

SUPREME CT.

R. v. HUGHES

[2007–09 Gib LR 317]

R. v. L. HUGHES, J. HUGHES, A. LINLEY and D. LINLEY

SUPREME COURT (Dudley, Ag. C.J.): April 3rd, 2009

Criminal Law—drugs—investigation into drug trafficking—confiscation of assets—offences of acting to avoid making or enforcement of confiscation order under Drug Trafficking Act 1995, s.54 not applicable to external confiscation order—omitted in respect of external orders by Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999

The defendants were charged with concealing or transferring proceeds of drug trafficking and conspiracy to avoid the making or enforcement of a confiscation order.

The first defendant had been convicted in England in connection with the supply of cannabis and a confiscation order had been made against him there. The defendants transferred moneys between their accounts, allegedly representing the proceeds of the first defendant's drug trafficking, and were charged under the Drug Trafficking Offences Act 1995, s.54 with two counts of assisting him to avoid the making or enforcement of the UK confiscation order. As a preliminary issue before trial, they applied to have both counts of the indictment quashed.

The defendants submitted that s.54 did not create an offence in respect of external confiscation orders, applying only to those made in Gibraltar, since the Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999 had omitted the provision with respect to confiscation orders made in designated countries.

The Crown submitted in reply that a purposive interpretation should be adopted in accordance with international provisions to facilitate the combating of money laundering and in the light of that the defendants' literal interpretation would render the 1999 Order futile.

Held, discharging the defendants on both counts:

Both counts on the indictment would be quashed as s.54 of the Drug Trafficking Offences Act 1995 did not create offences in respect of the avoidance of an external confiscation order. The 1999 Order had omitted the provision with respect to designated countries but the Order would not be rendered nugatory as there were other mechanisms for the enforcement of external confiscation orders without relying on penal sanctions. Further, although such penal sanctions would be desirable, a purposive construction would offend the principle requiring the strict construction of penal

enactments. Since the counts related to a UK confiscation order, the defendants would be discharged (paras. 10–11).

Case cited:

(1) *S.-L., In re*, [1996] Q.B. 272; [1995] 3 W.L.R. 830; [1995] 4 All E.R. 159, referred to.

Legislation construed:

Drug Trafficking Offences Act 1995, s.2(1): The relevant terms of this sub-section are set out at para. 4.

s.46: The relevant terms of this section are set out at para. 5.

s.54: The relevant terms of this section are set out at para. 3.

Ms. K. Khubchand, Crown Counsel, for the Crown;
C. Salter and R. Pilley for the defendants.

1 **DUDLEY, Ag. C.J.:** The defendants stand indicted of, *inter alia*, various counts of concealing or transferring proceeds of drug trafficking contrary to s.54(2)(a) and (b) of the Drug Trafficking Offences Act 1995 and various counts of conspiracy contrary to s.11 of the Criminal Offences Act where the conspiracy alleged is that of seeking to avoid the making or enforcement of a confiscation order contrary to s.54(1)(a) and (b) of the Drug Trafficking Offences Act. At its most basic, the prosecution case is that the defendants sought to avoid the making or enforcement of a confiscation order, made by the Kingston Crown Court in the United Kingdom, by transferring diverse sums of moneys between accounts.

2 The matter is set down for trial for three weeks as from April 15th, 2009. So as to assist in the management of the trial, a preliminary point has been argued at this stage upon an undertaking of counsel for the defendants that he will renew the application upon the defendants being put in the charge of the jury but accepting that he will be bound by the terms of this ruling.

3 The point taken is relatively short but requires setting out the relevant statutory provisions in some detail. Section 54 of the Drug Trafficking Offences Act provides:

“(1) A person is guilty of an offence if he—

- (a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of drug trafficking, or
- (b) converts or transfers that property or removes it from the jurisdiction,

for the purpose of avoiding prosecution for a drug trafficking offence or the making or enforcement in his case of a confiscation order.

