THE COURT OF APPEAL

174/2013

The President.
Edwards J.
Hedigan J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

MARTIN MORGAN

APPELLANT

JUDGMENT of the Court delivered on the 31st day of July 2018 by Mr. Justice Hedigan

The Appeal
1. This is an appeal against the making of a confiscation order pursuant to s.9 of the Criminal Justice Act, 1994 by the Dublin Circuit Criminal Court on the 28th of June 2013.

Background
2. On the 22nd of February 2008, the appellant was convicted by a Jury on two counts on an indictment. These were managing a brothel and organising prostitution, contrary to s.11(a) and s.9 of the Criminal Law (Sexual Offences) Act, 1993 respectively. The offending took place in 2005. Following lengthy Garda investigations, it was found that a premises on Bachelor's Walk in Dublin city was being used as a brothel managed by the appellant. The appellant was sentenced to three years imprisonment and fined €24,000. The appellant subsequently appealed his conviction to the Court of Criminal Appeal. The appeal was dismissed.

3. At the time of sentencing in the Dublin Circuit Criminal Court, the respondent indicated that it would be submitting a request for the court to make a confiscation order in the amount of €252,980.33 pursuant to s.9 of The Criminal Justice Act 1994 (the 1994 Act). This request was successful and the order was initiated after the appellant's conviction was upheld. On the 28th of June 2013, judgment was given directing that this amount be confiscated from the appellant.

Personal Circumstances
4. The appellant was born on the 3rd of December 1963, making him 44 years of age at the time of conviction. The appellant had addresses at 23C Lesson Park, Ranelagh, Dublin 6, and 59 Herbert Lane, Dublin 2. The appellant relocated to the United Kingdom to live with his brother and provides an address of 213, Blackstock Road, Highbury, London, N52LL.

Sentence
5. The appellant was sentenced to three years imprisonment and a fine of €24,000 was imposed. The appellant has served that sentence and the fine has been paid. The confiscation order of €252,980.33 was later imposed against the appellant.

Grounds of Appeal
6. The appellant submits the following grounds of appeal; the learned trial judge:

> a) Erred in law and in fact in determining that the sum of €252,980 might be realised at the time the order was made. The court finding in relation to the amount that might be realised at the time the order was made was unsupported by the evidence and against the weight of the evidence that was before the court.
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> b) Failed to have due or any regard to section 9(6) of the 1994 Act in making the confiscation order, thus denying the appellant the benefit of the section, which restricts the amount of any confiscation order to that which might be realised at the time the order is made.

Submissions of the Appellant
7. With regard to the confiscation hearing, the appellant submits that subsection 6 of s.9 of the 1994 Act, limits the scope of any confiscation order to the monies the appellant possesses at the time of the making of the confiscation order. S.9 (6) of the Act states:

> (6) The amount to be recovered by an order under this section shall not exceed-
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> (a) the amount of the benefit or pecuniary advantage which the court is satisfied that a person has obtained, or
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> (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.'

8. The appellant relies on the case of *Izundu v Judge Martin Nolan & the DPP* [2014] IEHC 20, which concerned a confiscation order pursuant to s.4 of the 1994 Act, which relates to the proceeds of drug trafficking. S. 6 of the Act relates to the amount to be recovered under a confiscation order made pursuant to s.4:

> "6.(1) Subject to subsection (2) of this section, where a confiscation order has been made under section 4 of this Act, the amount to be recovered under the order shall be equal to the amount assessed by the court to be the value of the defendant's proceeds of drug trafficking.

(2) If the court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be the amount appearing to the court to be the amount that might be so realised."

9. The appellant submits that s.6 of the Act imposes the same obligation on the court as s.9 (6) in this instant case, the only difference being that s.6 relates to drug trafficking while s.9 (6) deals with non-drug trafficking offences.

