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No. 2018/05083/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 12th June 2019

B e f o r e:

MR JUSTICE SPENCER

and

SIR ALAN WILKIE

_____

R E G I N A

- v -

RICHARD PAUL BAISON

_____

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Mr D Ackerley appeared on behalf of the Appellant

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J U D G M E N T
(Approved)

_____

Wednesday 12th June 2019

MR JUSTICE SPENCER:

1. This is an appeal against sentence brought with the leave of the single judge. It concerns a substantial order for costs made at the conclusion of confiscation proceedings in the Crown Court. It was an order which the appellant had no prospect of paying.

2. It is unnecessary to rehearse the background in any great detail. Suffice it to say that the appellant and a co-accused, Peter Ogg, were jointly charged with offences under the Environmental Protection Act 1990 in respect of the disposal of waste, causing pollution of the River Dee at Saltney, near Chester, just over the border into Flintshire. The prosecution was brought by National Resources (Wales), previously the Environment Agency for Wales.

3. The appellant stood trial with his co-accused in the Crown Court at Caernarfon in September 2015. On day nine of the trial, the jury were discharged from returning a verdict on the appellant because there had been a serious deterioration in his mental health. The trial proceeded against his co-accused, who was convicted.

4. One year later, in September 2016, the appellant's case was listed for mention and he pleaded guilty to the offences in question. On 31st October 2016, he was sentenced to a term of eleven months' imprisonment, suspended for eighteen months, and disqualified from acting as a company director for a period of seven years. On that occasion, the judge was informed that there would be an application for prosecution costs; but the question of costs was adjourned for determination at the conclusion of the confiscation proceedings against both defendants, when the details of their respective financial positions would be before the court.

5. The confiscation proceedings were listed in the Crown Court at Caernarfon nearly a year later, over a period of two days, 16th and 17th August 2017, before His Honour Judge Huw Rees. The first day was given over to the case of the co-defendant, Peter Ogg. We have a transcript of the relevant part of the hearing. The day was spent in lengthy negotiations. It was eventually agreed that the benefit figure in his case was £694,481.77. It was agreed that his available assets exceeded that sum. A confiscation order was, therefore, made for that amount.

6. The appellant and his counsel (Mr Ackerley) were present in court during the hearing that day. Prosecuting counsel (Mr Stables), having informed the judge of the agreement reached between the prosecution and those representing Mr Ogg, made an application for prosecution costs against Mr Ogg. The total costs of the case, including the investigation, were £116,377. Half of that figure, £58,189, was sought against Mr Ogg. The transcript reveals that Mr Ogg had the means to pay that sum of costs in addition to the confiscation order. In his statement of means, he had declared that his available assets were valued at between four and seven million euros. His assets were in the Republic of Ireland at the time. The judge said:

> "On the basis of the evidence before me, I see no reasons why Mr Ogg should not pay the costs in the sum of £58,189."

The judge allowed three months to pay, the same period as for the confiscation order.

7. By the time Mr Ogg's case had been dealt with that day, it was after five o'clock. The judge took the view that it was better to return to the appellant's case the following morning, as two days had been set aside for the confiscation hearing. At that stage there was some talk of an application by the appellant to vacate his guilty pleas, although how that could ever have been proposed escapes us, bearing in mind that he had already been sentenced for the offences.

8. The next day, 17th August 2017, the judge was eventually presented with an agreed position for the appellant in relation to the confiscation order. We have only a brief transcript of the hearing at 12.28pm. However, the case log reveals that the earlier part of the morning must have been taken up with negotiations between prosecution and defence. In short, the same benefit figure was agreed as for Mr Ogg, £694,481.77. The available amount in the appellant's case, however, fell far short of the benefit figure. The amount of the appellant's realisable and available assets was agreed at £433,500.

