

Judgments

## Steed v R

*Sentence - Confiscation order - Assumptions to be made in case of criminal lifestyle - Assumption that any property held by defendant at any time after date of conviction obtained as result of general conduct - Whether assumption incorrect or causing serious injustice - Proceeds of Crime Act 2002, s 10*

[2011] EWCA Crim 75, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

### CA, CRIMINAL DIVISION

**MOSES LJ, KENNETH PARKER J, JUDGE ELGAN EDWARDS**

**2 DECEMBER 2010, 1 FEBRUARY 2011**

**1 FEBRUARY 2011**

A Mitchell QC and S Hellman for the Appellant/Defendant

R Tedd QC and M Mather-Lees for the Respondent

Keppe Rofer; Crown Prosecution Service

### **MOSES LJ:**

(reading the judgment of the court)

**[1]** On 9 October 2009 at Cardiff Crown Court HH Judge Richards made a confiscation order against this Appellant under the Proceeds of Crime Act 2002 ("POCA") in the sum of £707,200, and, in default, ordered four years' imprisonment. The order followed a plea of guilty on 23 April 2007 to an offence of cheating the public revenue by failing to submit accounts for tax. We shall need to identify the particular offence when considering the arguments raised against the order.

**[2]** The Judge ruled that the Appellant had a "criminal lifestyle" within the meaning of POCA. He then applied statutory assumptions and concluded that property held by the Defendant and expenditure incurred by him had been obtained as a result of the Appellant's criminal conduct. Applying those assumptions, the Judge concluded that the Appellant had benefited in the sum of £863,303.04.

**[3]** The essential arguments advanced by Mr Mitchell QC on behalf of the Appellant are, first, that the Judge was not entitled to conclude that the Appellant had a criminal lifestyle because he had not obtained any benefit from the offence or, if he did benefit, that benefit was less than £5,000 and the offence to which he pleaded guilty was not committed over a period of "at least" six months.

**[4]** The second ground of appeal is that if the Appellant had a criminal lifestyle he had either demonstrated that the assumptions as to the source of property or expenditure were incorrect or that there would be a serious risk of injustice if the assumptions were made.

**[5]** The court was required to decide whether the Defendant had a criminal lifestyle (s 6(4)(a)). It was accepted that the Defendant had not benefited from his general criminal conduct (s 6(4)(b)). Accordingly,

the court was required to decide whether the Defendant had benefited from his particular criminal conduct (s 6(4)(c)).

**[6]** In order to determine whether the Defendant had benefited from his particular criminal conduct, the court was required to decide whether the offence to which he had pleaded guilty had been committed over a period of at least six months and whether the Defendant had benefited from that conduct (s 75(2)(c)). The prosecution was required to prove that the Defendant obtained a benefit from that conduct of not less than £5,000 (s 75(4)).

**[7]** In his ruling dated 17 September 2009 the Judge concluded that the conditions specified in s 75(2)(c) and s 75(4) were satisfied.

**[8]** The Appellant now contends that the Judge erred in concluding that the Defendant had obtained any benefit from the conduct which constituted the offence. This requires analysis of the offence to which he pleaded guilty. The Count was drafted and added to the indictment on 23 April 2007 on the prosecution agreeing that they would offer no evidence on the other three Counts. The new Count read as follows:

*"STATEMENT OF OFFENCE*

Failing to submit accounts for tax due tending to prejudice Her Majesty the Queen and The Revenue with intent to defraud Her Majesty the Queen contrary to common Law.

*PARTICULARS OF OFFENCE*

GARETH EDWARD STEED on diverse (*sic*) dates between 1 April 2003 and 31 December 2004 did cheat Her Majesty the Queen and the Public Revenue in that you did fail to submit [and/or did honestly fail to make accurate] declarations of tax due including the proceeds derived from the sale of vehicles, furniture and tools together with that from building work [where the proceeds derived from such work exceeds but is not limited to £32,500]."

The prosecution say that the words in square brackets were deleted. In order to make sense of the Appellant's plea of guilty it is plain that they must have been.

**[9]** The Appellant's first contention is that he derived no benefit at all from the offence set out in that single Count. All that was alleged, so he contends, is that he failed to submit declarations of tax due. That failure, so it is contended, constituted a breach of s 7 of the Taxes Management Act 1970. It is an obligation limited to bringing notice to an officer of the Board of Inland Revenue that a person chargeable to income tax in any year of assessment is so chargeable. Section 7 of the TMA provides:

"(1) Every person who -

(a) is chargeable to income tax . . . for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return of that year of his total income and chargeable gains.

shall . . . within six months from the end of that year, give notice to an officer of the Board that he is so chargeable."

