he did so on the basis that they had benefited from their particular conduct (thus bringing the case within section 156(4)(c) of the 2002 Act) rather than on the grounds that the applicants had a criminal lifestyle for the purposes of section 156(4)(a)(b). The orders as drawn erroneously stated that the court was satisfied that the individual applicants had a criminal lifestyle and had benefited from their general criminal conduct. However, the orders could be simply amended under the slip rule and the error in the orders does not in itself invalidate the confiscation orders as made.

### **Relevant statutory provisions**

[7] The statutory framework for criminal confiscation orders set out in Part IV of the Proceeds of Crime Act 2002. So far as material Section 156 provides as follows:-

*"Making of order*

156.-(1) The Crown Court must proceed under this section if the following two conditions are satisfied.

(2) The first condition is that a defendant falls within either of the following paragraphs -

(a) he is convicted of an offence or offences in proceedings before the Crown Court;

(3) The second condition is that-

(a) the prosecutor or the Director asks the court to proceed under this section, or

(b) the court believes it is appropriate for it to do so.

(4) The court must proceed as follows -

(a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must-

(a) decide the recoverable amount, and

- (b) make an order (a confiscation order) requiring him to pay that amount.
- (6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.
- (7) The court must decide any question arising under subsection (4) or (5) on a balance of probabilities.
- ...
- (9) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2)."

[8] Section 157 sets out the meaning of the relevant recoverable amount thus:-

*"Recoverable amount*

157.-(1)The recoverable amount for the purposes of section 156 is an amount equal to the defendant's benefit from the conduct concerned.

- (2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is -
  - (a) the available amount, or
  - (b) a nominal amount, if the available amount is nil.
- (3) But if section 156(6) applies the recoverable amount is such amount as -
  - (a) the court believes is just, but
  - (b) does not exceed the amount found under subsection (1) or (2) (as the case may be).

- (4) 111 calculating the defendant's benefit from the conduct concerned for the purposes of subsection (1), any property in respect of which –
  - (a) a recovery order is in force under section 266, or
  - (b) a forfeiture order is in force under section 298(2), must be ignored.
- (5) If the court decides the available amount, it must include in the confiscation order a statement of its findings as to the matters relevant for deciding that amount.”

[9] Section 158 provides:-

*“Defendant's benefit*

158.-(1) If the court is proceeding under section 156 this section applies for the purpose of-

- (a) deciding whether the defendant has benefited from conduct, and
  - (b) deciding his benefit from the conduct.
- (2) The court must-
- (a) take account of conduct occurring up to the time it makes its decision;
  - (b) take account of property obtained up to that time.”

[10] Section 159 which deals with the determination of the relevant available amount provides –

*“Available amount*

159.-(1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of –

- (a) the total of the values (at the time the confiscation order is made) of all the free property

then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and

(b) the total of the values (at that time) of all tainted gifts.”

[11] Section 224 deals with conduct and benefit and provides as follows:-

*“Conduct and benefit*

224.-(1) Criminal conduct is conduct which -

- (a) constitutes an offence in Northern Ireland, or
  - (b) would constitute such an offence if it occurred in Northern Ireland.
- (3) Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs -
- (a) conduct which constitutes the offence or offences concerned;
  - (b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;
  - (c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned.

(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary

advantage.

- (6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.
- (7) If a person benefits from conduct his benefit is the value of the property obtained."

### **The parties' contentions**

[12] Mr McDonald QC appeared with Mr Hutton on behalf of the applicant Leslie. Mr O'Rourke and Mr Fahy appeared on behalf of the applicant Mooney. They argued that the making of the confiscation orders clearly involved an interference with property which engaged Article 1 of the First Protocol of the ECHR. The confiscation orders in this case were unduly harsh and disproportionate. The primary aim of the legislation is properly described as being to remove from criminals their ill-gotten gains. Here the confiscation orders confiscated a total of £64,000 in respect of goods which were only worth £32,000 and in respect of goods which in fact had been returned to the true owner. The other co-accused who were equally involved in the crime had not been made subject to any confiscation order. The reparative, preventative and confiscatory aims of the legislation had already been met. On the particular facts of the case the court should distinguish and decline to follow authorities such as R v Wilkes [2003] 2 Cr App R(S) 105 in which it was held that a defendant derives benefit by merely obtaining goods even if they are subsequently destroyed or recovered. Counsel pointed out that there was no free standing discretion under the 2002 Act and the case law before 2002 accordingly needed to be viewed differently. The judge had a discretion not an obligation to order confiscation. The applicant's pleaded guilty on the basis of the facts led by the Crown at the Rooney hearing. These facts included the acceptance that this was a joint enterprise and that the proceeds of the crime would have been split five ways between the five defendants. The judge should not have proceeded at the confiscation hearing on a different factual basis. In any event a straight division between a co-accused and a case of joint benefit is a fair method and as good a start as any (R v Gibbons [2003] 2 Cr App R(S) 34). A failure to apportion leads to a disproportionate result. It was further argued that the applicants had not obtained the property in the sense of obtaining ownership of it. Alternatively the judge should have found that the applicants had made advance restitution by allowing the goods to be returned to the owner. The court order could have declared that the advance restitution satisfied the order. Counsel relied in particular on the recent trilogy of cases in the House of Lords R v May [2008] UKHL 28, R v Green [2008] UKHL 30 and the Crown Prosecution

