

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

V

WILLIAM DENIS FENTON

CARSWELL LCJ

This is an application for leave to appeal against a forfeiture order made by His Honour Judge Smyth QC on 28 February 2000 in Antrim Crown Court, sitting in Coleraine. The applicant was convicted following a trial on a number of counts, including drugs charges, and sentenced by the judge on 2 February 2000. No application for forfeiture was made at that time by the Crown, which returned to the judge on 28 February, asking him to vary the sentence. The judge acceded to the request and ordered the forfeiture of the applicant's car under Article 11 of the Criminal Justice (Northern Ireland) Order 1994 and of various sums of money totalling £6790.36 under section 27(1) of the Misuse of Drugs Act 1971. There is no appeal against the order in respect of the car, but the applicant sought leave to appeal against the

forfeiture of the money. Leave was refused by the single judge, and the applicant renewed his application before the court.

The applicant was found guilty by the jury of the rape of a young woman, of administering a thing to obtain or facilitate carnal connection and of assault upon her. He pleaded guilty to four charges of supplying controlled drugs, seven charges of possession of controlled drugs and one of possession with intent to supply. The judge sentenced him to twelve years imprisonment on the charges of rape and administering a thing, with sentences ranging up to seven years on the drugs charges, all to be concurrent.

There was evidence at trial from which the judge was satisfied that the applicant had a regular round of drug supplying in Belfast and around Northern Ireland. In so doing he used a Renault 19 car, the value of which was estimated to be £2887. He claimed to have purchased it for £2500 from a person in Glengormley, whose name he said he could not remember.

The following sums of cash were found at or around his home at Islandmagee:

- £60.00 in the boot of the Renault car;
- £151.20 in a trouser pocket;
- £3000.00 in his jacket;
- £2400.00 concealed inside a vacuum cleaner;
- £149.02 in a bag containing drugs.

In or around his flat in Newtownards Road, Belfast the following sums were found:

- £30.14 in coins inside a boot;
- £1000.00 in assorted notes inside the underneath part of a washing machine.

When interviewed by the police the applicant claimed that all these sums had come from legitimate sources, selling items from his home, money from his mother and his brother, from the sale of his house and his dogs and savings from benefits.

The application made to the judge on 28 February 2000 to make a forfeiture order was grounded on section 49(2) of the Judicature (Northern Ireland) Act 1978, which provides:

“(2) Subject to the following provisions of this section, a sentence imposed, or other order made, by the Crown Court when dealing with an offender may be varied or rescinded by the Crown Court within the period of 28 days beginning with the day on which the sentence or other order was imposed or made or, where subsection (3) applies, within the time allowed by that subsection.”

It was not in dispute that the judge had power to vary the disposition of the case made by him on 2 February by adding to the penalties an order for confiscation or forfeiture of property.

The application was made under two heads of statutory authority, section 27(1) of the Misuse of Drugs Act 1971 and Article 11 of the Criminal Justice (Northern Ireland) Order 1994. The former provision reads:

“27(1) Subject to subsection (2) below, the court by or before which a person is convicted of an offence under this Act may order anything shown to the satisfaction of the court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the court may order.”

Article 11(1) of the 1994 Order defines the circumstances in which a forfeiture order may be made under the more general jurisdiction conferred by that

Article on the court:

“11(1) Subject to the following provisions of this Article, where a person is convicted of an offence and -

- (a) the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued -
 - (i) has been used for the purpose of committing, or facilitating the commission of, any offence; or
 - (ii) was intended by him to be used for that purpose; or
- (b) the offence, or an offence which the court has taken into consideration in determining his sentence, consists of unlawful possession of property which -
 - (i) has been lawfully seized from him; or
 - (ii) was in his possession or under his control at the time when he was apprehended for the offence of which he has been convicted or when a summons in respect of that offence was issued,

the court may make an order under this Article in respect of that property, and may do so whether or not it also deals with the offender in respect of the offence in any other way and without regard to any restrictions on forfeiture in a relevant provision.”

The learned judge, after hearing argument, stated that he was satisfied that the car had been used to effect drug deliveries and that the applicant had intended to continue to use it for that purpose. He accordingly held that the requirements of Article 11(1)(a) of the Criminal Justice (Northern Ireland) Order 1994 had been fulfilled and ordered the forfeiture of the car. The applicant has not sought to appeal against this part of his order.

