[COURT OF APPEAL]

REGINA v. CHRASTNY (NO. 2)

1991 March 4, 5, 6, 8

Glidewell L.J., Hollings and Alliott JJ.

Crime - Drugs - Confiscation order - Conspiracy to import drugs - Proceeds of drug trafficking held jointly - Only one conspirator before court - Whether confiscation order to be made against defendant for whole of proceeds - "Realisable property" - Drug Trafficking Offences Act 1986 (c. 32), ss. 4(1)(3), 5(1)

The appellant was convicted of conspiring with her husband and two others to supply a controlled drug contrary to section 1(1) of the Criminal Law Act 1977. The prosecution had served, pursuant to section 3 of the Drug Trafficking Offences Act 1986,[1] a schedule of assets which the prosecution contended were the defendant's proceeds of drug trafficking. The assets listed were held by the appellant and her husband either jointly or solely. The judge, taking what the prosecution put forward as the "global" assessment of the profits made by the appellant's husband, held it to represent the amount by which the defendant had benefited and made a confiscation order in the sum £2,676,629.28, with six years' imprisonment in lieu, to run consecutively to the seven-year term which he then imposed in respect of the offence.

On appeal against sentence: -

Held, allowing the appeal in part, that the combined effect of sections 2, 4 and 38(7) of the Drug Trafficking Offences Act 1986 was that any property in the possession of a person convicted of a drug trafficking offence at the time of his conviction, or over which he then had sufficient control to be able to dispose of it, was to be presumed, in the absence of contrary evidence, to be his proceeds of drug trafficking; that where such property was held jointly by conspirators, but only one of them had been convicted, a confiscation order could

1 Drug Trafficking Offences Act 1986, s. 2(1)(2): see post, p. 1388B-D.
S. 4(1)(3): see post, p. 1388F-G.
S. 5(1): see post, p. 1388G-H.
S. 38(7): "Property is held by any person if he holds any interest in it."

properly be made against that one in respect of the whole of the property; that the definition of realisable property in section 5(1) of the Act of 1986 was not limited to illegitimately acquired property and, therefore, if the amount realisable from the proceeds of drug trafficking were less than the total of such proceeds which a defendant had received, a confiscation order could be made in respect of that total amount with the result that the defendant could be required to realise legitimately acquired assets to satisfy the order; that, on the evidence, the amount of the order would be reduced to £2,175,748.97, and the prison term in lieu of payment under the order would be reduced to three years; but that, in all the circumstances, the sentence of seven years' imprisonment was not excessive (post, pp. 1392C-E, F-G, 1394D, 1395C-E, 1396F-G, 1397H).

Reg. v. Dickens [1990] 2 Q.B. 102, C.A. applied.

Reg. v. Porter [1990] 1 W.L.R. 1260, C.A. distinguished.

Per curiam. If the confiscation order made is satisfied by the appellant, no such order can be made against her husband in respect of the property covered by the order against the appellant since it will not be in his possession or control (post, p. 1394E-F).

The following cases are referred to in the judgment:

Reg. v. Dickens [1990] 2 Q.B. 102; [1990] 2 W.L.R. 1384; [1990] 2 All E.R. 626; 91 Cr.App.R. 164, C.A.

Reg. v. Porter [1990] 1 W.L.R. 1260; [1990] 3 All E.R. 784, C.A.
Reg. v. Viner (unreported), 25 May 1990, C.A.

The following additional cases were cited in argument:

Reg. v. Comiskey, The Times, 5 December 1990, C.A.
Reg. v. Enwezor, The Times, 18 February 1991, C.A.
Reg. v. Franklyn (1981) 3 Cr.App.R.(S.) 65, C.A.
Reg. v. Haleth (1982) 4 Cr.App.R.(S.) 178, D.C.
Reg. v. Smith (Ian) [1989] 1 W.L.R. 765; [1989] 2 All E.R. 948; 89 Cr.App.R. 235, C.A.
Reg. v. Vaughan (1982) 4 Cr.App.R.(S.) 83, C.A.

APPEAL against sentence.

