Neutral Citation No. [2015] NICA 5

Ref: **GIR9497**

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

Delivered: **21/01/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

GABRIEL MACKLE

_____

Before: Girvan LJ, Gillen LJ and Treacy J

_____

Girvan LJ (delivering the judgment of the court)

[1] This is an appeal against sentence imposed by the Crown Court sitting in Antrim following the appellant's pleas of guilty to charges that on 7 August 2013 (i) he unlawfully and maliciously had in his possession or under his control an explosive substance, namely mercury, with intent by means thereof to endanger life or cause serious damage to property, or to enable anyone else to do so, contrary to section 3(1)(b) of the Explosive Substances Act 1883, and (ii) he had in his possession ammunition with intent by that means thereof to endanger life or cause serious damage to property or to enable anyone else to do so contrary to article 58(1) of the Firearms (Northern Ireland) Order 2004.

[2] The court imposed a determinate custodial sentence of 8 years on 5 June 2014. The appellant does not take issue with that custodial sentence. He seeks by this appeal to overturn a forfeiture order made on 8 September 2014 under Article 11 of the Criminal Justice (Northern Ireland) Order 1994 ("the 1994 Order") in respect of the motorcycle which he was riding at the time of the offence.

Factual background

[3] On 7 August 2013 at approximately 10.05 p.m. police stopped the appellant who had been travelling alone in Lurgan on a black BMW motorcycle. When the police searched the rucksack worn by the appellant they found a quantity of ammunition, namely 22 live .22 calibre rim cartridges, wrapped in cling film and a bottle containing a quantity of mercury. The report of the forensic science officer involved in the case indicated that mercury has been used in the production of improvised tilt switches found in some improvised explosive devices in Northern Ireland and it can also be used in the production of a primary high explosive which has been used in the explosive fill of improvised detonators in Northern Ireland. The appellant was arrested under section 41 of the Terrorism Act 2000 and made no reply after caution.

[4] The appellant made no reply when interviewed a number of times by police on 8 August 2013 but, at the end of the final interview, his solicitor made a statement, namely that the appellant wanted to state that he was not a member of any illegal organisation. The learned trial judge was satisfied on the basis of the evidence before him that the appellant was sympathetic to Republican terrorist groups and that the items were being transported for such a group. Given the quantity of mercury seized together with the ammunition, the judge considered that it was a serious case in which a sentence range of 8 to 10 years was appropriate.

[5] As regards the motorcycle, it was a powerful model which the court considered would be of great use to someone carrying out the role the appellant had admitted to carrying out. The judge was satisfied that the bike had been lawfully seized and that the appellant had intended to use and had used the vehicle to assist in the commission of the offence. An issue was raised by the defence about the ownership of the motorcycle. The court was provided with a purchase contract and hire purchase agreement which indicated that it was the appellant's brother who had purchased the motorcycle on hire purchase terms on 25 January 2012 for £15000. The appellant's brother had made all payments under the hire purchase agreement to BMW Financial Services (GB) Ltd ("the finance company") and he had continued to do so after the motorcycle was seized. He had bought the bike because of his interest in motorcycle racing and his sponsorship of the applicant and his racing team. He himself could not ride the bike and did not have the appropriate licence to do so.

[6] The court heard evidence that it was the appellant who had used and kept the motorcycle. The motorcycle was first registered on 10 February 2012 and the appellant was the registered keeper. The appellant paid the insurance and road tax. When the motorcycle was seized, the appellant's partner completed and registered a statutory off road notification on his behalf. The appellant owned the appropriate leather clothing and equipment to use the bike. The learned judge found that:

> "Effectively, out of natural love and affection, he bought a bike for his brother to use it as he saw fit - to ride in races and for personal reasons. It was a generous act on his part … this was not some off-the-cuff or short-term loan; this was effectively a granting to his brother out of natural love and affection full rights of ownership of the vehicle. … In this case … the defendant clearly exercised all the rights of an owner apart from the fact that he did not pay the monthly payments. … the bike was essentially purchased for him and he had used it exclusively over a very substantial period of time."

