Neutral Citation Number: [2005] EWCA Crim 491

Case No: 200405317

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL APPEALS DIVISION)
SITTING AT WINCHESTER
ON APPEAL FROM
LEWES CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:03/03/2005

Before :

LORD JUSTICE ROSE
Vice President of Court of Appeal Criminal Division

MR JUSTICE DAVID STEEL

MRS JUSTICE HALLETT

Between :

Department For Works & Pensions
- v -
Michael Richards

Andrew Mitchell QC and **Sarah Thorne** for the **Department For Works & Pensions**
Jan Luba QC and **Kate Aubrey-Johnson** for the **Defendant**

Hearing date: Monday 14/02/05

JUDGMENT

Mr Justice David Steel :

1. On the 29th March 2004, at Central Sussex Magistrates Court, the appellant pleaded guilty to nine charges under the Social Security Administration Act 1992 ("the Act"). The charges were specimen charges of making a false statement or representation so as to obtain benefit.

2. On the 20th August 2004 at the Crown Court at Lewes, when some 25 similar offences were taken into consideration, he was sentenced by HHJ Anthony to 4 months imprisonment on each count concurrent. The judge also imposed a confiscation order in the sum of £19,424.30 to be paid within one year with 12 months imprisonment in default.

3. The appellant was released from custody on the 19th October 2004. He appeals with leave of a single judge against the confiscation order.

4. The background facts are very easy to outline. Mr Richards submitted an application for income support on the 26th March 1999. But his circumstances changed in September 1999 when first his partner, and then he, began receiving income from work. He failed to inform the Department of Work and Pensions of these material changes to his personal circumstances. He therefore was dishonestly receiving benefits for the 3½ year period up to mid February 2003. The total sum involved was £22,735.19.

5. This figure is derived from a letter dated the 10th April 2003 to the appellant from the Department for Works and Pensions ("the Department") enclosing an "Overpayment Decision" made under Section 71 of Part III of the Act and the regulations thereunder. This section of the Act entitles the Secretary of State to recover overpayment induced by misrepresentations whether fraudulent or not.

6. Sub-section (6) enables regulations to be issued for the calculation of the amounts recoverable. Sub-section (7) allows for the amount thus calculated to be recovered from prescribed benefit payments. Sub-section (10), on which considerable emphasis was placed by the appellant, entitles the Secretary of State to recover the relevant amount by process of execution issued by a county court.

7. As regards the regulations, they are entitled the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 ("the Regulations"). Regulation 13 requires certain deductions or offsets to be made against the sum overpaid, including any income support, pension credit or job seeker's allowance which was not payable under the original determination yet which would have been but for the misrepresentation. The regulation also makes specific provision for allowing offsets under Part III of the Act save that such offset shall apply to tax credits only where both the overpayment and the offset are tax credits.

8. The Department operated a "Family Credit" scheme during part of the relevant period in which the appellant was receiving benefits to which he was not entitled. It appears to be common ground that the appellant was notionally entitled to the sum of £3001.46 under that scheme but for the payments induced by his misrepresentation.

Notably, no allowance for that credit was made in the determination and it has not been demonstrated to us that there was any regulatory obligation to do so. In the event this is of no significance as an allowance was in due course made in the confiscation proceedings.

9. The Family Credit Scheme was in due course replaced by a scheme entitled "Working Families Tax Credit" administered, not by the Department, but by the Inland Revenue. Whilst it was common ground that, but for the misrepresentations, the appellant had a notional "entitlement" to £16,521 in the form of such tax credit, it is clear from the regulations that he was not entitled to any offset or deduction in that respect since the overpayment itself was not a tax credit.

10. Thus the letter from the Debt Management Section of the Department dated 10th April records:

> "We are writing to you because we have had to look again at your income support. We have decided that you have been paid £22,735.19 too much income support from the 8th October 1999 to the 20th February 2003. This was because you were working and did not tell us. .... You need to pay back this money. .... This does not affect any other action, including proceedings in a criminal court, which may be taken in this case. .... Please pay £22,735.19 as soon as you can."