On 22 April 1989 at the Central Criminal Court before Judge Machin Q.C. and a jury, the appellant, Charlotte Barbara Chrastny, was convicted of conspiring with her husband and two others to supply a Class A controlled drug. A confiscation order in the sum of £2,676,629.28 was made against her under the Drug Trafficking Offences Act 1986, with a period of six years' imprisonment in default, to run consecutively to a sentence of seven years' imprisonment then imposed for the offence. On 4 March 1991 the appeal against conviction was dismissed: *Reg. v. Chrastny* [1991] 1 W.L.R. 1381. She appealed against sentence by leave of the Court of Appeal on the grounds that, having regard to all the circumstances, seven years' imprisonment was excessive; and that the amount of the confiscation order was excessive since (i) some of the items in respect of which the order had been made either were lawfully hers or belonged to her husband and were beyond her control, (ii) the judge had been wrong to make global assessment of her husband's profits of drug trafficking as representing the amount by which the appellant had benefited, (iii) she was being made liable for the total amount of her husband's proceeds when there was no evidence of joint property or that she was an equal partner: her role had been very

limited, (iv) the judge had erred in regarding items lawfully acquired as realisable property for the purposes of the order, which amounted to reparation rather than confiscation, (v) the value of some items could not be assessed and speculative assessments of worth had been wrongly relied on, (vi) some items were beyond the appellant's control, having been seized by foreign police or being subject to orders of foreign courts, and the judge had therefore been wrong to hold that they were held by her and to rely on her remedy under section 14 of the Act of 1986 if she could not realise those items, and (vii) it was wrong for the judge to make orders based on speculative information, leaving a defendant to take his chance in an application under section 14.

The facts are stated in the judgment.

Timothy Cassel Q.C. and *Jonathan Caplan* for the appellant.
Michael Brompton for the Crown.

GLIDEWELL L.J. gave the following judgment of the court. This is an appeal against a confiscation order made under section 1(5) of the Drugs Trafficking Offences Act 1986 in the sum of £2,676,627.28. On 4 March the court gave judgment dismissing the appeal against conviction: *Reg. v. Chrastny* [1991] 1 W.L.R. 1381.

Putting the matter shortly, the appellant was convicted on count 2 of the indictment; that is to say, a count alleging conspiracy with her husband, Roy Garner and another man to supply cocaine. The prosecution case, which the jury accepted, was that she joined the conspiracy in November 1986 when she arrived in the United Kingdom and was then active in it until she and her husband were arrested on 19 June 1987. The part she played consisted of renting flats in various parts of London, hiring safe deposit boxes (in which some of the proceeds of the drug trafficking could be stored) both in the United Kingdom and abroad, opening bank accounts for the same purpose in the United Kingdom and abroad, and spending some of the money on jewellery and furs.

After her conviction the prosecution served on her a statement in accordance with section 3(1)(*a*) of the Act of 1986. The appellant's solicitors served a statement in reply putting in issue her liability to a compensation order, save in respect of certain specific items which had a total value of just under £20,000. At the proceedings for the confiscation order before the judge no evidence was called or tendered. It was assumed, or perhaps it was agreed - we are not clear which - that the judge could properly reach a decision on the basis of the material which was put before him and the evidence which had been given at the trial. The decision of this court in *Reg. v. Dickens* [1990] 2 Q.B. 102, to which we shall refer later in more detail, shows that the assumption was correct provided that the evidence which had been given at the trial was sufficient.

We must say something about the relevant provisions of the Act of 1986. Under section 1(2) a court asked to make a confiscation order under these provisions must first determine whether the defendant has benefited from drug trafficking. By subsection (3):

> "For the purposes of this Act, a person who has at any time (whether before or after the commencement of this section) received any payment or other reward in connection with drug trafficking carried on by [her] or another has benefited from drug trafficking."

It is conceded that the appellant did so benefit. Under subsections (4) and (5), if the court has determined that the defendant has benefited from drug trafficking then "the court shall, before sentencing . . . determine in accordance with section 4 of this Act the amount to be recovered in [her] case by virtue of this section." Under subsection (5) the court shall then order her to pay that amount. If the court is considering a monetary penalty it must take the confiscation order into account in assessing the monetary penalty but otherwise it must leave it out of account in determining the appropriate sentence, so it is not relevant to the determination of a sentence of imprisonment for drug trafficking.

Section 2 provides:

> "(1) For the purposes of this Act - (*a*) any payments or other rewards received by a person at any time . . . in connection with drug trafficking carried on by [her] or another are [her] proceeds of drug trafficking, and (*b*) the value of [her] proceeds of drug trafficking is the aggregate of the values of the payments or other rewards. (2) The court may, for the purpose of determining whether the defendant has benefited from drug trafficking and, if [she] has, of assessing the value of [her] proceeds of drug trafficking, make the following assumptions, except to the extent that any of the assumptions are shown to be incorrect in the defendant's case. (3) Those assumptons are - (*a*) that any property appearing to the court - (i) to have been held by [her] at any time since [her] conviction, or (ii) to have been transferred to [her] at any time since the beginning of the period of six years ending when the proceedings were instituted against [her], was received by [her], at the earliest time at which [she] appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by [her] . . ."

