Neutral Citation Number: [2011] EWCA Crim 1198

Case No: 201002223C5

**IN THE HIGH COURT OF JUSTICE**
**COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM LEICESTER CROWN COURT**
**HIS HONOUR JUDGE HAMMOND**
**T20050088**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2011

**Before :**

**LORD JUSTICE GROSS**
**MR JUSTICE HEDLEY**
and
**MRS JUSTICE NICOLA DAVIES**

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**Between :**

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| **Jayesh Jobanputra Bhanji** | **Appellant** |
| **- and -** | |
| **Regina** | **Respondent** |

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Rudi Fortson Q.C. (instructed by David Phillips & Partners) for the Appellant
Malcolm Morse (instructed by The Crown Prosecution Service) for the Crown

Hearing dates : 25th March 2011

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# Approved Judgment

**Mr. Justice Hedley :**

1. The question in this case is whether it is an abuse of process for the Crown Court to conduct a hearing in respect of a prosecution application for a confiscation order under the Proceeds of Crime Act 2002 at a time then the Defendant by reason of chronic illness is unable to attend or give instructions or otherwise effectively participate in the proceedings. This is an appeal, with the leave of the single judge, against an order made on the 17th July 2009 by His Honour Judge Hammond sitting in the Crown Court at Leicester whereby a confiscation order was made against the appellant in the sum of £1,202,815.90 with a sentence of 3 years imprisonment in default.

2. On 24th February 2006 the appellant was convicted of an offence in relation to the smuggling of cigarettes and the evasion of duty in a sum exceeding £1m. He was sentenced to 3 years imprisonment. On 10th October 2006 that sentence was reduced by this Court to one of 9 months imprisonment which permitted immediate release. The sole reason given was the medical evidence which convinced this Court that this was "a case in which exceptional mercy should be shown."

3. The prosecution applied for a confiscation order thus triggering the procedure under the Proceeds of Crime Act. It was common ground that the appellant's benefit for the purposes of POCA was £1,202,815.90 by way of a pecuniary advantage.

4. The issue in dispute was the 'available amount' i.e. the appellant's relevant assets. In the end the judge determined those at £1,272,495: hence the confiscation order in fact made. At a hearing before the learned judge in December 2008, counsel then instructed on behalf of the applicant applied to stay the confiscation proceedings. The learned judge declined to do so. Although the appeal is in form an appeal against his order of 17th July 2009, it is in substance against this ruling made on 17th December 2008. It was effectively accepted at both hearings that the appellant's condition would not improve and thus the earlier ruling effectively governed the substantive hearing.

5. In these proceedings the prosecution have not sought to dispute the proposition that as from December 2008 (at the latest) the appellant's medical condition did in fact prevent his attendance at any hearing, prevent his giving evidence and prevent his effective personal participation in these proceedings. And so the question posed at the outset of the judgment has arisen.

6. There was little if anything between the parties as to the substantive law to be applied. Considerable assistance in this regard is to be derived from the judgment of Elias LJ in GAVIN & TASIE [2010] EWCA CRIM 2727 [2011] CRIM L.R. 239 especially at paragraphs 9-19. Under POCA these proceedings are mandatory. They are 'criminal proceedings' and hence within Art. 6.1 ECHR, but because (as is settled law) they are part of the sentencing process and do not involve the appellant being "charged with a criminal offence" Art. 6.2 ECHR does not apply. It is axiomatic that any defendant should have the right (should he so wish) to attend and participate in confiscation proceedings, the dictates of a fair trial would ordinarily so require. On the other hand the court retains a discretion to proceed in his absence. POCA does indeed (esp. Section 27) make specific provision for absconders - and it is common ground that proceedings abate if a defendant were to die before an order in made. On the other hand, as Lord Bingham said in R -v- JONES [2003] 1 AC 1 in respect of a trial -

> "If the absence of the defendant is attributable to involuntary illness or incapacity, it would very rarely, if ever, be right to exercise a discretion in favour of commencing a trial at any rate unless the defendant has been represented and asks that the trial should begin."

It is accepted that the court retains a discretion to proceed in the absence of the defendant but, submits Mr. Rudi Fortson Q.C. on behalf of the appellant, it should not have exercised it to continue in these circumstances.

7. This was not a criminal trial to which the presumption of innocence applied but rather was part of the sentencing process in respect of a convicted defendant. Thus the position is different to that described above by Lord Bingham. On the other hand it is also the fact that the issues related to the appellant's own assets and that he bore the burden of proof in establishing what they were. It is a reasonable conclusion to draw from the applicable law that the question is: was the determination made against this appellant the product of a fair hearing?

8. This point based on chronic illness, although anticipated, has not called for determination by this Court before. GAVIN & TASIE mark points either side of the line: compulsory deportation renders proceedings unfair whereas participation in a voluntary repatriation scheme does not. The resolution in this case, however, is not to be found in a search for equivalent cases and their outcome but rather in consideration of the question posed: did the appellant have a fair hearing?