11. The Department's regulatory regime was challenged in ***R (on the Application of Larusai) v Secretary of State for Work and Pensions*** [2003] EWHC 371 (Admin), a judgment referred to by the trial judge in his ruling in the confiscation proceedings. The applicant in that case sought by way of judicial review to contend that the refusal of the Secretary of State to reduce the amount he was seeking to recover from the claimant (being an overpayment secured by fraud) by the amount of the notional entitlement to tax credit was unlawful. The reasoning of Mr Justice Newman is instructive in the present case and yet the appellant did not seek to challenge the decision.

12. Newman J, having set out the relevant regulations, drew a contrast between such benefits as income support and job seekers' allowance on the one hand and tax credit on the other. The regulations provided that the former were deductible but no other deductions could be made. Indeed, as we have already noted, he was able to refer to the regulations expressly providing that tax credit should be confined to tax credit against tax credit, not tax credit against benefits of another kind.

13. The policy, or the exercise of it, was challenged on a range of grounds: -

    i) The distinction between tax credit and benefit was irrational.

    ii) The policy was penal as regards to the claimant.

    iii) The policy led to a windfall to the State.

14. He dealt with these arguments in paragraphs 26-30 of the judgment: -

"26. As to the first point, in my judgment the rationale for treating tax credits and WFTC as a distinct aspect of state support for those on benefit and those on limited incomes cannot be characterised as irrational. It may be, as Mr De Mello submits, that in respect of some people it will operate so as to discourage people moving from the benefit steam to the employment stream. That said, the observation cannot be sufficient to render irrational a policy which places weight upon the concept that there is an advantage in seeking to change the perception of recipients to enable them to see advantages in the longer term, even though they may be suffering financially in the short term, and to see that there is a way forward through employment, as opposed to remaining permanently the recipients of one or other form of benefit. It can be seen that regulation 13 bears out the distinction that if you are a recipient of cash from the state in the form of benefit, then as between those benefits, there will be offsetting. But if you have moved to employment, having been on benefit, twin principles come into play. It should be the responsibility of the individual who moves to employment to disclose that the situation has changed. Secondly, disclosure should be encouraged and the availability of WFTC can act as an incentive to disclosure. I can find no basis for categorising this approach as irrational.

....

29. I turn, therefore, to ground 2; penalising the claimant. The short submission is that there are other penal sanctions which could have been adopted and brought into play, and the course which has been taken, namely determining that the whole amount of overpayment should be recovered, is penal....So far as it goes to hardship, I will come back to it. But I would observe that the momentum for the argument derives from a misconception as to the true legal position. As I have said, the recoverable amount is an overpayment to which this department of state is entitled. A notional entitlement to WFTC does not, as a matter of law, constitute a debt owed by the department to the claimant. At common law it can provide the claimant with no relief or defence at all. It should not be regarded, and it cannot be regarded, as an entitlement. That being its true character, the position falls to be determined in accordance with the discretion given to the Secretary of State to decide how far he considers it is just and fair in the circumstances to pursue its recovery.

30. The third head is windfall for the State. This, again, covers some of the ground I have already covered under the previous heading. The proposition is that, had the claimant made a

> claim for WFTC, she would have been entitled to receive £2,000 from, as it happens, the Inland Revenue, by way of tax credit. She has not received that sum because she did not claim it, and therefore the Treasury chest has not been reduced by that amount. Against that the Secretary of State is recovering the full amount she has obtained by way of overpayment without regard to the fact that it will be a windfall to the State. It is, in my judgment, turning the law on its head, for the reason I have given in the previous paragraph. Yet again, it really seems to me to be another way of seeking to advance the policy argument, which I have already rejected under the previous part of this judgment. The policy argument can be seen as directing and encouraging full recovery, and it is supported by regulation 13, which specifically envisages that no deduction will be made in respect of those benefits, other than the benefits which are stipulated. Further, one should not lose sight of the fact that government departments exist as independent departments. They have their own responsibilities, obligations and duties to perform, which are subject to accountability, but more than that, are subject to budget. This is common knowledge. In my judgment, it misrepresents the structural position, as well as the law, to describe this as "a windfall to the State"."