Service v Jennings [2008] UKHL 29 in which the House reviewed the authorities and, in counsel's argument, stressed that the policy of the legislation was to deprive wrongdoers of benefits actually obtained from crimes.

[13] Mr Reid on behalf of the Crown argued that the court was obliged to proceed under section 156 of the 2002 Act. Once a defendant is convicted and the prosecutor asked the court to proceed. If the court decides that the defendant has benefited from the conduct referred to in section 156(4) then it must decide on the recoverable amount and make an order requiring him to pay that amount. This duty only becomes a power in the strictly limited circumstances of the victims starting or intending to start proceedings against the defendant in respect of the loss. The purposes of the legislation as stated by Lord Steyn in R v Rezvi [2003] 1 AC 1099 are "to punish convicted prisoners, to deter the commission of further offences and reduce the profits available to fund further criminal activities." If property is obtained momentarily and then disposed of or dissipated the property would nonetheless be "obtained" for the purposes of the Act. Counsel relied in particular on the House of Lords decision in R v Cadman Smith [2002] 1 WLR 154 and R v Wilkes [2003] 2 Cr App R(S) 105. The purpose of making confiscation orders is not only intended to remove the proceeds of crime but to penalise the defendant and to deter others. Counsel rejected the argument that the judge erred in failing to find that the order was disproportionate, would be double recovery and offended against the reparative purposes of the legislation. In the Court of Appeal decision in May subsequently upheld by the House of Lords the court held that where assets were held by the defendants there was nothing wrong in making a confiscation order for the whole of the benefit against each of the defendants. If that amounted to multiple recovery of the benefit this was not in itself unfair. A confiscation order is a penalty. Mr Reid also rejected the arguments that the recovery of the items by the victims should be treated as a form of advance restitution. R v Farquhar [2008] EWCA Crim 806 makes clear that there is a distinction between compensation and confiscation. Actual voluntary compensation by the offender is no bar to making against the offender in addition a confiscation order. The House of Lords decisions in May, Jennings and Green have not changed the law.

[14] In R v Cadman Smith [2001] UK HL 68 the question before the House of Lords was whether an importer of uncustomed goods who intends not to pay duty on them derives a benefit under Section 74 of the Criminal Justice Act 1988 (the predecessor of the 2002 Act) through not paying the required duty at the point of importation where the goods are forfeited following importation before their value could be realised by the importer. In that case the Court of Appeal held that the respondent had not derived any pecuniary benefit in terms of section 71(5) of the 1988 Act from evading the payment of duty since he remained liable to pay the duty and he had never sold the



cigarettes because they had been seized. The position would have been different if the respondent had been able to sell the cigarettes since then the duty evaded would have been part of the profits of the sale. The House of Lords rejected this approach. In the course of his speech Lord Rodger at paragraph 23 stated:-

“... When considering the measure of the benefit obtained by an offender in terms of section 71(4), the court is concerned simply with the value of the property to him at the time when he obtained it or, if it is greater, at the material time. In particular where the offender has property representing in his hands the property which he obtained, the value to be considered is the value of the substitute property “but disregarding any charging order”. Except, therefore, where the actual property obtained by the offender has subsequently increased in value, the court is simply concerned with its value to the offender “when he obtained it”. It therefore makes no difference if, after he obtains it, the property is destroyed or damaged in a fire or is seized by custom officers; for confiscation order purposes the relevant value is still the value of the property to the offender when he obtained it.”

Nothing was said in the case of May, Jennings and Green to call into question the correctness of Lord Rodger’s statement of the governing principles in this context.