By section 38(7) "property is held by any person if [she] holds any interest in it." Section 4 provides:

> "(1) Subject to subsection (3) below, the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Crown Court assesses to be the value of the defendant's proceeds of drug trafficking. . . . (3) 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 [her] 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."

Section 5 is a definition section. By 5(1):

> "In this Act, 'realisable property' means, subject to subsection (2) below - (*a*) any property held by the defendant, and (*b*) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act."

There is a number of exceptions to that in subsection (2) which do not apply in the circumstances of this case.

At the time when the judge was hearing this application, there was relatively little guidance for him in decisions of this court; but afterwards,

there came a number of decisions, of which the most important is the decision of this court in *Reg. v. Dickens* [1990] 2 Q.B. 102, to which I have already referred. Giving the judgment of the court in that case, Lord Lane C.J. said, at p. 106:

> "The prosecution have the task of proving both the fact that the defendant has benefited from drug trafficking and the amount of such benefit. In our judgment the context of the Act and the nature of the penalties which are likely to be imposed, make it clear that the standard of proof required is the criminal standard, namely proof so that the judge feels sure of proof beyond reasonable doubt. The evidence upon which that judgment is based will come in part from the trial, if there has been one, in part from the statements tendered by the parties to the court under section 3 of the Act (with which we shall deal later in this judgment) and in part from evidence adduced before the court. What may thus seem at first sight to be a heavy burden on the prosecution is considerably lightened by the provisions of section 2(2)."

The Lord Chief Justice read out that subsection and subsection (3). He then said, at pp. 107-108:

> "The words 'appearing to the court' in our judgment mean that if there is prima facie evidence that any property has been held by the defendant since his conviction or was transferred to him since the beginning of the relevant period, the judge may make the assumption that it was a payment or reward in connection with his drug trafficking. Likewise with expenditure, once there is prima facie evidence of expenditure by the defendant since the beginning of the relevant period, the judge can assume that it was met out of payments received by him from drug trafficking. Those assumptions can be displaced if they are 'shown to be incorrect in the defendant's case.' In other words, if after the matter has been fully heard the defendant shows on the balance of probabilities that in respect of each item of property and expenditure the assumptions are in his case incorrect, they can no longer be relied on as evidence that that item of property or expenditure was part of the defendant's proceeds of drug trafficking. In so far as any of them survive they will, together with any evidence which the judge may accept, assist the judge to decide whether he is satisfied so as to feel sure that the prosecution have made out their case. Thus the initial heavy burden on the prosecution is greatly lightened by the potential assumptions.
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> "We turn now to the hearing. This in a complicated case is likely to be protracted and difficult. However, section 3 of the Act of 1986 goes a little way towards simplifying proceedings and crystallising the issues. It provides that the prosecution may tender a statement dealing with any matter relevant to either of the first two issues, and also provides, no doubt by way of clarification, that if the defendant accepts any of those facts, that acceptance may be treated as conclusive. By section 3(4) a similar provision is made with regard to any statement tendered by the defendant relating to the amount which might be realised at the time the confiscation order is made. Section 3(2) imposes restrictions on the defendant when he has been served with a copy of the prosecution's section 3(1) notice, because the court may then require him to indicate to what extent he accepts the prosecution allegation and if he does

not, to indicate any matter he proposes to rely on. That will have the effect, one hopes, of containing the ambit of the inquiry. Section 3(3) imposes sanctions upon him if he fails to comply with a requirement under section 3(2). It is clear from these provisions that where the prosecution statement is not accepted by the defendant, the prosecution, if they wish to rely on any of its contents, must adduce evidence to establish them. The judge then hears the evidence on either side and reaches his conclusion (1) as to whether the defendant has successfully rebutted any provisional assumptions under section 2; (2) as to the existence of any benefit from drug trafficking; and (3) as to the value of such benefit."

He went on to deal with section 4(3). I do not need to read that.

In the prosecution's section 3 statement, paragraph 3 reads:

"*Value and benefit of drug trafficking.* (i) The court has heard evidence relating to the items specified on [a] schedule of money and valuables. It is the prosecution's contention that the majority of items shown on [the] schedule Field A, were derived from the sale of . . . cocaine imported in August 1986."