15. An echo of the very same arguments was put forward by the appellant in the present case but before considering them it is now necessary to return briefly to the regulations. These identify those benefits from which deductions to recover overpayment can be made. These include income support and incapacity benefit: see Regulation 15. Regulation 16 however imposes a limit on the permissible deductions which, on the facts of the present case, amounted to a maximum £8.40 per week (or up to a higher deduction of £11.20 in cases of where, as here, there had been a conviction under section 111A of the Act).

16. It appears that the appellant had not only been overpaid income support but also incapacity benefit, the latter to the tune of £13,067.65. In the period leading up to the imposition of the confiscation order in August 2004, some £8.25 per week was deducted from his continuing entitlement to incapacity benefit by way of what are described as "voluntary" repayments making a total of £425. Notably no increase in the rate of deduction was made following the conviction in March 2004.

17. The Prosecution Statement pursuant to Section 73 of the Criminal Justice Act 1988 was dated 28th July 2004. It alleged that the appellant had derived benefit in the sum of £19,849.30. It follows, as we intimated earlier, that this figure reflects an allowance against the sum originally determined as overpaid of the notional Family Credit otherwise payable.

18. The Prosecution Statement went on to say under the rubric "Civil Proceedings": -

> "There are no civil proceedings, instituted by a victim of the offences to which these proceedings relate, in respect of loss,

> injury or damages sustained in connection with the offences to which the defendant has pleaded guilty or is willing to have taken into consideration."

19. This latter assertion was challenged in the appellant's reply dated 5th August 2004: -

> "The Defence submit that the Department of Works and Pensions have commenced civil proceedings which relate to the loss sustained in connection to these offences. Mr Richards has been asked to enter into an agreement to repay the overpayments and commenced repayments in April 2003 which remain ongoing."

20. Immediately prior to the confiscation hearing, the Debt Management Section of the Department sent a fax attaching a status report on the overpayments and adding: -

> "I can confirm that we will not be taking civil action."

21. This fax was attached to the Prosecution Rebuttal dated 16th August which recognised that the court might wish to "consider" the repayments which totalled £425. In the event allowance for that sum appears to have been made thus reducing the confiscated sum to £19,424.30

22. However, it was also submitted to the trial judge that, for the purpose of the confiscation proceedings, the court should take into account the notional tax credit in the sum of £16,521.96, thereby reducing the outstanding sum to £3,327.34. This submission was buttressed by reference to the implications of not doing so. Mr Richards, it was submitted, was still dependent on state benefits. The only asset of value was his house at Peacehaven valued in the region of £190,000. To meet a confiscation order in the sum claimed would inevitably require sale of the house and the associated consequences for both himself and his family.

23. The judge ruled against that submission. Having referred to ***Larusai, supra*** he went on: -

> "Even, I think, without assistance of the view of Newman J as expressed in R v Larusai, it would have been difficult to have avoided the conclusion that I come to which is that the mere fact that if the defendant had behaved in another more honest fashion he might have been not very much worse off and therefore the State in its overall capacity might as a result of his dishonesty be said to be only minimally worse off; that, it seems to me, is no answer to the question that I have to decide. I am concerned with how much money the defendant dishonestly obtained when it comes to sentence.

> When it comes to confiscation proceedings, I am concerned with how much money again he received as a result of his dishonesty. I am not persuaded that the mere fact that if he had acted honestly he might have obtained from another Government department a sum not very much less than that which he dishonestly obtains in any way either mitigates the seriousness of the offence that he committed when one had regard to how much money he actually received, nor with regard to how much under the admittedly Draconian provisions of the confiscation proceedings he may be required to repay. For those reasons I rule against the submission made by Miss Aubrey-Johnson to the effect that I should deal with this both for sentence and confiscation proceedings as though the overall amount involved only some £3,000 odd pounds."

24. The focus of this appeal is two fold: -

a) that in exercising its power under Section 71 (1B) of the Criminal Justice Act 1988 the court ought to have taken into consideration the tax credit in reduction of the sum claimed; or

b) that the court wrongly failed to exercise its discretionary powers under Section 71 (1C) of that Act by way of taking account of the tax credit.