9. The relevant part of the transcript, obtained by the Registrar, contains only the judge's final words in making the order. However, through the efficient assistance of the Registrar's staff, we have been provided with the digital recording of the relevant part of the proceedings which led up to the passage which has been transcribed. We have carefully listened ourselves to the recording. The relevant part is as follows:

Mr Stables, counsel for the prosecution, explains to the judge the figures which have been agreed in relation to benefit and available assets

> "MR STABLES: … the total is £433,500. That reflects what the Crown believes to be the full extent of this defendant's realisable or available assets at the date of this order."

Mr Stables then invited the judge, by agreement, to declare the benefit figure and the figure for available assets. There is discussion of time for payment (three months) and the period in default is set at four years' imprisonment. Only then is the question of costs raised. The transcript reads as follows:

> "MR STABLES: The last thing that I mention is this, your Honour. It is the question of coasts.
>
> JUDGE: Yes.

> MR STABLES: Half of the costs comes to £58,189, but we recognise that the order reflects the full extent of the defendant's assets.
>
> JUDGE: Thank you very much. Well, this is an order that I can make happily by consent. What do you want to say about the costs?
>
> MR ACKERLEY: (Pause) Just that I am content for the order to be made, your Honour.
>
> JUDGE: The parties are to be congratulated for their very hard work, and this brings the extended proceedings to an end as far as the court is concerned. But, by consent, I declare the total benefit figure to be £694,481.77; the available amount is £433,500. There will be a … confiscation order in that amount of £433,500. It will be paid in three months, which is the maximum period which can be allowed. In default of payment, there will be a sentence of imprisonment of four years, and the order for costs in the same sum as yesterday will follow."

By "the same sum as yesterday", the judge meant £58,189. That is the sum set out in the court record as the amount of the costs ordered.

10. On the face of it, Mr Ackerley, who appears before us today for the appellant, seems to have consented to the order for costs on behalf of the appellant, as well as to have consented to the confiscation order. However, when provided with a copy of the full transcript, as we have read it, Mr Ackerley recalls that when the judge asked him about costs, he was busy taking instructions from the appellant, who was sitting behind him, in relation to another issue which the appellant was insisting Mr Ackerley should raise, and which he did indeed raise with the judge immediately thereafter, relating to the value of some pension policies in the appellant's wife's name and the potential third-party claim she would be making. Mr Ackerley assures us that there was never any agreement between himself and Mr Stables that any costs would or could be paid by the appellant.

11. The very full and helpful respondent's notice was settled by Mr Stables (prosecuting counsel). It suggests that the costs order was agreed. Whether or not it was agreed does not in the end matter, it seems to us. We did not require the prosecution to attend today's hearing, having regard to the costs already expended on this case, although Mr Stables had expressed his willingness to attend and assist the court if requested.

12. The simple question for us is whether the order was properly made. It now appears that it was not properly made, because the appellant had no assets or income from which the order could be paid. The position in his case was very different from that of his co-defendant, Mr Ogg, whose realisable assets well exceeded the amount of the confiscation order, as we have already explained.

13. That was not the end of the proceedings. Six months later, in February 2018, there was an application by the appellant to vary the confiscation order under the terms of section 23 of the Proceeds of Crime Act 2002. As had been anticipated, a further accountant's report provided a more detailed and precise analysis of various pension policies held by the appellant and his wife. The upshot was that there was a further hearing on 16th April 2018, before the same Judge, His Honour Judge Huw Rees, this time at Mold Crown Court. Following lengthy discussions between the parties, agreement was reached and a variation of the confiscation order was made by consent. The appellant's available assets were now declared to be £306,096.81, nearly £130,000 less than the figure previously agreed. Again, we have a transcript of the relevant part of that hearing. Nothing at all was said about the costs order, which remained unpaid.

14. The present appeal was lodged in October 2018, some fourteen months after the costs order which is the subject of the appeal was made. The single judge granted the necessary extension of time and granted leave to appeal. The grounds of appeal assert that the appellant does not and

never had the means to pay the costs order. His assets had all gone to pay the confiscation order. His income is merely his state pension of £783 per month, plus a very modest occupational pension of £82 per month.