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(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he—

- (a) conceals or disguises that property, or
- (b) converts or transfers that property or removes it from the jurisdiction,

for the purpose of assisting any person to avoid prosecution for a drug trafficking offence or the making or enforcement of a confiscation order.”

4 Section 2(1) of the Drug Trafficking Offences Act defines a confiscation order in the following terms: “‘confiscation order’ means an order made under section 3 and includes, in particular, such an order made by virtue of section 12, 13 or 18 . . .” Albeit not specifically spelt out in s.3, when it is read together with the definition of “the court” in s.2, s.3 clearly relates to a confiscation order made by this court. Sections 12, 13 and 18 refer back to s.3.

5 Section 46 empowers the Government to make provision for the application of the Drug Trafficking Offences Act in respect of confiscation orders made in countries or territories outside Gibraltar in the following terms:

“The Government may, by Order—

- (a) direct in relation to a country or territory outside Gibraltar designated by the order (‘designated country’) that *subject to such modifications as may be specified, this Act shall apply to external confiscation orders* and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there . . .” [Emphasis supplied.]

6 The Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999 (“the Designated Countries and Territories Order”) is the extant order made pursuant to s.46 of the Act. By virtue of para. 3(1) and Schedule 1, it is apparent that the United Kingdom is a designated country. The modifications which apply to the Drug Trafficking Offences Act are set out at Schedule 2 and, very usefully, the “Modified Act” is then set out at Schedule 3. It is significant for present purposes that by virtue of para. 17 of Schedule 2, ss. 37–69 of the Drug Trafficking Offences Act are omitted from the Modified Act, therefore the penal sanctions found in Part V of the Drug Trafficking Offences Act including s.54, do not form part of the Modified Act.

7 Mr. Salter's very short point is that, given the omission from the Modified Act of the penal provisions, on a proper interpretation of the Drug Trafficking Offences Act, the s.54 offence relates exclusively to confiscation orders made by this court pursuant to s.3 of the Drug Trafficking Offences Act and therefore is not capable of creating an offence in respect of external confiscation orders.

8 Ms. Khubchand for her part accepts that, on a strict literal analysis of the statutory provisions, Mr. Salter's proposition is correct but submits that the court should adopt a purposive approach to the legislation. She submits that the Drug Trafficking Offences Act was in part implemented to give effect to the Vienna Convention 1988 and Council Directive 91/308/EEC, the purpose of which was, *inter alia*, to combat money laundering and to provide tools to prevent drug traffickers from evading the legal consequences of their actions. She further argues that to give the statutory provisions a literal construction would make a nonsense of the Designated Countries and Territories Order as it could be defeated with impunity. She further relies upon *In re S.-L.* (1).

9 The case dealt with English statutory provisions no longer extant in England and Wales but which I am told are similar to the statutory provisions before me. Whilst accepting that that case supports the proposition that a purposive interpretation is to be given to these statutory provisions, it is, however, of limited assistance. *In re S.-L.* was a case which involved the making of a restraint order whilst the question before me is whether s.54 creates a criminal offence in respect of the avoidance of an external confiscation order.

10 I am of the view that the Designated Countries and Territories Order is not rendered nugatory merely because external confiscation orders do not come within the umbrella of the penal sanction created by s.54 of the Drug Trafficking Offences Act. It is perfectly plausible that the Government simply sought to allow for the enforcement of external confiscation orders in this jurisdiction in terms of restraining and charging orders and the realization of property so that any such order may be satisfied. Whilst the availability of a penal sanction against those seeking to avoid enforcement would be desirable, to give the statutory provisions their literal meaning does not render them absurd. Moreover, to afford the provisions the interpretation urged by Ms. Khubchand would also, in my view, offend the principle which requires strict construction of penal enactments.

11 In the circumstances, I am of the view that such of the counts as relate to the commission of an offence by virtue of the avoidance of the Kingston Crown Court confiscation order are offences unknown to the law.

Order accordingly.