Field A is a schedule appended to that document referring to some 57 items, some of money and some of property. The point made in that first sub-paragraph is as a generalisation conceded:

"(ii) It is alleged that the basic value of the benefit of drug trafficking is £4,436,000. This figure is based on the notebook jottings of Nikolaus Chrastny who kept a day to day running total of cocaine sold. (Exhibit 'Patel H23B'). In Nikolaus Chrastny's statement of July 1987, he speaks of this record. (Page 7 of his statement refers)."

That assertion is not conceded and it forms the first matter with which we have to deal. As we have said, schedule Field A is a list of 57 items recovered or discovered by the Customs and Excise after Mr. and Mrs. Chrastny were arrested. Those items have on the schedule a total estimated value of £3,172,412.17. From now on we propose to forget about the pence. The prosecution, however, submitted that the appellant's proceeds of drug taking amounted to the larger sum of £4,436,000. That is the total of the sum shown on the notebook jottings of Mr. Chrastny. The prosecution contended that this was a list of sales and of the drugs with dates and amounts of sale prices. The documents (Patel H23B) were a number of pieces of paper on which there appeared columns of numbers in the manuscript, in which undoubtedly, the total of the figures in one column was £4,436,000. However, the document itself does not indicate what any of the numbers are, to what they refer or of what they are records.

While Mr. Chrastny was in custody, before he escaped, he was, not unnaturally, extensively interviewed. It seems that he made a considerable number of confessions and gave a considerable number of explanations. In one of the interview statements he explained what H23B was. He said, apparently that it was indeed a record made by him of his sales of cocaine with the dates, quantitites and sale prices written on and the £4,436,000 was the total of the sale prices. It came nowhere near what the prosecution had said was the street value of the drug, but then of course he was not selling retail; he was selling first stage wholesale so to speak. Whether that is right or not does not matter for our purposes.

That document, which was introduced as evidence in the conspiracy trial, and Mr. Chrastny's statement, constituted what was described throughout the proceedings before the judge rather vaguely as the global approach. The global approach was one which appealed to the judge, and he therefore concluded on this matter that it was the right course to adopt. He said:

> "I do not propose to give a long judgment, it is sufficient that I say for this purpose that I am persuaded that the global approach is correct, and therefore the joint proceeds are of 392 kilogrammes of cocaine imported, 52 not disposed of into the market, and there is evidence of a piece of paper left by the man Nikolaus Chrastny showing that the proceeds were £4,436,000. Accepting, as I do, the submissions of the Crown upon the global approach this, in my judgment, is the value of the defendant's proceeds of drug trafficking."

Mr. Cassel submits that as against the appellant the statement made by Mr. Chrastny in interview is inadmissible. That is conceded by the Crown. Mr. Cassel further submits that the list, albeit it was put in evidence in the course of the prosecution for the conspiracy, is meaningless and of no effect without the explanation contained in Chrastny's statement. Mr. Brompton, for the prosecution, submits that this was in evidence and admissible and is therefore admissible in these proceedings.

For our part, we do have some doubt whether evidence which would not be admissible, if the prosecution were for an offence other than conspiracy but is admissible because of the rules applying to evidence in conspiracies, is therefore also admissible in relation to proceedings for confiscation under the Drug Trafficking Offences Act 1986. I say we have some doubt about it, but we do not think it necessary at this stage to resolve that question. It may have to be resolved at some later stage. But we do agree with Mr. Cassel's submission that without Mr. Chrastny's explanation, which was clearly inadmissible in any proceedings against his wife, the list was meaningless and of no effect. If follows, in our view, that in these proceedings there was no clear evidence against Mrs. Chrastny establishing the value of £4,436,000 as being her proceeds of drug trafficking.

It follows from that, therefore, that the material before the court (now before this court because of course we must base ourselves on the material that was before the judge) as to the total proceeds of drug trafficking is limited to the items in the document Field A because that constitutes the only other sort of material before the court. There is a very generalised proposition of course that the street value of the total amount imported was vastly greater than £4.5m., but the prosecution do not seek to rely upon that.

