



**THE COURT OF APPEAL**

**Birmingham J.  
Sheehan J.  
Edwards J.**

**287/12**

**In the matter of an appeal against a confiscation order made pursuant to  
Section 4 of the Criminal Justice Act 1994**

**The People Director of Public Prosecutions**

**Respondent**

**V**

**Michael Byrne**

**Appellant**

**Judgment of the Court delivered on the 22nd day of July 2016, by Mr. Justice Birmingham**

1. This is an appeal against a confiscation order made in the Dublin Circuit Criminal Court on the 31st July, 2012. The background to the application is that on the 8th March, 2010, the applicant was convicted of an offence of possession of a controlled drug, Diamorphine contrary to s. 15A of the Misuse of Drugs Act 1977. So far as relevant, the circumstances of the offence were that the applicant was observed driving a van and then counting packages in the rear of the van which were later analysed and found to contain Diamorphine. The total value of the drugs seized was approximately €6 million. The applicant was sentenced to a term of seventeen years imprisonment.

2. Following the conviction, the Director informed the judge who had presided over the trial that an inquiry would be required to determine whether the appellant had benefited or had assets attributable to drug dealing. Part II of the Criminal Justice Act 1994, as amended, mandates an inquiry by a Circuit Court judge into three things in respect of a person who has been sentenced for a drug trafficking offence.

A. Determining whether the defendant has benefited from drug trafficking.

B. Assessing the value of the defendant's proceeds of drug trafficking.

C. Determining the amount which can be recovered from the defendant's assets.

3. Having conducted these inquiries, a court may order the confiscation of so much of the defendant's assets as do not exceed the value of his assessed benefit from drug trafficking. In this case, the Director of Public Prosecutions served a statement in accordance with s. 10 of the Criminal Justice Act 1994, seeking the confiscation of the total sum of €40,253.62 held by Mr. Byrne in three bank accounts. This sum represented the entire proceeds of three accounts belonging to the appellant.

4. The inquiry was listed and adjourned from time to time as the applicant had appealed his conviction. The appeal against conviction was abandoned and the confiscation application eventually came on for hearing before His Honour Judge Tony Hunt on the 28th March, 2012.

5. Legal argument and indeed evidence was heard over several days between the 28th March, 2012 and June 2012. On the 31st July, 2012, Judge Hunt acceded to the application before him and ordered the confiscation of the sum of €40,253.62 being the total sum held by the applicant in the three separate bank accounts.

6. The grounds of appeal are that the trial judge erred in making the order and in particular had erred in admitting into evidence a statement served by the respondent pursuant to s. 10 of the Criminal Justice Act 1994 and in relying on its contents for the purpose of determining the issues before him.

**The relevant statutory provisions s. 10 of the Criminal Justice Act 1994**

7. Section 10 of the Criminal Justice Act 1994, so far as is material provides as follows:-

"10(1) Where a defendant accepts to any extent any allegation in the statement that –

(a) is tendered by or on behalf of Director of Public Prosecutions to a court that is engaged in a determination under s. 4 of this Act as to whether a person has benefited from drug trafficking or as to any amount to be recovered by virtue of that section or to a court that is considering an application under s. 7, 8, 8A, 8D, 8E or 9 of this Act and

(b) concerns any other matter relevant –

(i) to the determination of whether the defendant –

(1) in the case of a conviction for a drug trafficking offence, has benefited from drug trafficking...

(ii) to the assessment of the value of the defendant's proceeds of drug trafficking, the value of the funds subject to confiscation or the value of the defendant's benefits as mentioned in s. 9(4) of this Act... as the case may be, the court may, for the purposes of that determination or assessment, treat the defendant's acceptance as conclusive of the matter to which it relates.

(2) Nothing in this section shall prevent the Director of Public Prosecutions from making more than one statement.

(3) Where –

(a) a statement is tendered under subs (1) or (2) of this section, and

(b) the court is satisfied that a copy of that statement has been served on the defendant, the court may require the defendant to indicate to what extent he accepts any such allegation, and to indicate any matters he proposes to rely on to refute such allegation.

(4) A defendant who fails in any respect to comply with a requirement under subs. (3) of this section, may be treated for the purposes of this section as accepting every allegation in the statement, other than

(a) any allegation in respect of which the defendant has complied with the requirement, and

(b) any allegation that

(i) in the case of a conviction for a drug trafficking offence, the defendant has benefited from drug trafficking or that any payment or other reward was received by the defendant in connection with drug trafficking carried on by the defendant or another person."

8. Counsel on behalf of the appellant summarises the effect of the section as follows:

(i) If the defendant accepts the contents of the statement, the Court may consider this acceptance as conclusive of the issue before it and

(ii) The Court may require the defendant to indicate to what extent he does not accept the allegations in the statement and to indicate any matters he proposes to rely on to refute the allegation.

(iii) The defendant may indicate his acceptance of an allegation, or may indicate any matter on which he relies to refute an allegation, either orally, in writing or otherwise as the court may direct.

(iv) A failure to comply with such a requirement may be treated as acceptance by the defendant of an allegation.

(v) A defendant may make a statement in response to the statement on behalf of the Director.

9. In essence, the first ground of appeal involves an assertion that the statement which was served in accordance with s. 10 of the Criminal Justice Act 1994, does not have evidential value and is not evidence of the truth of the matters contained therein.