[7] The learned judge said that he was required under Article 11(2) of the 1994 Order to exercise his discretion by having regard to the value of the property to be seized and the likely financial and other effects on the offender of the making of the order. The judge was satisfied that this was not a case in which the bike had been borrowed for a brief time but, rather, the appellant had clearly exercised all the rights of an owner apart from the fact that he had not made the monthly payments. The appellant was the owner in all but name by any test that could be applied. The judge considered that the financial effect on the appellant was that he had not had to pay one penny piece towards the purchase of the bike. He had paid the insurance and road tax, and when released from prison would have to find the funds to purchase another bike, but that was really no different from the person who uses his own car to transport drugs or explosives. It was a risk that one takes when committing a serious crime. Thus the judge considered it appropriate to make the forfeiture order.

Legislation

[8] Article 11 of the 1994 Order states:

> ***"Forfeiture (Arts.11-13)***
>
> *Power to deprive offenders of property used, or intended for use, for purposes of crime*
>
> 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.
>
> (2) In considering whether to make such an order in respect of any property a court shall have regard-
>
> (a) to the value of the property; and
> (b) to the likely financial and other effects on the offender of the making of the order (taken together

with any other order that the court contemplates making).

…..

(5) Facilitating the commission of an offence shall be taken for the purposes of this Article to include the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection, and references in this Article to an offence punishable with imprisonment shall be construed without regard to any prohibition or restriction imposed by or under any statutory provision on the imprisonment of young offenders.

(6) An order under this Article shall operate to deprive the offender of his rights, if any, in the property to which it relates, and the property shall (if not already in their possession) be taken into the possession of the police.

(7)(8)(8A)(8B) (repealed 1998 c.32)

(9) In this Article "relevant provision" means a provision contained in an Act or Order mentioned in the definition of "relevant provision" in Article 2(2) being such an Act or Order passed or made before this Order is made."

[9] Regulation 5 of the Police (Property) Regulations (Northern Ireland) 1997/448 provides:

"5.— Disposal of property lawfully seized from convicted offender

(1) This regulation applies to property which is in the possession of the police by virtue of Article 11 of the Order and in respect of which no application by a claimant has been made within six months of the making of the order under that Article or no such application has succeeded.

(2) Subject to section 2(3) of the Act, property to which this regulation applies shall not be disposed of until the expiration of six months from the date on which the order in respect of the property was made under Article 11 of the Order on the conviction of an offender or, if an application by a claimant of the property has been made within that period or the offender has appealed against the conviction or sentence, until that application or appeal has been determined."

[10] Article 74(3) and Schedule 6 of the Police (Northern Ireland) Act 1998 repealed article 11(7) to (8B) of the 1994 Order. Article 11(7) provided that the Police (Property) Act 1897 applied, subject to the modification provisions set out in (a) and (b). The repeal of Article 11 raises the question of the extent to which, if at all, the 1897 Act applies when forfeiture orders are made. Ms Quinlivan QC who appears for the appellant argued that the repeal of subsection 7 meant that the 1897 Act applied without the statutory modifications contained in article 11(7) (a) and (b). She contended that there was no reason to conclude that the 1897 Act does not apply unmodified to property seized by the police where the defendant is ultimately convicted. The Crown did not present any contradictory argument. We shall assume that Ms Quinlivan's point is a good one but it is unnecessary to come to a concluded view on the question since the appeal must be allowed for other reasons as set out below.

The relevant authorities

[11] It does not appear that the learned judge was referred to the relevant authorities as he should have been. It was incumbent in particular on the prosecution to ensure that the trial judge was referred to the relevant case law without which the court was liable to fall into error. In fact there are a number of highly relevant cases laying down the principles to be applied by the court when considering the making of a forfeiture order.

[12] In R v Troth (1980) 71 Cr App R in which the subject property belonged to a partnership Wein J said:

> "We do not say it is impossible for the Court to make an order in a case such as this nor do we say that it is impossible for the police to take proper steps under the Police (Property) Act 1897. But clearly in the case of a partnership it leads to difficulties which may be so onerous as to make it not worth while making the order in the first instance. This case is such a case and we take the view that the order should not have been made. …. Just as in cases where compensation orders are made this Court has repeatedly said that orders ought not to be made unless they are simple orders and there

> are no complicating factors. We consider that forfeiture orders ought not to be made except in simple, uncomplicated cases. If a person has an interest in an object which is not free from encumbrances then difficulties are likely to arise. …"

[13] In R v Kearney [2011] 2 Cr App R (S) 608 in which the subject property was purchased by hire purchase agreement under which a sum was still outstanding Spencer J said:

> "16 … However, as events have proved, the better course would have been to decline to make such an order because of the complications of the finance company's interest, the uncertainty as to the value of the appellant's interest and the uncertainty, therefore, of the practicality of realising that interest. …"

In O'Leary International Ltd v Chief Constable of North Wales Police [2012] EWHC 1516 (Admin) Sir John Thomas P. provided a detailed review of the case law and approved the approach adopted in R v Kearney.