25. It is necessary now to set out the provisions of Section 71 of the Criminal Justice Act 1988 ("the 1988 Act): -

> "71.-(1) Where an offender is convicted, in any proceedings before the Crown Court or a magistrates' court, of an offence of a relevant description, it shall be the duty of the court-
>
> (a) if the prosecutor has given written notice to the court that he considers it appropriate for the court to proceed under this section....
>
> to act as follows before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct.
>
> (1A) The court shall first determine whether the offender has benefited from any relevant criminal conduct.
>
> (1B) Subject to subsection (1C) below, if the court determines that the offender has benefited from any relevant criminal conduct, it shall then-
>
> (a) determine in accordance with subsection (6) below the amount to be recovered in his case by virtue of this section, and

(b) make an order under this section ordering the offender to pay that amount.

(1C) If, in a case falling within subsection (1B) above, the court is satisfied that a victim of any relevant criminal conduct has instituted, or intends to institute, civil proceedings against the defendant in respect of loss, injury or damage sustained in connection with that conduct-

(a) the court shall have a power, instead of a duty, to make an order under this section;

(b) subsection (6) below shall not apply for determining the amount to be recovered in that case by virtue of this section; and

(c) where the court makes an order in exercise of that power, the sum required to be paid under that order shall be of such amount, not exceeding the amount which (but for paragraph (b) above) would apply by virtue of subsection (6) below, as the court thinks fit.....

(4) For the purposes of this Part of this Act a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained.

(5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

(6) Subject to subsection (1C) above, the sum which an order made by a court under this section requires an offender to pay shall be equal to-

(a) the benefit in respect of which it is made; or

(b) the amount appearing to the court to be the amount that might be realised at the time the order is made,

whichever is the less.

26. Mr Luba QC in his submissions on the appellant's behalf recognised that the primary scheme under the section as contained in Section 71 (1B) of the 1988 Act accorded no discretion to the court. The court was bound to require the defendant to pay the amount of benefit obtained. He sought to suggest however that the assessment of

benefit under Section 71 (4) involved an inquiry into the extent to which the offender had in fact benefited. He emphasised the reference to "his" benefit as identifying the need for the court to identify the benefit "to him" and this, so the argument ran, led to the requirement that the sums to which he, the offender, was entitled to recover from his victim must, by definition, reduce "his" benefit.

27. This, Mr Luba QC submitted, justified the deduction of the tax credit because:-

(a) it would have been an entitlement in the absence of fraudulent conduct, and

(b) that such entitlement derived from the State when viewed as one entity, albeit from two arms of it.

28. In our judgment, this argument is based on a misconception, a misconception to which the trial judge was fully alive as appears from his ruling :

> "There are many situations in which it can be said that the amount to which a defendant has benefited should be reduced by reference to what might have happened if he had acted in an entirely different way. It could be said of the burglar or the drug dealer that if he had only worked in an honest fashion he would have earned very much less than in fact was the case, but it is not ever said in those circumstances that the extent to which he has dishonestly benefited should be notionally reduced. Why is it different in this case? Because ... it is simply that one arm of the State, namely the department of Work and Pensions has lost, whereas another, the Inland Revenue, has notionally gained by not having to pay out or allow by way of credit and additional amount....(p. 4)
>
> "I am not persuaded that the mere fact that if he had acted honestly he might have obtained from another Government department a sum not very much less than that which he dishonestly obtains[ed] in any way mitigates the seriousness of the offences that he committed when one has regard to how much money he actually received, nor with regard to how much under the admittedly Draconian provisions of the confiscation proceedings he may be required to repay": (p. 6).

29. Section 71(4) bites at the moment when the property is obtained or the pecuniary advantage is derived: an approach which has been very recently emphasised by this court in ***R v May*** [2005] EWCA Crim 97. It is entirely irrelevant that the property is thereafter destroyed (***R v Smith*** [2002] 1 WLR 56), transferred to a third party (***R v Patel*** [2000] 2.Crim.App Rep (S) 10) or simply dissipated to no profitable advantage (***R v Currey*** [1995] 16 Crim.App Rep (S) 421).