Section 7(8) provides for a penalty for failure to comply with the obligation identified in s 7(1); (s 7(8) has now been repealed).

**[10]** Since the Appellant had never given notice of his liability to income tax to the Revenue he had never received a notice under s 8 requiring a return. The Appellant, accordingly, contends that a failure to

give notice of his chargeability does not constitute cheating the Revenue. The connection between notice of liability and a failure to pay any tax for which he is liable is too remote.

**[11]** We reject that argument. It is beyond question that the offence of cheating the Revenue may be committed by omission. The Appellant's failure to give notice of his liability in breach of his obligation under s 7(1) of TMA was admitted by him to be fraudulent. Were it not so, he would not have pleaded guilty. That fraudulent conduct was committed for the purpose of avoiding the payment of tax. To avoid the payment of tax by that means constitutes a fraud on the Crown and a fraud on the public (see *R v Hudson* [1956] 2 QB 252 at 261-262). *Hudson* was a case concerning false representations. But a fraudulent concealment of income or, as in this case, of a liability to pay tax, constitutes the offence of cheat. Cheating consists of any form of fraudulent conduct, whether by making positive false representations, as in *Hudson*, or by concealing or omitting to disclose liability or income with the result that money is diverted from the Revenue and the Revenue is deprived of money to which it is entitled (see *R v Majvi* [1987] 84 Cr App Rep 34 at 38).

**[12]** By failing to disclose his liability in breach of his obligation under s 7(1) TMA the Defendant failed to disclose to the Revenue the existence of his untaxed profits. Whilst the particulars of Count 4 of the indictment might have been better expressed (for a clear example of how such a Count should be drafted see *R v Foggon* [2002] EWCA Crim 2772, [2003] 2 Cr App Rep (S) 85 p 507, 512 para 13), the last-minute draft made sufficiently clear the admission the Defendant was making by his plea of guilty.

**[13]** Second, the Appellant contends that the tax payable for the tax year ending 5 April 2003 was £3,558 and, accordingly, well below the £5,000 threshold for which s 75(4) provides. The Appellant also contends that a further £3,558, payable on account of liability to tax for the following tax year, ended 5 April 2004, was only a provisional liability contingent on his income during that following year.

**[14]** As a result of his failure to submit a s 7 Notice the Appellant avoided receipt of a notice given by an officer of the Board under s 8 of the TMA. Thus he avoided the obligation imposed by s 9 of the TMA to include in his s 8 return an assessment of the amount in which he is chargeable to income tax and capital gains for the year of assessment (see s 9(1)). Such self-assessment would have revealed the extent of his liability to pay income tax and national insurance contributions for the year 2002-2003. The Defendant did not dispute that that would have shown, at the minimum, £3,558.

**[15]** But that was not the limit of his obligation. He was under an obligation to make a payment of income tax on account of his liability in the following tax year 2003-2004. This liability was imposed by s 59 of the TMA which provides:

"(1) . . . this section applies to any person (the taxpayer) as regards a year of assessment if as regards the immediately preceding year -

(a) he is assessed to income tax under section 9 of this Act in any amount and

(b) that amount (the assessed amount) exceeds the amount of any income tax which has been deducted at source

. . .

(2) . . . the taxpayer shall make two payments on account of his liability to income tax for the year of assessment -

(a) the first on or before 31 January in that year, and

(b) the second on or before the next following 31 July;

and . . . each of those payments on account shall be of an amount equal to 50% of the relevant amount."

**[16]** Thus the Appellant was under an obligation to pay an amount of £3,558 in respect of the tax year 2003-2004 based on the return that he should have submitted in the previous year. His fraud on the Revenue consisted of avoiding or deferring payment of tax of £3,558 in respect of the year 2002-2003 *and* payment of a similar amount on account in respect of his liability for the tax year 2003-2004.

**[17]** The Appellant contends that the liability in respect of the tax year ended 5 April 2004 was only a provisional liability. That is wrong. The liability imposed by s 59(A) was an existing liability subject to the claims and adjustments for which s 59(A) provides (see eg, s 59(A)(9)). Accordingly, the amount of benefit exceeded the statutory minimum of £5,000 and the condition in s 75(4) was satisfied.

**[18]** The third basis upon which the finding of criminal lifestyle was challenged was that the offence to which the Appellant pleaded guilty was an offence committed on a particular day; it was not committed over a period of at least six months (s 75(2)(c)). It was contended that the failure to submit the notice under s 7(1) or make a return in response to a notice under s 8 was a discrete act or omission completed on the day immediately following that on which the return fell due. Thus two s 7(1) notices fell due within the period covered by the indictment, namely on 5 October 2003 and 5 October 2004.