10. In *Izundu*, it was stated by Barrett J that:

> *"What the State cannot do is seek to use the confiscation order process to attain the unattainable, i.e. recoup from a convicted drug trafficker monies that, for whatever reason, he no longer possesses."*

11. Barrett J set out a two-step process to be applied under s.6:

> *"s.6 (1) requires that a confiscation order be in the amount assessed by the court to be the total value of a defendant's proceedings of drug trafficking. Section 6 (2) provides that if the court is satisfied that the amount that might be realised at the time of the order is less than the amount settled upon pursuant to s.6 (1), then the amount of the order must be reduced to the amount that the court considers might be realised."*

12. It is submitted that the limitation held by Barrett J was not taken into account in this case, and no regard was had to s.9 (6) in relation to the amount that might be recouped from the appellant. The appellant lived in London at the time of the trial, and continues to do so, which meant that he regularly travelled to and from the UK and Ireland in order to meet his bail conditions. The appellant accumulated €57,550 in travel expenses, in addition to significant legal expenses. It is submitted that this was not adequately considered by the trial judge. Further, it is submitted that the trial judge's expression that the appellant "certainly does have the money" was not supported by any evidence before the court. Further, it is submitted that the two-step test set out in *Izundu* was not followed.

13. It is submitted that the appellant is put at risk of imprisonment by the confiscation order. In Izundu, Barrett J set out the consequences for a person who fails to pay the amount ordered:

> *"Under s.19 (2), if the amount ordered goes unpaid, then upon report to this effect being made to the High Court by the DPP, the affected individual may be imprisoned by the High Court according to a sliding scale in which the greater the outstanding amount under the confiscation order, the greater the period of imprisonment the individual faces."*

14. Section 19 of the 1994 Act applies to the enforcement of confiscation orders and sets out the periods of imprisonment relative to the amount ordered. Under statute, the appellant would be facing a period of imprisonment of three years (exceeding £100,000 but not exceeding £250,000). It is submitted that therefore in the appellant's case any failure by him to honour the confiscation order puts him at risk of a custodial sentence.

15. The deficiency that was addressed in *Izundu* is apparent in this case, whereby the learned trial judge failed to have any regard to the obligation imposed by s.9 (6) and did not give consideration to the amount appearing to the court that might be realised at the time the order was made.

16. The trial judge erred in law and principle in determining that the sum of €252,980 might be realised at the time the order was made and that the court's finding in relation to the amount that might be realised at the time the order was made was unsupported by the evidence and against the weight of the evidence that was before the court.

17. The trial judge failed to allow against the benefit found the sum of €9,397 seized from him at the time of his arrest.

Submission of the Respondent

18. The respondent submits that the court was not obliged to engage with whether or not the appellant had assets available to meet the confiscation order in the absence of evidence that he has no such assets. It is submitted that the purpose of the provisions dealing with confiscation in the 1994 Act are to ensure that those who engage in crime are prevented from being financially enriched by requiring payment of a sum equivalent to the value of the benefit obtained through unlawful means. It is submitted that there is nothing in section 9 (6) or elsewhere in the Act which requires identification *in specie* or by means of tracing the "amount of the benefit or pecuniary advantage" with assets of the defendant available to answer the confiscation order, when realised. The power of the court ordering confiscation is set out in section 9 (1) and is one of "requiring the person concerned to pay such sum as the court sees fit". This is qualified by the limitations set out in s.9 (6). It is submitted that a defendant who seeks to establish a case that an order imposed would give rise to a disproportionate result would have to place evidential material before the court to permit such a finding. It is submitted that section 9 (1) is not intended to give the court unfettered discretion in dealing with such an application or to permit a defendant to avoid disclosure of his true financial situation for the purpose of any finding envisaged by the legislation. If there is a discretion it should be exercised by the court very sparingly and only where very good reasons are established based on the principle of proportionately.

19. It is submitted that the appellant's reliance on the case of *Izundu v Nolan and the DPP* [2014] IEHC 361 is in error. In that case the High Court appeared to take the view that the assets available for the purposes of a confiscation order had to derive in some way from the benefit obtained as a result of crime. The judgment does not indicate that the defendant had addressed in evidence what assets she had at the date of the confiscation order and refers to what she spent out of the "proceeds of crime". It was for the defendant to satisfy the court that the amount which might be realised from her was less than the amount assessed under the section 6(1). Whether or not that defendant had dissipated the proceeds of the drug dealing which resulted in her conviction was a different issue from that of whether she had no assets available to satisfy a confiscation order based on the value of proceeds of crime. It is submitted that proof of dissipation of assets is only relevant in the context of establishing that a person has no assets or insufficient assets available to satisfy a confiscation order at the date that such order is made. It is submitted that the decision in *Izundu* should not be followed in this case if it is construed as requiring the court to make a determination under section. 9 (6) (2) in the absence of evidence from a defendant establishing a *prima facie* case that his or her assets have a value which is less than the value of the amount of the benefit or pecuniary value that the person has obtained from their crime.