This becomes a case in which the evidence before the court is as to property which has in fact been discovered and the issue becomes whether and to what extent that property was shown, taking into account the presumptions, to be the proceeds of drug trafficking. At the trial there was evidence that the various items in Field A were found at the places in which according to that schedule they were found; where there were bank accounts said to have been opened by particular persons they had indeed been opened by those persons; and where there were safe deposit boxes said to have been rented by particular persons

they had indeed been negotiated in the name of the person shown in the schedule. However, with both bank accounts and safe deposit boxes, there was in some cases evidence - and it is recorded in the material put before the court - that other persons either would have access to the box or be entitled to benefit from the bank account. It is accepted, or not challenged, that such evidence was given and that thus before the judge and before this court that is admissible evidence upon which to base the conclusion as to what constitutes the appellant's proceeds of drug trafficking.

Much of that evidence showed that money and various items of value were found at the flat at 69, Harley Street, at which Mr. and Mrs. Chrastny were living when they were arrested, or showed that there was property, either money or valuables, in safe deposit boxes which were either in her name or in joint names. Some of the bank accounts and some of the safe deposit boxes were in the sole name Charlotte Chrastny; some were in other names but there was evidence that she had access to them.

I go back to the statutory provisions. Section 4(1) of the Act of 1986 makes it clear that the amount to be recovered under a confiscation order is, subject to subsection (3), the value of the defendant's proceeds of drug trafficking. Subsection (3) comes into play if the court is satisfied that the amount that might be realised at the time of the confiscation order is less than the proceeds of drug trafficking; then the lesser sum is to be the amount ordered. But if it is not less, then going back to finding the value of the defendant's proceeds of drug trafficking, which is the exercise the court has to conduct in any case, by section 2(1) any payment or other rewards received by a person in connection with drug trafficking are his or her proceeds. The joint effect of section 2(2) and (3) is that the assumption is to be made unless it is proved to be incorrect that any property held by the defendant at any time since, which obviously means after her conviction, was received as a payment or reward for drug trafficking. As I have said, by section 38(7), property is held by any person if he or she holds an interest in it.

It follows in our view, therefore, that the appellant's proceeds of drug trafficking include, certainly comprise, money and property received by her and property assumed to be received by her under the statutory assumption as a reward if at the time of her conviction she held an interest in that property. In other words, in our judgment, if at the time of her conviction, the defendant is in possession of property or has a sufficient control over it to be able to dispose of it, it can be assumed in the absence of contrary evidence to be her proceeds of drug trafficking. That is the test we have applied, and we have therefore gone on to consider whether the evidence established to the necessary standard that the appellant had such possession or control. Where the evidence did establish that, there was no contrary evidence to displace the assumption. Clearly there was such evidence regarding the property found at the 69, Harley Street flat (all the property found there) and the safe deposit boxes and bank accounts which were in her name, or to which she had access so that she could take out the proceeds in a bank account or remove the property from a safe deposit box.

Mr. Cassel, for the appellant, contends, - this was the main plank of his argument - that where a husband and wife are living together and property is found in their joint possession in their home, or where it is in a joint account or a bank deposit box in their joint names, the court

should not find that the whole of that property was the proceeds of the drug trafficking attributable to either one defendant. What the court should do - indeed I think Mr. Cassel submits is obliged to do - is to apportion the total between husband and wife. This does not only apply to husband and wife; it applies to other persons not married to each other in the same situation. He invites us, therefore, having assessed the total of property to which this submission applies, to say that at most we should attribute 50 per cent. to her but that there is material upon which we could attribute less than 50 per cent. to her.

He bases that submission largely upon the decision of this court in *Reg. v. Porter* [1990] 1 W.L.R. 1260. That was a case in which there were two co-defendants. They were not married to each other. They were men, Porter and Rolph. The facts which are set out in the judgment of Garland J., giving the judgment of the court, showed that the judge in those confiscation order proceedings, found as a fact that the two men had jointly benefited from drug trafficking to the extent of £9,600. That calculation was based on evidence of the sale price of cannabis in that case over a given number of weeks and the amount of cannabis. Garland J. continued, at p. 1262:

> "The two, the appellant and the co-defendant, fortuitously had a joint asset, a house at 7, Shelley Close, Royston in Hertfordshire, which they bought in January 1988 for £49,000 subject to mortgage which, by the time of the hearing, was in arrears, but it was thought that the equity was worth between £25,000 and £30,000. It was assumed throughout that the house was 'realisable property' within the terms of section 5(1)(*a*) . . . and the nine months which the appellant and his co-defendant were given in which to pay the confiscation order was based on the contemplated sale of that property after they had been released from their custodial sentences."

