2 May 2018

PRESS SUMMARY

R v McCool (Appellant) (Northern Ireland)
R v Harkin (Appellant) (Northern Ireland)
[2018] UKSC 23
On appeal from [2015] NICA 31

JUSTICES: Lord Mance (Deputy President), Lord Kerr, Lord Reed, Lord Hughes, Lady Black

BACKGROUND TO THE APPEAL

The two appellants, Ms McCool and Mr Harkin, were at all material times married to one another. They were both convicted of a series of offences of making dishonest claims for state benefits by pretending that they were single people when they were not and, in the case of Mr Harkin, by claiming housing benefit for a house when he was living with Ms McCool at a different house.

The Proceeds of Crime Act 2002 (the "2002 Act") came into force on 24 March 2003 (the "commencement date"). Section 156 of the 2002 Act provides for the making of orders to confiscate benefits obtained by criminal activity ("confiscation orders"). All of the offences in the present appeal, except one in each case, were committed after the coming into force of the 2002 Act.

There are stipulations in the the commencement, transitional and savings provisions of the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendments) Order 2003 (the "Commencement Order") which set out when the 2002 Act applies. The issue is whether, given these stipulations, a confiscation order under section 156 of the 2002 Act could be made by a Crown Court if the Crown disclaims reliance on any pre-commencement offence for the purpose of the order.

JUDGMENT

The Supreme Court by a majority of three to two (Lord Reed and Lord Mance dissenting) dismisses the appeal. Lord Kerr gives the main judgment. Lord Hughes gives a concurring judgment with which Lady Black agrees. Lord Reed gives the dissenting judgment, with which Lord Mance agrees.

REASONS FOR THE JUDGMENT

The appellants argue that the wording of the Commencement Order is such that where a defendant is committed for a number of offences, where any of the offences has been committed before the commencement date, then none of the offences can be dealt with under the 2002 Act.

Lord Kerr observes that his would produce an anomalous result – the appellants are effectively submitting that the jurisdiction of the court to make confiscation orders under the 2002 Act could be controlled by tactical decisions by the prosecution to not proceed with charging offences committed before the commencement date **[11-12]**. The overarching consideration is that it was Parliament's intention that (i) offences committed before the commencement date should not be included in the

section 156 consideration; and (ii) offences committed after that date which could generate confiscation orders under the Act should be dealt with under section 156. It cannot have been intended that a number of post-2003 offences should be removed from the scope of the 2002 Act simply because the defendant was convicted of an associated offence before the commencement date **[17]**.

Further, the court should seek to avoid an interpretation of the statute which would produce an absurd result. Here, the consequence of the 2002 Act being disapplied to a wide range of offences committed after the commencement date and requiring them to be dealt with under earlier legislation is undesirable. Contemporary cases would have to be dealt with according to standards and rules which have been replaced **[24-26]**. It is not necessary to read words into the statute in order to permit applications for confiscation orders for offences committed after the commencement date **[38]**.

Lord Hughes agrees with Lord Kerr that it is not necessary to read words into the statute to achieve this result **[68]**. The issue depends on whether the offences referred to in section 156(2) are all offences or only those on which reliance is placed for the purposes of asking the court to make a confiscation order. He considers the differences between the earlier legislation and the 2002 Act and concludes that the key question is whether the construction proposed by the Crown would result in any unfairness to the defendants. If it would or might, then the principle that penal statutes must be construed strictly in favour of those penalised would carry considerable weight. There is nothing unfair in saying that the appellants should bear the confiscation consequences of post-March 2003 offences, as required by the 2002 Act, unless those consequences differ in some way from what they would have been if they had not committed the earlier offences, which they do not **[70-83]**.

There is no unfairness caused by any of the differences between the earlier regime and the regime under the 2002 Act where the 2002 Act regime is applied only to post-commencement offences, because the rules which are being applied are those which were in force, and publicly known, at the time the offences generating the confiscation order were committed **[93-94]**. It is not improper for there to be an element of election by the Crown in relation to which offences are relied on for the confiscation process **[97]**.

Although the question of the Court of Appeal's power to put an error right by substituting an order did not arise given the conclusion, Lord Hughes notes that it ought not to be assumed that there is no such power **[108-114]**. Lord Kerr agrees with this analysis **[55]**.

Lord Reed dissents from the conclusion of the majority and would have allowed the appeal. His view is that the language of the provisions cannot be interpreted as excluding offences which the prosecution had elected to leave out of account for the purpose of assessing the benefit obtained by the defendant **[128]**.

References in square brackets are to paragraphs in the judgment

<u>NOTE</u>
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html