20. It is submitted that the final stage of the two-stage process as envisioned by section.9 (6) (b) does not become relevant if the defendant refuses to engage with the process and no evidence is placed before the court that could enable it to conclude on the balance of probabilities that the amount that might be realised from his assets is less than the amount assessed as his benefit from

the pecuniary advantage obtained from the crime.

21. It is submitted that it would not be appropriate for a court to allow deductions in respect of legal costs incurred in defending a criminal prosecution or costs of travelling to locations to meet conditions of bail. These are not matters which come within s.6 (a) of the 1994 Act, nor do they come with s.9 (6) (b), unless it is established that the expenditures made had the effect of reducing the overall assets of the defendant at the date of the confiscation order to less than the amount of the benefit or pecuniary advantage obtained by crime.

22. The expenses accrued by the appellant in committing the offences of which he was convicted include the rent of the Bachelors Walk premises, rent of an apartment in the Irish Financial Services Centre, wages paid out to staff, laundry costs, toiletries, phone credit, and advertising. This amounted to over €29,000. The appellant also spent a considerable amount on travelling to and from the UK and Ireland to meet bail conditions and on legal fees. However, it is submitted that if the Oireachtas had intended that the expenses of committing crime, or that travel and subsistence expenses accrued relating to criminal prosecutions were to be excluded then such exclusion would have been expressly included in s.3 (8) in calculating the amount that might be realised at the time the confiscation order was made or as deductions allowable under s.6 (a).

23. People who engage in criminal activity take the risk that they may have to deploy their own financial resources in respect of legal costs and other ancillary expenses relating to criminal prosecution. This may also include loss of employment or loss of a business. The statutory confiscation regime does not allow for set offs of these type of losses and expenses against the assets available to meet the confiscation order. To do so would be contrary to the policy of the relevant legislation. It is therefore submitted that the trial judge was correct in refusing to allow deductions such as legal and travel expenses on the basis that is was wrong "in principle" to permit these expenses as deductions.

24. The respondent submits that the submission that "the answers to the questions that have been furnished to the Court should be taken into consideration as to whether or not that money can be paid" was incorrect as claims in answer to questions put under s.10 of the 1994 Act did not become evidence. The submission that the onus was on the respondent to establish that the appellant had the assets to meet the confiscation order was also incorrect.

25. With regard to the appellant's complaint that the court failed to engage with s.9(6) (b) of the 1994 Act. It is submitted that no evidential material was placed before the court in order to allow it to do so.

26. It is submitted that the only possible error made by the learned trial judge arose from his failure to deduct the amount seized from the defendant of €9,397.02 from the €252,980.33, if that figure represented cash receipts earned by the brothel business and was in his possession at the time of his arrest. It is submitted that the other items claimed as deductions were not allowable.

27. Therefore, in all of the circumstances, it is submitted that the trial judge did not err in law or in principle and that the confiscation order should stand.

Decision

28. Section 9(6) of the 1994 Act provides as follows:-

> *"(6) The amount to be recovered by an order under this section shall not exceed-*
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> (a) the amount of the benefit or pecuniary advantage which the court is satisfied that a person has obtained, or
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> (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."

29. In this case the amount of the benefit which the court was satisfied that the appellant obtained from his criminal activities is not in dispute. It is €252,980. This was conceded by counsel for the appellant in her submissions to the learned trial judge at p. 17, line 20 of the transcript of the 26th April 2013. The issue for the court in this case, as was identified at the outset of the appeal hearing by Mr. Green, S.C. for the appellant, is as to where the onus lies in respect of the second stage of this process as provided by s. 9(6) (b). The appellant argues that the onus lies upon the DPP. The respondent disagrees. This is the issue for the court to decide. It is a significant issue because a person the subject of such a confiscation order who fails to satisfy it may be imprisoned in accordance with a sliding scale. The greater the amount outstanding, the greater the period of imprisonment. In this case the term of imprisonment that could be imposed for failure to pay is three years.