The judge went on to hold that he was satisfied on the balance of probabilities that the sums of money “arose out of drug dealing”, and that it related to the offences of possession of controlled drugs with intent to supply. He therefore ordered their forfeiture under section 27(1) of the Misuse of Drugs Act 1971. Mr Duffy for the applicant attacked the ruling on two grounds, first that the judge had applied the wrong standard of proof, and, secondly, that the facts proved could not properly ground an application under the 1971 Act.

We regard both of these grounds of attack as well founded. In our view it cannot be doubted that the standard of proof applicable is the regular criminal standard of proof beyond reasonable doubt. Factual matters which have to be established from time to time in the imposition of penalties have in general to be proved to that standard. For example, when a judge holds a *Newton* hearing, the factual basis on which he decides to act must be proved

beyond reasonable doubt: see *R v Kerrigan* (1993) 14 Cr App R (S) 179. It has also been held that when the court is asked to make a confiscation order under the Drug Trafficking Offences Act 1986 the necessary facts have to be proved beyond reasonable doubt: *R v Finch* (1993) 14 Cr App R (S) 226 at 231, per Lloyd LJ. The same has been held in the case of a confiscation order under the Criminal Justice (Confiscation (Northern Ireland) Order 1990: *R v O'Neill* [1998] NIJB 1. A deliberate contrast may be seen in section 2(8) of the Drug Trafficking Act 1994, where there is a specific statutory reference to the civil standard of proof on the balance of probabilities.

In order to ground an application for forfeiture under section 27(1) of the Misuse of Drugs Act 1971 it is necessary for the Crown to prove that the property in question related to the offence. The difficulty which confronts it in cases such as the present is highlighted in the judgment of Lawton LJ in *R v Morgan* [1977] Crim LR 488, which has been regularly followed in subsequent cases. He said that he had no doubt that money found in the defendant's possession at the time of his arrest was part of his working capital for the purpose of his trade in drugs. That was not, however, sufficient to ground a confiscation order. The defendant had been convicted of possession of drugs with intent to supply. As this meant that he was going to sell them, he would not have required his working capital for that purpose, therefore it could not be said that the money related to the offence of which he had been convicted. Mr Kerr QC for the Crown acknowledged the force of this reasoning and its application to the present case, and did not seek to uphold

the judge's ruling that the money could be confiscated under section 27 of the Misuse of Drugs Act 1971.

He did submit, however, that the judge could have validly ordered confiscation under the 1994 Order, which was the alternative basis on which the forfeiture application had been made. He recognised that he could not rely on the first limb of Article 11(1)(a), "used for the purpose of committing, or facilitating the commission of, any offence", for the same logical difficulty arose as under the 1971 Act: if the money was the applicant's stock in trade or the proceeds of previous sales, it could not have been used for the purpose of committing the offence of possession with intent to supply of which he had been convicted. He had to rely on the second limb, that the sums of money found were intended by the applicant to be used for the purpose of committing an offence. The judge expressed the firm view in the course of argument that the bulk of the money would probably have gone to buy in other drugs. We are bound to agree that it looks very probable that the money, or most of it, would have been used for that very purpose and that the applicant intended at the time of his arrest to put it to that use. We consider, however, that such a degree of probability falls short of the requisite proof beyond reasonable doubt. There remains the possibility that he may have spent the money, or some or most of it, on other purchases. It is as a matter of realism inescapable that the finding of some of the money in a bag containing drugs was a strong pointer to its future destination, and that the concealment by a drug dealer of substantial sums in cash about his house is another clear

indication. If the standard of proof were on the balance of probabilities we should have little difficulty in reaching the conclusion that the money, or certainly most of it, was the applicant's stock in trade, to be used for the purchase of further supplies of drugs. But when we have to apply the standard of proof beyond reasonable doubt, we do not feel that we can be sufficiently sure in respect of any of the sums of money that it was to be used for the purchase of more drugs.

In these circumstances we are, somewhat reluctantly, impelled to grant the application for leave, allow the appeal and set aside the forfeiture order in respect of the several sums of money.

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