**[19]** We reject that submission. The count alleged a continuing failure and a continuing cheat. By r 14.2(2) of the Criminal Procedure (Amendment) Rules 2007 which came into force on 2 April 2007, before the Appellant was arraigned:

"More than one incident of the commission of the offence may be included in a Count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission."

The omissions of the Defendant were all connected with one another by their common purpose and formed part of the same criminal enterprise. Thus it was appropriate to charge them in a single count (see *DPP v Merriman* [1973] AC 584 at 607 C, [1972] 3 All ER 42, 136 JP 659). The Defendant admitted, by his plea of guilty to that single count of cheat, that he had failed to give notice that he was chargeable to income tax pursuant to his obligation under s 7, that he had failed to make a return of the tax payable by him pursuant to his obligation under s 8 and that he had thereby defrauded the Revenue of the amount which he should have paid. In those circumstances the offence to which he pleaded guilty was an offence committed over a period of at least six months. For those reasons, we endorse the Judge's conclusion that the Appellant had a criminal lifestyle and reject his appeal against that finding.

**[20]** In the light of the finding that the Appellant had a criminal lifestyle, the court was required to make the assumption that any property held by the Defendant at any time after the date of his conviction was obtained by him as a result of his general conduct (s 10(1) and (3)), and the assumption that any expenditure incurred by him was met from property obtained by him as a result of his general criminal conduct (s 10(4)), unless the Defendant showed that those assumptions were incorrect or that there would be a serious risk of injustice if the assumption were made.

**[21]** The Judge concluded that the value of the benefit was £863,303.04, and the available amount was £707,200. In his ruling dated 17 September 2009 he rejected the Defendant's contention that he had rebutted the assumptions identified in s 10 and rejected the submission that to apply those assumptions would create a serious risk of injustice.

**[22]** Before this court, many of the arguments which the Defendant deployed were not pursued. The essential argument advanced before us in support of both the contention that the assumptions in s 10 were shown to be incorrect and in support of the submission that a serious injustice would be caused rested upon the argument that the Defendant had shown that a substantial proportion of his activities were legitimate. His criminality did not consist of the pursuit of criminal activity but the undertaking of legitimate activities which he did not declare to the Revenue and on which he did not pay tax. They were described as and found by the Judge to be "moonlighting activities". They consisted, in part, of the trading in second-hand cars. Such activity is lawful and was the source of the property held and expenditure incurred by the Appellant. The only *criminal* benefit was the amount of unpaid tax on those lawful activities.

**[23]** There was, undoubtedly, evidence that the Appellant was a man who worked hard, selling vehicles and undertaking building work. The Judge accepted that the Appellant "worked like a dog in pursuit of his economic interests" (judgment, p 37, (c)-(d)). Evidence of what was said to be his and his partner's legitimate income was provided by the Defendant to the accountants Grant Thornton. The Judge rejected the proposition that the Grant Thornton figures represented the extent of the Defendant's income from house sales and building work (judgment, p 25, (c)). However, although the extent of the income from such activities was not accepted, it is plain that the judge did accept that the Defendant had been undertaking what the judge described as "moonlighting activities", by which we understand the judge to mean legitimate trading activities on which tax was not paid. There are a number of specific findings of moonlighting activities (see judgment at 24(c), 25(c), 29(g) and 31(f)). In dealing with assets held by the Defendant and expenditure incurred by him the judge made repeated references to such moonlighting activities.

**[24]** In those passages the judgment demonstrates a clear error. The judge seems to have equated the Appellant's moonlighting activities with "criminal conduct". We can give two examples:

"What the account confirms, of course, is Mr Steed's capacity for concealing the proceeds of his moonlighting activities. It does show that the source of the money used to obtain the property was not other than from his general criminal conduct. Indeed, it tends to confirm it, that it was from his moonlighting activities and, *therefore* in connection with that criminal conduct for which tax was evaded. (Judgment, 24, (c)-(d))

He admits that he did not declare that (the price for building work undertaken of £27,500) for tax and so it is all part of the moonlighting and the tax evaded and, plainly, this *therefore*, is a benefit from the Defendant's general criminal conduct or in connection with that conduct." (Judgment, 29(g)) (Our emphasis)

**[25]** If the Defendant demonstrated that the source of the benefit consisting of assets he held or expenditure he had incurred was from that type of moonlighting activity on which tax was not paid then that activity was not general criminal conduct within the meaning of s 76(1) and (2). In *R v Moran* [2002] 1 WLR 205 at 256 the court rejected the Crown's argument that where there has been systematic and persistent non-disclosure of profits the whole of the enterprise was to be regarded as fraudulent and the proceeds liable to forfeiture (see para 8, p 256). That case concerned s 71 of the Criminal Justice Act 1988 and the assumptions created by s 10 of POCA did not apply. But where a trader evades tax and proves, on the balance of probabilities, that his assets and expenditure derived from legitimate trading on which he paid no tax then the trader will have rebutted the statutory assumptions.