15. The short point in the appeal is that the costs order was not properly made because, by definition, the appellant did not have the means to pay it within a reasonable time, or at all. The leading case is *R v Szrajber* (1994) 15 Cr App R(S) 821. There it was held that a court which imposes a confiscation order in an amount equal to the whole of the defendant's assets should not, in addition, make an order for the payment of the costs of the prosecution. In that case, the amount of the defendant's realisable assets was some £407,000, whereas the benefit figure was £524,000. The court said:

> "… it is plain from the sentencing remarks of the judge that the judge did not make any inquiry as to the ability of this appellant to meet an order for costs …
> …
> It is also apparent from the transcript that we have that nobody referred the judge at that time to the principle which is quite plainly established, namely that a court should not order a defendant to pay costs unless satisfied that the defendant has the means to pay those costs within a reasonable period of time. We do not think it necessary to refer to the individual authorities which establish that proposition; it is trite law."

16. In the respondent's notice, the prosecution accepted that the approach in *Szrajber* may be applicable in the present case, in that the entirety of the appellant's available assets had gone in satisfaction of the confiscation order, leaving nothing from which he could be expected to meet the order for costs. The prosecution have never actively opposed the appeal. The respondent's notice asserted in addition, however, that "ultimately, the extent of any order for prosecution costs, together with the appellant's ability to pay such costs, are matters for the assessment of the court, having heard the submissions advanced on behalf of the appellant". On its face, that

seemed to be an invitation to this court to make its own assessment of what the appellant could or should pay by way of prosecution costs, despite the fact that his realisable assets were all taken up in paying the confiscation order, which was duly paid in full.

17. That is not an exercise upon which this court is permitted to embark. So much was established in *R v Coleman* [2016] EWCA Crim 1665, [2017] 4 WLR 29. That was a case where the defendant had been ordered to pay £16,000 towards the costs of the prosecution, in addition to a confiscation order of £326,000. Subsequently, the defendant applied to the High Court for a Certificate of Inadequacy because his realisable assets, consisting of interests in two companies and hotels, had proved insufficient to pay off secured creditors. A certificate of inadequacy was granted by the High Court, and by consent the confiscation order was varied to a nominal £1 order. The defendant then sought to appeal to this court against the order for costs on the basis that he had no funds to pay it. By contrast, at the time of the original hearing he had asserted that he had available assets sufficient to meet both the confiscation order and the costs. This court refused to entertain such an appeal. In giving the judgment of the court, Davis LJ said:

> "19. … Shortly put, given the circumstances we simply decline to go down this particular road on which the appellant has set himself. In our view, this matter of payment of the outstanding costs as ordered to be paid by the Crown Court as long ago as 2003 should properly be dealt with in the magistrates' court. The Court of Appeal (Criminal Division) simply is not the appropriate forum for entertaining this dispute.
>
> …
>
> 23. … It is the magistrates who should be deciding this case and dealing with the issues arising. This court is not well equipped, or indeed appropriate, to engage in fact finding concerning the means and assets of particular debtors. Moreover, issues often arise as to the ability to pay by instalments and so on: with regular review thereafter. Again, such matters are entirely appropriate for the magistrates' court; entirely inappropriate for

> the Court of Appeal comprising two or three judges sitting in London.
>
> …
>
> 25. At the time of sentence the sentencing judge had correctly directed himself, as is evident from his sentencing remarks. The defendant had not sought to contend or adduce evidence at the time that he was unable to pay the costs within 18 months. In fact, he was effectively inviting such an order. The fact that thereafter, as the defendant says, circumstances have changed so that he cannot pay as anticipated does not get away from the fact that the order was properly made in the first place at the time of sentence.
>
> 26. Given that the order was properly made at the time, it is difficult to see on what basis this court should, even accepting that in theory it can, now interfere."