10. In the view of the Court, that assertion is entirely uncontroversial. However, simply to say that ignores the reality of what happened in this case. On the first day of the hearing before Judge Hunt, counsel on behalf of the Director requested that the Court would inquire of the defence what was being disputed, what aspect of the s. 10 statement that had been served was being disputed and what documentation or otherwise was being relied upon. Counsel for the appellant responded by saying that the request was being made two years too late. There followed a debate between counsel and the judge ruled on the matter. The Court's ruling was that this was a matter of discretion and that the Court had a continuing discretion. Specifically the judge commented:

"I shouldn't **at the moment** exercise my discretion in favour of making any requirement of the defendant, but there may come a time, depending on what is said in the rest of the case where I would regard it as appropriate." (Emphasis added)

11. The Court returned to the issue on the following day and the judge, at p. 22 of the transcript commented as follows:-

"So, what I propose to do in this case is to adopt from here on in, having received the initial material, a two step procedure under the relevant part of the 1994 Act. One of which is expressly provided for, but in the absence of other specific provisions, in that part of the Act guiding the Court as to the procedures and method to be adopted, the second of which I am adopting off my own bat, so to speak, in order to respect the right of the respondent to deal with the material contained in the statement in a full fashion. So, what I propose to do in relation to the four documents that I have identified as being statements for the purpose of s. 10, that is the s. 10 statement dated September 2010, the affidavit and exhibits of Ms. Massey (the forensic accountant), the affidavit and exhibits of Garda Grimes and the certificate and associated documents of the revenue official, and treating all of these matters as being covered by the term statements for the purpose of this inquiry, and I am now making an order subject to, or under the provisions of s. 10(3) of the 1994 Act, because I consider that it is appropriate to require Mr. Byrne to indicate to what extent he accepts each allegation in these statements. Insofar as he does not accept any allegation to indicate any matters he proposes to rely in refuting such an allegation. And the second step is that if he is unable to determine which matters he accepts and does not accept without cross examining or having any appropriate witness in relation to the contents of any of those documents present, I will make an order for their attendance for examination by me and for cross examination by the parties to the proceedings. And I consider that is a procedure which would vindicate the rights of both parties in the proceedings."

12. The matter was then listed by the Court for mention on the 23rd April, 2012 and on this occasion a reply was handed in indicating that Mr. Byrne did not accept any of the allegations contained in the material.

13. On the 11th June, 2012 Ms. Massey, a forensic accountant, was examined and cross examined in relation to her analysis of the bank accounts. In summary her conclusion was that for the period in question Mr. Byrne had a declared income of about €43,000 net

and had spent about €188,000 net. She also drew attention to the fact that the figure for spending did not include a good deal of day to day expenditure as there were not sums going out of the account to cover standard day to day bills. Once Ms Massey had finished giving evidence, submissions were made by counsel. The thrust of the cross examination on behalf of Mr. Byrne and the submissions was to the effect that the sums in the bank account were more likely the proceeds of "nixers". The judge indicated to counsel that if he was being asked to find that it was more probable that "nixers" were involved as opposed to something else that he would have expected to have been provided with some details, perhaps a few examples or the like. The judge put the matter back and gave his decision on the 31st July, 2012. He began by saying that the issue was narrow and fairly clear. There was, on any view of the evidence, a disparity in relation to the sums found to be available to Mr. Byrne when compared to his income from what might be referred to as legitimate sources that being principally his business activities as a tiler. The judge said that he was satisfied that Mr. Byrne did carry out such a business and was qualified to do so, but the question is not whether the business was carried out, but whether the sums found in the bank accounts are more likely to be attributable to that than to his activities in relation to illicit drugs.

14. The judge considered the two scenarios that had been presented, (i) the funds were the proceeds of drugs trafficking or (ii) the funds had come into existence as a result of greater activity in the black economy. The judge concluded that it seemed to him that the prosecution case was not only more likely to be correct, but overwhelmingly so to the extent that even if the application was on the criminal standard, he would have no reason to doubt that the proceeds came from illicit activity, and he was satisfied that they were representative of activities based on drug dealing. The judge continued that he was satisfied that no valid or credible explanation had been provided in the course of the inquiry as to the source of the funds.

15. In this case, the judge took the view that there were four statements within the statutory definition as interpreted in the case of *Harrison v. Judge Elizabeth Dunne*, a decision of the 24th March, 2006, of White J., these statements were the formal s. 10 statement, the affidavit of Ms. Massey with exhibits, an affidavit of Detective Garda Grimes with exhibits and a certificate of a Revenue official. He then proceeded to make an order requiring Mr. Byrne to indicate to what extent he accepted each allegation in the statements. In doing so he was properly following the procedure laid down by statute.

16. Mr. Byrne indicated that he was not accepting the contents of any of the statements but it remains the case that the Court had before it two affidavits with exhibits. There has been objection to the fact that each of the documents to which Ms. Massey had regard was not itself formally proved. In the Court's view, Ms. Massey was entitled to carry out such inquiries as she regarded as appropriate and then to have regard to the material that was available to her in reaching a view. Thereafter, Ms. Massey attended court, gave direct evidence and was subject to cross examination. At that stage two alternative theories were before the Court, one that the funds came into existence as a result of "nixers" ie. activity in the black economy and two that the funds in question represented the proceeds of drug dealing. In the view of the Court, the conclusion reached by the trial judge was one that was open to him and for which there was an ample evidential base. In the circumstances the Court will dismiss the appeal and confirm the confiscation order.