He went on, after dealing with another matter, to say: "what is before us today is the issue whether or not the confiscation order could properly be joint and several . . ." Having determined that the proceeds of drug trafficking of the two men together were £9,600 and that they had a joint asset, the judge in that case took what many people might think is the sensible course of making a joint order against them. The point of the decision in *Reg. v. Porter* was that, whether that is a good thing or bad thing, the statute does not permit it to be done. Garland J. said, at p. 1263:

> "The Drug Trafficking Offences Act 1986 has not been without difficulties in its application. In April 1990 in *Reg. v. Dickens* [1990] 2 Q.B. 102, this court sought to give some guidance to those who have to grapple with those difficulties. Where property is jointly owned, particular problems may arise. In this case there was quite fortuitously both a joint enterprise and a joint asset. However this court takes the view that the Act of 1986 does not contemplate, as the judge thought, joint penalties, even though there has been a joint venture. There must be certainty in sentencing. A convicted person is entitled to know the extent of his monetary liability; a fortiori when he is liable to lose his liberty if he fails to discharge a monetary penalty. It appears to us that in assessing benefit in accordance with the provisions of section 1 of the Act, the court must, as between co-defendants, determine their respective shares of any joint benefit that they may have received as a result of drug

trafficking. In the absence of any evidence, whether from the co-defendants or elsewhere, a court is entitled to assume that they were sharing equally. Then when it comes to arriving at the amount of the confiscation order pursuant to section 4 of the Act, section 4(3) makes it quite clear that if the means of the co-defendants differ, then the amount of the confiscation order can be tailored to those means."

In that case the order was quashed in relation to the particular appellant. A sum of £4,800 was substituted as the amount of the confiscation order.

Mr. Cassel argues that that applies generally where property is jointly held. We note, however, that *Reg. v. Porter* and the slightly earlier decision in *Reg. v. Viner* (unreported), 25 May 1990, were both cases in which the persons who had the joint interest in the relevant property were both convicted and both before the court in the confiscation proceedings. *Reg. v. Porter* [1990] 1 W.L.R. 1260 is of course authority for the proposition that the joint order may not be made. Clearly, in such circumstances, to make an order against each of the defendants in the total sum would be unfair. They could not both satisfy such an order and it would then expose one or other of them to potential penalties, or perhaps both of them. But where only one defendant has been convicted and has sufficient control to realise the property, we see no reason why an order in the total sum should not be made against him or her. The situation is not that which obtained in *Reg. v. Porter* and *Reg. v. Viner*. We see no unfairness.

Mr. Cassel urged us to say that it would be unfair because if Mr. Chrastny is apprehended and convicted then it may be that the prosecution would seek to have a confiscation order made against him in respect of precisely the same property as is now under consideration as the basis of the confiscation order against the appellant. With respect, that cannot be the case. If the order is made in respect of some of the items in Field A and is then satisfied by the appellant by allowing the property in Field A to be realised, or realising it itself and paying the proceeds, no such order can be made against Mr. Chrastny because by the time he comes to be convicted it will not be in his possession or control. All that may be in his possession or control is anything which remains out of Field A which we do not determine to be property of the proceeds of drug trafficking of the appellant.

Therefore, we conclude that we can properly make an order, subject to other considerations to which I shall have to come later, relating to the whole of the property which we find was within the possession of, or the control of, the appellant in such a way that she could dispose of it and realise it.

The issue, therefore, for us is one which the judge did not consider at all because of the approach he adopted. We have had to turn ourselves into a court of first instance for this purpose and ask, in relation to each item in the schedule, did the evidence show that the appellant had such possession or control of the property? It was conceded by the prosecution that in relation to some of the items the evidence did not show that. In relation to some other items we have decided that it did not. We therefore find, without finding it necessary to go through each item in detail as to why we have so found, that her proceeds of drug trafficking were the total of the following items of the

schedule: 1 to 28; 29, but excluding four rings which are conceded to be her personal property inherited from her mother; 30 and 31 (swords and pistols found in the flat); 32 and 36 (the contents of a safe deposit at a bank at her home town, Ingolstadt, in Germany); 45, except the account with the engaging name Duckwebs; 46; 48, for what it is worth because 48 is an account which is said to be in overdraft; and 55.

We have then gone on to consider whether under section 4(3) we should make some lesser order. We take the view that the money in the Flynn account forming part of item 45 (which if my arithmetic is correct is £19,267.24) is not realisable property within section 5(1) of the Act of 1986 because it is not property held by the appellant.