30. In the Circuit Criminal Court, Ms. Stuart on behalf of the appellant addressed the court in relation to the amount that might be realised as at that date i.e. the 26th April 2013. She argued that the onus was on the prosecution to show he had something to give. She submitted that despite their investigations, including availing of mutual legal assistance in the United Kingdom, nothing was identified. She submitted that the appellant had co-operated as best he could. He answered all questions asked to the best of his ability. She stated that he had no money.

31. Mr. Foley for the DPP referred the learned trial judge to the case of *R v. Barwick* [2001] Criminal Appeal Reports 129 at p. 445. He argued that in relation to similar legislation in England and Wales, this judgment established in that jurisdiction that the onus of proof that his realisable assets are less than the benefit established by the court lies upon the defendant. He urged the court to follow the reasoning of that court. Counsel pointed out that the investigating Garda Walsh had doubts as to the answers and information given by the appellant herein. He observed that the evidence in the case demonstrated a highly efficient criminal operation. It may be noted that the evidence in the case was that it was a criminal operation capable of turning over in excess of €4m. per year. Mr. Foley suggested to the court that it might accept from this that the appellant was likely to be very efficient in hiding assets. The headnote of the report at p. 445 states as follows:-

> *"…section 71 of the 1988 Act empowered the court to make a confiscation order if the offender had benefited from the offence. It distinguished between the benefit which was obtained and the amount that might be realised at the time the order was made. It was clear that the onus of proving or establishing the benefit obtained was on the prosecution. Certain provisions of the Act, principle and decided authority clearly indicated that if the defendant then wished to contend that the amount that might be realised was less, the burden was on him to do so. In the court's view, the words "shall do so if satisfied that the amount that might be realised is less than the benefit" within section 70(6) clearly indicated that the burden was on the defendant to satisfy the court that the amount that might be realised was less, his being the interest in doing so…Turning to principle, it was likely that an offender might take steps to make the proceeds of crime difficult to trace. Once it was proved that he had received the benefit, it was pragmatic and entirely fair to the*

defendant, to place upon him the onus of showing to the civil standard that he no longer had the proceeds or that their extent or value had diminished…The scheme of the Act requires the court to perform two distinct and discreet tasks. First, to determine the benefit. Secondly, to determine the amount that might be realised at the time the order was made, which might be very different. The amount that might be realised might be quite unrelated to the identifiable proceeds of the offence, for example a lottery win, inheritance or lawfully acquired property. In the end, the task of the court at the second stage was to determine the amount "appearing to the court" to be the amount that might be realised. Once the benefit had been proved, it was permissible and ought normally to be the approach of the court to conclude that the benefit remained available until the defendant proved otherwise, subject to the issue of changes in the value of money".

32. In our judgment, the scheme of the 1994 Act was the same as that of the legislation dealt with in *Barwick*. Where a person is found to have benefited from crime, then he should be made to pay to the State an amount equivalent to his criminally obtained benefit. Whether that amount was realisable from the proceeds of the criminal activity of which he was convicted or from any other source is immaterial. The amount may be recovered from any assets of which he is possessed at the time of making the order. The legislation, in very simple terms, makes that clear. It is stating the obvious that any person convicted of criminal activity is quite likely to do everything in his power to hide his assets, ill gotten or otherwise from identification and confiscation. It thus inevitably follows from this that once the benefit is established to the satisfaction of the court by the prosecution, the onus shifts to the convicted person to satisfy the court to the balance of probabilities that he has either no realisable assets or that his realisable assets are less than the benefit identified pursuant to the Act. We further consider correct the learned trial judge's conclusion that the expenses involved in committing the criminal activity of which a person has been convicted or the costs involved in defending himself on those charges or meeting bail conditions, may not be set off against the benefit found under the Act. Such costs or expenses can only arise in the context of ascertaining the realisable assets of a convicted person at the time of making a confiscation order. Finally we note that it is effectively conceded that the sum of €9,397 should have been deducted from the sum found of €252,980.

33. For the above reasons the appeal is dismissed but we will vary the amount of benefit found to a figure of €243,583.