[15] In R v Wilkes [2003] EWCA Crim 848 the appellant was convicted on one count of aggravated burglary. He was arrested while the burglary was in progress and all the stolen goods were recovered. Notwithstanding this the Court of Appeal concluded that the appellant had obtained the property. It was irrelevant that he was unable to realise the property because of the police intervention just as it would have been irrelevant if the property had been destroyed by fire or by some other accident. The Court of Appeal concluded that the matter was put beyond argument by the House of Lords decision in R v Cadman Smith. Wilkes was decided under the provisions of the Criminal Justice Act 1988 (as amended) which conferred on the sentencing judge the discretion to make assumptions permitted by section 72 AA where the offender did not retain benefit derived from the offence. The court noted that any serious or real injustice could be avoided by not making the assumptions or by dis-applying them. In that case there was no injustice in making the assumptions and the appellant failed to displace them. On analysis the appellant had only one argument namely that the assumption should not be

made because the offence was unsuccessful. That is essentially the case made by the applicants in the present application for leave to appeal.

[16] In May the House of Lords stated that the 2002 Act is intended to deprive defendants within the limits of their available means of the benefit gained from relevant criminal conduct whether or not they have retained such benefit. The benefit gained is the total value of the property or advantage obtained not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators. The House pointed out that there are three questions to be addressed. Firstly, has the defendant benefited from the relevant criminal conduct? Secondly, if so, what is the value of the benefit so obtained? Thirdly what sum is recoverable from D? D ordinarily obtains property if in law he owns it whether on loan or jointly. This will ordinarily confer a power of disposition or control. In May the House of Lords did not address the question decided previously in R v Cadman Smith and, as noted nothing in the decision questioned its correctness. The House of Lords made clear in the trilogy of cases that guidance should ordinarily be sought in the statutory language itself rather than in the proliferating case law. The language of the statute is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. In reading the reference in references to "benefit" in May one must bear in mind the statutory definition of benefit. Under the statute a benefit arises from conduct if the defendant "obtains" property by virtue of the criminal conduct.

[17] In Green the House of Lords cited with approval the judgment of David Clarke J in the Court of Appeal in that case. He stated:-

"For reasons given earlier we consider that where money or property is received by one defendant on behalf of several defendants jointly each defendant is to regard it as having received the whole of it for the purposes of the section. It does not matter that the proceeds of sale may have been received by one conspirator who retains his share before passing on the remainder. What matters is the capacity in which he received them."

[18] From the authorities we are driven to the conclusion that the applicants must be held to have benefited from the property criminally obtained from the true owner of the quad bikes. They obtained possession and control of those items as thieves which gave them a possessory title pending their return to the true owner. The subsequent seizure of the items by the police did not negate their obtaining of the items which gave rise to the statutory benefit. Green makes clear that each of the thieves who are joint conspirators in the theft obtained the goods and thereby each of them benefited from them. May makes clear that where assets are held jointly there is nothing wrong in principle in

making a confiscation order for the whole of the benefit as against each of the defendants severally. The fact that that may amount to multiple recovery of the benefit does not of itself make it unfair to impose a several liability on each of the co-defendants in respect of the entirety. In the trilogy of cases before the House of Lords the House said nothing to question the compatibility of the Proceeds of Crime Act 2002 with Article 1 of Protocol 1 of the Convention but it did recognise that in appropriate circumstances proportionality may call for an apportionment. At paragraph [45] in May the House of Lords stated:-

“There might be circumstances in which orders for the full amount against several defendants might be disproportionate and contrary to Article 1 of the First Protocol and in such cases an apportionment approach might be adopted.”

[19] In the exceptional circumstances of this case a number of factors lead to the conclusion that the principle of proportionality favours an apportionment of the liability between the applicants. The total amount of the confiscation order as made by the court is double the value of the goods stolen. This factor combined with the facts that the goods were in the possession of the defendants for a very short time and the victims suffered no loss because the goods were returned to him produce what appears on the face of it to be a disproportionate outcome. Only two of the five defendants were made the subject of confiscation orders. There may well have been reasons relevant to the means of the other defendants which led the Crown not to proceed against the other defendants. Whatever the reason the question of apportionment can only be decided in the context of an apportionment between the two parties before the court. In the circumstances throwing the entire recoverable amount on each of the two applicants throws an exceptionally heavy burden on each in a case where it was accepted that the proceeds of the crime were to be split amongst the five defendants. It is to be noted that at no stage during the Rooney hearing was any reference made to the likelihood of a confiscation order of the magnitude ultimately imposed. Had the court been fully aware of the significance of the potential confiscation orders that fell to be imposed upon the applicants the judge’s approach to the actual sentencing may have been somewhat different.

## **Disposal**

[20] For the reasons indicated and in the exceptional circumstances of these applications we conclude that we should grant the applicants leave to appeal. We allow the appeals to the extent of directing that the appropriate recoverable sum on foot of the confiscation orders made against each defendant should be reduced to the sum of £16,000.