**[26]** The judge's findings, to which we have referred, did establish that the Defendant was conducting legitimate trade. But the judge's findings were not limited to that conclusion. Once the judge had rejected the contention that the assumptions relating to the source of property and expenditure had been shown to be incorrect he turned to the question as to whether there would be a serious risk of injustice if the assumptions were made (s 10(6)(B)). He referred to the evidence that the Defendant had worked like a dog in pursuance of his economic interests. He said:

"I find it difficult to accept, in those circumstances, that the court has been presented with a full account of his moonlighting activities or that the Inland Revenue has been presented with a full account of his true liabilities to it. I also accept Mr Robinson's assertion that Mr Steed is 'a grafter, who is always on the lookout for an opportunity to make a profit out of trading'."

**[27]** The judge then made various findings of criminal activity. He referred to money-laundering, drug-dealing, the possession of goods bearing false trademarks with a view to sale, the evasion of duty and benefit fraud. Relying on those findings, the Judge concluded:

"It may be that the Defendant . . . would not be convicted on the criminal standard of all the matter to which I have referred. It is a question of viewing an overall picture and the conclusion I come to is that the overall picture supports the contention that it is more likely than not that he was involved in criminal conduct over and above the Count to which he pleaded guilty. The clear impression the evidence gives is that he was an individual who drew very heavily on the fruits of society without making his proper contribution to society in return for those fruits . . . ." (Judgment, 42(a) - (c))

**[28]** These findings are, in our judgment, fatal to the Defendant's case. Those findings of criminal activity are relevant not, as the judge appears to have thought, merely to the question whether there would be a serious risk of injustice if the assumptions in s 10 were made (s 10(6)(b)), but also to the logically prior question as to whether the assumptions in s 10(3) and (4) had been shown to be incorrect.

**[29]** Those findings of criminal activity presented insuperable difficulties to the Defendant's case. Firstly, they demonstrated that the Appellant was unable to establish on the balance of probability the extent to which the sources of his assets and expenditure were legitimate and the extent to which they were illegitimate. Since he was unable to prove what proportion was legitimate the consequence was that in relation to any given asset or item of expenditure he could not prove that the property was not held by him as a result of his general criminal conduct. He was unable to discharge the burden on him for the purposes of s 10(3) or (4); see, eg, *R v David Lee Jones* [2006] EWCA Crim 933 at paras 19-20. A similar difficulty was faced by the Appellant in *R v Jatvinder Singh* [2009] EWCA Crim 1095, [2010] 1 Cr App Rep (S) 215 paras 8-9. The court said "Where there is a mixed legitimate and illegitimate business, as the applicant was contending, it is for the applicant to demonstrate what those proportions are."

**[30]** Once the figures which the Defendant had provided to his accountants had been rejected and once the judge had made findings of criminal activity, the Appellant was in a hopeless position. He was unable to show the extent to which the assets he held and the expenditure he had incurred were derived either from tax which he ought to have paid but which he had not paid, or his criminal activities, or his legitimate activities, described by the Judge as "moonlighting".

**[31]** Mr Mitchell QC, in his written argument, suggested that it was for the Crown to prove other criminal activities besides those charged in the Count to which he pleaded guilty. That is not the law and involves a mis-reading of *R v Briggs-Price* [2009] UKHL 19, [2009] AC 1026, [2009] 4 All ER 594, [2009] 2 WLR 1101. This was a case in which there were known existing assets and expenditure. In those circumstances, the burden was upon the Appellant to show the source of that property and that expenditure (see *R v Mark Whittington* [2009] EWCA Crim 1641, [2010] 1 Cr App Rep (S) 545, [2010] Crim LR 65 (para 32)).

**[32]** Neither at the confiscation hearing nor at the appeal, was the Appellant able to show the source of the property and expenditure and thus could not rebut the assumptions contained in s 10. There was no foundation for any contention that a serious injustice would be caused merely by reason of the fact that to some extent, as yet unknown and not yet disclosed by the Defendant, some of his activities were legitimate. In those circumstances, this appeal fails.

*Judgment accordingly.*