The following issues remain. First of all, whether it is shown to our satisfaction that the amount that might be realised at the time the confiscation order is made, for which purpose we must go back to the date when the court originally made it but now attributing it to the amount which we are dealing with, is less than the value of the proceeds for drug trafficking. One of the questions that arises is if a defendant has legiti- mately acquired property which is not part of his or her proceeds of drug trafficking, and if the amount realisable from the proceeds of drug trafficking are less than the total proceeds attributable to her, whether an order can be made in the total sum of the proceeds of drug trafficking, which will mean that she has to turn to some of her legitimate assets in order to satisfy the order.

I have read the definition of realisable property within section 5(1). In our view it is quite clear that that definition embraces legitimately acquired property. We cannot read into the Act of 1986 any inference that that definition is to be limited to illegimately acquired property; that is to say, the proceeds of drug trafficking.

Thus we reject Mr. Cassel's submission on that aspect of the matter. This statute is undoubtedly Draconian and the decision on that point may seem to be harsh; the statute is harsh. The statute is in essence one that seeks to ensure that anybody who has benefited from drug trafficking shall to the extent to which he or she can do so be deprived of the whole of that benefit.

The next matter relates to items 32 and 36. That is, I remind myself, the contents of the safe deposit box in Ingolstadt, partly money and partly jewellery. Apparently, the German police in the course of investigation of related proceedings in Germany, that is to say proceedings relating to these same drugs or a part of them, obtained possession of the contents of that box. We are told that they still hold them. Quite what the effect of that possession is now, we do not know. On what we have been told, it is totally unclear to us whether they would still have any rights to retain possession, but then of course we are not conversant with German law. It follows, however, that in our view the contents of that box are, as I have already indicated they are, the proceeds of drug trafficking. In our view they are also realisable property within section 5(1) as far as the appellant is concerned. If it transpires that she cannot meet the order we are about to make because she cannot get at those particular proceeds, her remedy is to apply later under section 14 of the Act of 1986. That may, however, not be necessary because one thing that we have been told - and of course if we had not been told it we should have assumed it - is that the sums of money in the various bank accounts, which have been subject to a restraint order (which is in effect an injunction preventing them from

being dealt with or disposed of) have been amassing interest. That interest will be available to meet in part - part of it has been expended we know on her costs - the order that we are about to make.

We therefore order that the confiscation order should be in an amount which is the total of the amounts of her proceeds of drug trafficking relating to the items, to which I have already referred. I read out the list; I am not going to read it out again. There is one remaining problem. That relates to the items which are not ready cash. Where they are ready cash there is no problem because whether they are English currency or foreign currency, the foreign currency, it was agreed, could be translated at the rate of exchange current at the time when the original order was made. There is no dispute about that. There are, however, a number of items of jewellery. There is one box that contains platinum bars and krugerrands and maybe other gold coins. There are a couple of fur coats. Finally, there are the appellant's four rings which have to be deducted from item 29. We were in a good deal of uncertainty about this at one stage because it did seem that the court did not have any valuation evidence and the judge had simply adopted the various sums set out in the schedule. It is now clear to use that in relation to all the items, except the fur coats and the four rings, the court did have valuation evidence. It is not wholly clear why it was given, but that it was given as part of the evidence in the conspiracy we accept.

Mr. Cassel said he did not challenge it at the time because it was not relevant to challenge it. He made it clear in his section 3 statement that he was not accepting the valuation. If that is right, with the greatest respect, he could have called contrary evidence if the view had been taken that the values attributable were not accurate. The witnesses are those whose names appear on the schedule. Mr. MacCann and various other gentlemen gave valuation evidence.

So far as items 28, 30, 31, 36 and 35 are concerned, we are satisfied there was such evidence. As a result of an indication we gave, the value of the furs has now been agreed at £20,000, although it is said that the value of the disposal will be substantially less; we accept that. The only remaining item is the appellant's four rings and, if necessary, we are prepared to put a valuation on those ourselves, but we hope it may have been done. [Counsel informed the court that the value of the rings plus VAT was £52,900.]

Subject to that being checked we allow the appeal against the confiscation order and reduce the sum in which the order is made to the sum that Mr. Cassel has just read out, £2,175,748.97. If there is any error in that I hope it will not be necessary to come back to the court, but there is liberty to apply.