[14] In R v Highbury Corner Stipendiary Magistrate Ex p de Matteo (1991) 92 Cr. App. R. 263 the defendant was ordered to forfeit his car. The magistrate made no enquiry into the likely financial and other effects of the order prior to imposing the order. The defendant applied for judicial review on the ground that the magistrate had no power to make such an order in the circumstances of the case. Allowing the application, the Divisional Court indicated that because the magistrate had made no enquiry prior to sentencing as to the likely financial and other effects that the order was likely to have on the defendant the order would be quashed.

Submissions

[15] The appellant appeals on the basis that the learned judge made an error of law or principle or a misapprehension about fact and that the sentence imposed was manifestly excessive. Ms Quinlivan QC on behalf of the appellant submitted that forfeiture orders should not be made except in simple, uncomplicated cases, and not where disputes as to title and proprietary interests arise. Complications exist in this case as to the

proprietary interests of the appellant's brother and the value, if any, of the appellant's interest in the motorcycle. She submitted that the learned judge erred in finding that the Crown had discharged the burden of proof in establishing that the appellant had a proprietary interest in the motorcycle such that an order under Article 11 of the 1994 Order could be made. Further, she submitted that the learned judge was wrong to determine that this case was no different from a case in which an offender uses his own vehicle to transport explosives because the appellant effectively was granted and had exercised full rights of ownership. The appellant also submitted that appropriate weight was not given to factors surrounding the ownership and use of the motorcycle, including the fact that the appellant's brother retains a controlling interest in it and the financial implications of the forfeiture order on both the appellant and his brother.

[16] In her written submissions submitted to the court after the conclusion of the oral hearing Ms McKay on behalf of the Crown made clear to the court that the Crown did not seek to uphold the forfeiture order. She accepted that Crown counsel had not been made aware of a PPS policy guidance document which made clear that forfeiture applications should only be made in clear and simple cases where there were no third property rights or incumbrances.

Conclusions

[17] In this case there were three parties with differing interests in the motor cycle. Under the hire purchase agreement the legal title to the vehicle remained vested in the finance company until the moneys due and payable under the HP agreement were discharged. The appellant's brother was the hirer of the vehicle with an entitlement to possession and control of the vehicle while he maintained payments and who would become outright owner of the vehicle on completion of payments due under the HP agreement. Once a third of the payments had been paid the finance company could only recover possession of the vehicle pursuant to an order of the court. The brother had made the vehicle available to his brother and he continued to make the payments. The brother, however, could not make a gift of the vehicle so as to pass title to the appellant in the light of the principle *nemo dat quod non habet*. The appellant's interest was that of a possessory bailee who could assert no title as against the finance company. Both the brother's interest and the possessory interest of the appellant in the vehicle were subject to the finance company's prior interest and legal title, even if that legal title was qualified by the need to obtain a court order

to recover the vehicle after one third of the moneys due had been paid. This case falls within the principles enunciated in Troth and Kearney. Because of the complications of the finance company's interest, the fact that the appellant had no title to or recoverable interest in the vehicle and the uncertainty of the practicality of realising the property a forfeiture order should not have been made. Indeed the vehicle would be unsellable in the absence of a release by the finance company of its interest in the vehicle. The seizure of the vehicle de facto deprived the appellant of the use of the vehicle which he had used for criminal activity and he will be unable to use the vehicle during his custodial sentence. The continued or future use of the vehicle for criminal activity has thus been effectively frustrated. The finance company's interest is protected by the terms of the HP agreement. The return of the vehicle to the brother who remains subject to the HP agreement does not in fact give rise to any injustice. The Crown does not assert that the brother had had criminal involvement in or knowledge of the appellant's criminal use of the vehicle.

[18] Accordingly, we must allow the appeal and quash the forfeiture order. We will hear counsel on the question of costs.