The court distinguished the decision in *Szrajber* on the basis that there the order was not properly made, whereas in the instant case it was. Furthermore, in *Coleman* the court expressly disapproved the approach by another constitution of this court in *R v Richards* [2014] EWCA Crim 1302, where the court had been prepared to embark upon a re-assessment of the amount the defendant should pay, where his available means had diminished since the order was made. At [35] in *Coleman* Davis LJ set out the relevant principle in very clear terms:

> " … We consider that, where once a costs order has been properly made in the Crown Court and a subsequent alleged change in the circumstances occurs which allegedly impacts adversely on a defendant's ability to pay the costs, then the proper forum under the statutory scheme is the magistrates' court; and it is to that court that such points should be addressed, relying to the extent necessary on any further evidence which has emerged as to change of circumstances."

18. In advance of today's hearing, we caused the authority of *Coleman* to be drawn to the attention of counsel. We are grateful for the additional written submissions of Mr Ackerley and Mr Stables. They appear to be in agreement that *Coleman* can be distinguished from the present

case because in *Coleman* the costs order had been properly made in the first place; whereas here, if we agree with Mr Ackerley's submission that there was never any prospect of paying the order for costs and so the judge should not have made it, the costs order had not been properly made.

19. This is an unusual and, we hope, unique situation. It is most unfortunate that Judge Huw Rees was not alerted by either counsel to the case of *Szrajber*. Had he been, we are sure that he would never have made the order without careful enquiry to establish that there were additional funds or some additional income available to the appellant, from which the costs could be paid. Had there been additional assets, of course, they would have featured in the schedule of available assets increasing the amount of the confiscation order.

20. We have considered whether the fact that, on the face of it, the appellant consented to pay the costs, if that was truly the position, should prevent the court from going behind that consent. We are conscious that this court has made it clear in relation to concessions and agreements made in confiscation proceedings that normally the court will not allow a defendant to retract his or her consent, unless it can be shown that the process as a whole was unfair: see, for example, *R v Hirani* [2008] EWCA Crim 1463.

21.We are satisfied, however, that this is rather a different situation. First, we are not confident that the appellant did give any informed consent to the order for costs. All the circumstances point to the contrary. It may well be that Mr Ackerley and the judge were at cross-purposes. Mr Ackerley was confirming his client's agreement to the confiscation order generally, but never intended to confirm that his client was agreeing to pay £58,000 costs as well. How could the appellant sensibly do so with no additional means to pay?

22. We think that Mr Stables properly qualified any application for costs he was making by

saying "but we recognise that the order reflects the full extent of the defendant's assets". He no doubt intended to convey the message to the judge that there was in reality no basis to make a costs order. It would perhaps have been better if Mr Stables had gone further and explained that on the authority of *Szrajber* there could be no order for costs unless the appellant had some other means to pay: for example, from his income.

23. Equally, as soon as Mr Ackerley realised that the judge was making an order for costs which the appellant could not conceivably pay, he should have pointed out the judge's error. Mr Ackerley has explained to us in the course of his oral submissions this morning, however, that he did not realise on the day, or indeed for some time afterwards, that an order for costs had been made. He had been distracted by taking instructions from the appellant at the vital moment when the judge had addressed him, and it was only much later that he discovered the error that had been made, outside the period for rectifying the error under the "slip rule".

24. Against this background, we well understand how the judge was inadvertently misled into believing that he could properly make the order for costs that he did.

25. The lesson which this case reinforces is that before a judge in the Crown Court makes an order for costs against a defendant in any circumstances – and particularly in conjunction with a confiscation order – the judge must be satisfied that the defendant has the means to pay those costs within a reasonable time. The mere fact that the judge is told that the costs order is agreed will always be relevant, but it does not absolve the court from ensuring that the costs order can properly and lawfully be made.

26. For all these reasons we are driven to conclude that the appeal must succeed. The order for costs is quashed. There is no basis upon which this court could substitute a reduced order for

costs. At the time the order was made, the appellant, by definition, did not have the means to pay it.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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