That leaves us with issues about time to pay and also of course, vitally, the appeal against the sentence and the time ordered to be served in lieu of payment of that amount. I have made it as clear as I can that the basis upon which we have assessed what is the appellant's proceeds of drug trafficking is that we have sought to see whether there is evidence that she does have sufficient control of her property to realise it. The one possible doubt about that would relate to items 32 and 36. I have already indicated that, if necessary, an application under section 14 can be made in respect of that and any other item if it proves to be decisive. That being so, we recognise that it may not be possible for her to satisfy this within the two-year period originally given to her,

but we do not think she needs anything like as long as Mr. Cassel asks for. We extend the time for compliance with the order to the end of this year (31 December 1991) with liberty, if necessary, to apply for a further extension. I hope we can order that any application for an extension should be made to the Crown Court rather than to this court. That is what we order.

The sentence passed on her was one of seven years' imprisonment. The judge when he was passing sentence said that she played an important and vital part in assisting her husband in his operations in the United Kingdom. He then detailed the part that the appellant played, and he said:

> "Those who indulge in drug offences must realise that whatever their personal circumstances there must be severe sentences intended to deter and intended to discourage, and I add the mere fact that someone has a wife, the fact - and it is a tragic one - that you have an eight year old child cannot prevent the court, and must not deter the court, from a substantial sentence of imprisonment."

Then he specifically took into account the fact that it was count 2 on which she was convicted, supply not importation. Secondly, she is a lady who, until the conviction, was of good character. Thirdly, she was used but not unwilling and, fourthly, she was corrupted but said that she was willing to be corrupted.

The amount of cocaine imported in this case, and which the appellant helped her husband and his evil associates to dispose of, must, as I have already said in dealing with sentence in relation to Mr. Garner, have caused untold suffering and misery to many many thousands of people in the United Kingdom and maybe, for all we know, in the continent of Europe. She is an intelligent woman; her background and history shows that. She must have realised the misery that she was spreading for gain for her husband and herself amongst others. She fell to be treated as somebody who, while occupying a place entirely subsidiary to her husband who was very much the leading villain in this conspiracy, nevertheless played an important part.

We have taken into account the matters which Mr. Cassel has urged upon us. In particular, we are very conscious that she has a son who now is deprived of both of his parents. He is deprived of his father because Mr. Chrastny has vanished. Inevitably, if Mr. Chrastny reappears in this country, he will continue to be deprived of Mr. Chrastny's care. As far as his mother is concerned, he has been deprived of her and she of him. We accept what is said in a report that we have read that the relationship between them is a caring and loving one and that the child himself must be suffering. He is with his grandmother and being looked after by her in Germany on relatively restricted funds. It is the sort of situation that occurs time and again in relation to criminal offences, that the criminal imposes sometimes an even greater burden on his or her family than he imposes on him or herself. In our view, even taking that matter into account, we cannot find that this sentence was in any way wrong or excessive.

We have also been referred to a report, which we have read, about the conditions in the high security wing in the prison in which the appellant is at present imprisoned, conditions which it is clear from the second report have somewhat improved but are still very restricted and

very claustrophobic. Nevertheless, she has put herself at risk. I will come back to say something about that later, but that cannot affect our determination of the sentence.

Accordingly, so far as the seven years is concerned, the appeal against sentence is dismissed.

We have, however, thought it right to reconsider the sentence in lieu of her making payment. We take the view that the prospect of having to serve any additional term of imprisonment is such, and will no doubt weigh upon her to such an extent, that it need not be as great as that which the judge thought right to impose. Accordingly, we do allow the appeal to the extent or reducing that term from six years to three. The effect will be that she is to meet a compensation order in the sum to which I have already referred. If she fails to do so by the end of this year the penalty is three years in default; that is subject to the complicated provisions which apparently provide that if she has made partial but not total payment the period in default is lessened pro rata.

I say one last thing, going back to her conditions in Durham Prison. This is not a matter for us at all. We are not in charge of the prisons in this country nor are we directly concerned with conditions in them. That is a matter for the Home Secretary and his advisers. Nevertheless, now that this appeal has been disposed of - she has been waiting for it for a long time - we do respectfully suggest that the Home Secretary might properly reconsider whether she needs to continue to be detained in that particular prison for the remainder of her sentence. As I say, he may well conclude that she does, but that is a matter for him.

Appeal allowed in part.
Confiscation order varied.
No order as to costs save legal aid taxation.

Solicitors: Simons, Muirhead & Burton; Solicitor, Customs and Excise.

[Reported by Mrs. Gurinder Gosal, Barrister]