30. It equally follows in our judgment that no allowance can be made for notional financial returns that might have been recovered from the victim in the absence of

dishonest conduct any more than the value of costs that might have been avoided or legitimate profits that might have been made as a consequence of acting honestly. Indeed, as ***Larusai*** makes plain, a tax credit as such gives rise to no entitlement or debt, let alone, on the facts of this case, from the victim.

31. The clear meaning of section 71, and the policy behind it, is spelt out in the following passage from ***R v Smith, supra***: -

> " These provisions show that, when considering the measure of the benefit obtained by an offender in terms of section 71 (4), the court is concerned simply with the value of the property to him at the time when he obtained it or, if it is greater, at the material time. In particular, where the offender has property representing in his hands the property which he obtained, the value to be considered is the value of the substitute property "but disregarding any charging order". Except therefore, where the actual property obtained by the offender has subsequently increased in value, the court is simply concerned with its value to the offender "when he obtained it". It therefore makes no difference if, after he obtains it, the property is destroyed or damaged in a fire or is seized by customs officers: for confiscation order purposes the relevant value is still the value of the property to the offender when he obtained it. Subsequent events are to be ignored, in just the same way as any charging order is to be ignored under subsection (6). Such a scheme has the merit of simplicity. If in some circumstances it can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes. That is a matter for the judgment of the legislature which has adopted a similar approach in enacting legislation for the confiscation of the proceeds of drug trafficking. In that context the courts have consistently held that "payments" received in connection with drug trafficking mean gross payments rather than net profit and that the "proceeds" of drug trafficking mean the gross sale proceeds, rather than the net profit after deducting the cost of the drug trafficking operation....": per Lord Rodger at p. 61

32. Measured against that analysis, the submission that the appellant could net off whatever the State as a whole may have saved is hopeless. Indeed, the appellant might regard himself as lucky that the notional family credit was credited against the overpayment.

33. The fact that the impact of these draconian provisions might lead to the loss of the family home might, as the judge recorded, be material to any exercise of discretion. But Section 71 (1B) affords no discretion, whatever the impact on the defendant may be: ***R v Roissetter*** [2004] EWCA Crim 1827.

34. This leads to the appellant's alternative submission that the circumstances were such that Section 71 (1C) was invoked or engaged because the victim had instituted or intended to institute civil proceedings. Despite the disclaimer of the Department recorded above, this was said to arise either from the terms of the letter of the 10th April 2003 or alternatively from the invocation of the recovery regime provided for in the Act and the regulations thereunder. Neither point was advanced in those terms below.

35. In our judgment civil proceedings mean simply proceedings whereby the civil jurisdiction of the court is invoked by the issuance (and service) of the claim form under Part 7 or Part 8 of CPR. The letter of the 10th April cannot constitute the initiation of a civil claim. Nor does it evince any intention to do so. To the contrary, if any proceedings are contemplated they are expressly criminal.

36. Furthermore, the existence of a statutory recovery scheme, whether by way of potential deduction from benefits or entitlement to pray in aid court execution process, cannot be perceived as coming under the umbrella of civil proceedings. Nor can the use of such a scheme involve the institution of such proceedings, leaving aside the fact that the repayments were in regard to a different overpayment. We say that even if the description of the repayments in the Rebuttal as being "voluntary" is misplaced. Indeed, Mr Luba QC categorised the scheme as a discrete statutory scheme, supplementing common law rights, to which the limitation provisions relating to civil proceedings would not be applicable.

37. Points arising on the relationship between the confiscation provisions in s71 of the 1988 Act and the Human Rights Act 1998 were pursued before the judge and in the Grounds of Appeal to this Court. Recognising that we would be bound by the recent decision of this Court in R v Ahmed and Quereshi [1005] 1 WLR 122, Mr Luba QC did not develop that ground before us but reserved his argument upon it for possible consideration in any further appeal. We need say nothing more about it.

38. For all these reasons this appeal is dismissed.