9. In the hearing of July 2009 the appellant was not able to participate. He was, however, represented by manifestly competent counsel who did all that could be expected of her; indeed, according to Mr Fortson, more than that. It follows that the appellant could not give evidence but those who were the other party to the main transactions could and did give evidence as did the appellant's wife. Indeed the judge exercised his trial management powers so as to ensure that all that could be done to advance the appellant's case was done. Mr. Fortson does not seek to gainsay that; his case is that in these circumstances the non-participation of the appellant was simply fatal to fairness.

10. Thus it is necessary to look more closely at the learned judge's ruling of 17th December 2008 whereby he authorised proceeding notwithstanding the appellant's inevitable absence. The judge recounts the history of delay over two years whilst the outcome of the decision in the House of Lords in MAY was awaited. In the end (see pp 35D - 36H) the judge's decision to refuse a stay was founded on the following -

    a) Apparently compelling evidence of dissipation of assets specifically to avoid a confiscation order;

    b) Failure to provide information whilst the appellant was able to do as he would have been in the time between May 2006 (date of sentence) and August 2008;

    c) The failure was both that of the appellant and his advisors;

    d) His specific failure to produce (as required) a statement which would then have been admitted as hearsay;

e) The absence of any misconduct by the prosecution;

f) As the judge put it:

> "Should Mr. Bhanji be allowed now to hide behind his solicitors' inadequate preparation or should the Crown be prejudiced by their conduct?"

The Judge did, however, adjourn the hearing to allow for further preparation: hence the final hearing in July.

11. Mr. Fortson forcefully submits that it is wrong to allow a chronically sick defendant to be saddled with the consequences of professional shortcomings. That is as may be but it overlooks the judge's finding (which he was entitled on the evidence to make) that the appellant too bore responsibility for the inactivity. Further we were told that the appellant had apparently been well enough to travel to Addis Ababa – at a time when he could have been providing information or a statement for use in the proceedings – albeit that he was taken ill when there.

12. . We do not think that individual criticisms of the judge's approach to this or that matter amount to very much in this case. The key point is the impact of the appellant's absence on the fairness of the July hearing.

13. Mr. Fortson was at one stage apparently tempted to argue that the involuntary absence of the appellant was sufficient to sustain an abuse of process submission given that he bore no responsibility for that absence. However, the law is clear (as Mr. Fortson recognised) that the court retains a discretion to continue despite the appellant's involuntary absence subject to the overriding requirement of fairness. The fact of involuntary absence is, however, a significant factor in that assessment of fairness.

14. It follows that it is not possible to assert that involuntary absence is inevitably fatal to fairness. In GAVIN & TASIE that particular involuntary absence was found to be fatal but even there the court could contemplate circumstances in which it might not be e.g. participation through a video-link. However, any attempt to elevate the effect of involuntary absence into a consistent proposition is, at least in the sentencing context, to go beyond what was contemplated by the House of Lords in JONES.

15. On the other hand, and this is why we have been much exercised over this case, involuntary absence must be a potent factor in the assessment of fairness and may on the particular facts of a case have a decisive impact. The essence of Mr. Fortson's case is that that is the impact it should have here for this absence is truly involuntary, inculpable and profound in its consequences. All this must of course be considered in the context of the judge's findings, the fact that the appellant was a convicted person and the court was dealing with a part of the process of sentence, the mandatory nature of the proceedings, the fact that the prosecution could not use the civil recovery proceedings under POCA and that the order could not in this case be enforced by the default sentence; all these matters comprise the considerations of fairness in this case. Fairness, of course, involves fairness both to the appellant and to the Crown.

16. In the end we have concluded that the judge was entitled to conclude as he did. In particular the judge concluded that the appellant bore some early responsibility for the

lack of information and particularly a statement but that his case could have been (and was) sufficiently before the court for a proper assessment of it to be made. Those were views sufficiently rooted in the evidence to require us to accept them as part of the facts of the case. The interests of justice required a determination and the proceedings, whilst inevitably falling short of the desired, did not, for the reasons we have endeavoured to articulate, transgress the boundary of fairness. The appellant, though truly involuntarily absent, was not blameless for the state of the evidence in December 2008 nor was he entitled to shelter behind such legal shortcomings as were established. There could be (and was) adduced relevant evidence on his behalf which in the end the judge rejected as, on that evidence, he was entitled to do. We so conclude notwithstanding our recognition of the incidence of the burden of proof and the fact that the appellant was, no doubt, the best able to explain his own financial affairs. In our judgment the question to be answered is not Mr. Fortson's (was there a real potential for unfairness?) but rather: did the appellant have a hearing that in all the circumstances could properly be described as fair? In our judgment he did.

17. For those reasons this appeal must be dismissed.