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R. v. HUGHES

[2007–09 Gib LR 361]

**R. v. L. HUGHES, J. HUGHES, A. LINLEY and D. LINLEY**COURT OF APPEAL (Stuart-Smith, P., Kennedy and Otton, JJ.A.):  
September 18th, 2009

*Criminal Law—drugs—investigation into drug trafficking—confiscation of assets—offence of concealing property to avoid making or enforcement of confiscation order under s.54 of Drug Trafficking Offences Act 1995 limited to orders made by Supreme Court—definition of “confiscation order” in s.2(1) not to be purposively construed to include external order—offence expressly omitted with respect to designated countries by Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999*

The defendants were charged in the Supreme Court with concealing or transferring proceeds of drug trafficking and conspiracy to avoid the making or enforcement of an external 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 Supreme Court (Dudley, Ag. C.J.) quashed (in proceedings reported at 2007–09 Gib LR 317) both counts in the indictment on the ground that s.54 of the Drug Trafficking Offences Act did not create offences in respect of the avoidance of external confiscation orders, such as the UK order which was the subject of these charges.

On appeal, the Crown submitted that the lower court had erred in law in finding that s.54 was restricted to offences of avoiding the making or enforcement of a confiscation order made by the Supreme Court of Gibraltar. It was further submitted that the Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999 extended the provisions of the 1995 Act to external confiscation orders made in designated countries and the mere fact that s.54 was not transposed to the 1999 Order did not prevent the use of its sanctions as it should be interpreted purposively in view of the fact that the legislation was introduced to give effect to global initiatives combating money laundering.

**Held**, dismissing the appeal:

The appeal would be dismissed and the order to strike out the two counts of the indictment upheld. Section 54 of the Drug Trafficking Offences Act created the offence of concealing property for the purpose of avoiding the making or enforcement of a “confiscation order” but a “confiscation order” was clearly confined in s.2(1) of the Act to a Gibraltar order and was not wide enough to encompass an external confiscation order. Nor had the 1999 Order extended the reach of s.54, and the provision had instead been expressly omitted with respect to designated countries in para. 17 of Schedule 2. Further, a purposive construction could not be used to override or contradict an express provision in the legislation, especially as this was a penal enactment, and given that the definition could not be expanded to include the UK confiscation order, the lower court’s decision to quash the indictment would therefore be upheld. This did not create a lacuna in the law as a prosecution with respect to this conduct could have been pursued in England (paras. 31–38).

**Case cited:**

- (1) *Goatley v. Brixton Prison Governor*, [2002] EWHC 1209 (Admin), referred to.

**Legislation construed:**

Drug Trafficking Offences Act 1995, s.2: The relevant terms of this section are set out at para. 8.

s.46: The relevant terms of this section are set out at para. 15.

s.54: The relevant terms of this section are set out at para. 7.

*R.R. Rhoda, Q.C., Attorney-General*, for the Crown;  
*C. Salter* and *R. Pilley* for the defendants.

1 **OTTON, J.A.:** This is an appeal against a decision of Dudley, Ag. C.J. (as he then was) formally handed down on April 3rd, 2009 quashing Counts 1 and 2 of this indictment and discharging the defendants on those counts.

2 The Crown brings this appeal under s.9(2) of the Court of Appeal Act. The appeal is on a question of law alone, namely whether the learned Dudley, Ag. C.J. correctly construed s.54 of the Drug Trafficking Offences Act 1995 (“the Act”), and whether that section is restricted to a situation where a confiscation order has been made or is likely to be made by the Supreme Court of Gibraltar. This court is not concerned with the question of avoidance of prosecution.

**Factual background**

3 The defendants were charged with various counts relating to money laundering the proceeds of drug trafficking contrary to the Drug Trafficking Offences Act. On April 7th, 2004, Leonard Hughes, together with

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others, was arrested in Birmingham, England in connection with a seizure of approximately 500kg. of cannabis resin with a street value of approximately £865,000 and was charged with conspiracy to supply a controlled Class C drug.

4 On July 9th, 2004, Leonard Hughes pleaded guilty to the charge before the Kingston Crown Court. Following his guilty plea, the court proceeded to a confiscation process to decide whether Mr. Hughes had benefited from his criminal conduct; to decide the recoverable amount and to make a confiscation order requiring him to pay that amount. On April 8th, 2005, Leonard Hughes was sentenced to six years' imprisonment and on this date he was ordered to provide financial information. The order required him to account for his income, disclose all financial accounts in which he had an interest and disclose all assets in which he held an interest.

5 On October 30th, 2006, a confiscation order was made against Leonard Hughes in the sum of £306,448.93. Part of the financial investigation conducted in England involved the issue of a letter of request to Gibraltar requesting assistance in obtaining evidence from financial institutions in Gibraltar for use in the confiscation investigation. As a result of the assistance provided to the UK authorities, officers of the Royal Gibraltar Police ("RGP") commenced an investigation into money laundering offences which had been committed in Gibraltar and several production orders were obtained under the Drug Trafficking Offences Act for production of documents from a number of financial institutions in Gibraltar as well as from the Income Tax Office.

6 Analysis of the documents showed that on diverse dates between April 2004 and May 2006, substantial sums of money were withdrawn from accounts held in the name of Leonard and Joanne Hughes and transferred into an account held in the name of Alison Linley, held either in her sole name, or held jointly with Derek Linley (the parents of Joanne Hughes). The prosecution is brought on the basis that these moneys represented Leonard Hughes' proceeds of drug trafficking and the transfers of money into the accounts of Derek and Alison Linley were made for the purpose of assisting Leonard Hughes to avoid the making or enforcement of a confiscation order in the United Kingdom.

#### **The law**

7 Section 54 of the Act is the critical piece of legislation before this court as it 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.

(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.”

8 The term “confiscation order” is defined in s.2(1) of the Act as “an order made under section 3 and includes, in particular, such an order made by virtue of section 12, 13 or 18. . .” The definitions in s.2(2) and (3) suggest that this Act is meant to be part of an international initiative to combat drug trafficking as it provides:

“(2) In this Act, ‘drug trafficking’ means, subject to subsection (3), doing or being concerned in any of the following, whether in Gibraltar or elsewhere—

- (a) producing or supplying a controlled drug where the production or supply contravenes section 6(1) of the Drugs (Misuse) Act or a corresponding law;

. . .

(3) In this Act, ‘drug trafficking’ also includes a person doing the following whether in Gibraltar or elsewhere, that is to say, entering into or being otherwise concerned in an arrangement whereby—

- (a) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated . . .”

9 The Drug Trafficking Offences Act, 1995 (Designated Countries and Territories) Order 1999 (“the 1999 Order”) is an order made under s.46 of the Act. The significance of designation is that—

- (a) designated countries may take legal action in the Supreme Court of Gibraltar to preserve assets for and to enforce the designated country's confiscation order; and

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- (b) a designated country is more likely to have laws in place enabling Gibraltar to take similar action in the designated country.

10 By virtue of para. 3(1) of Schedule 1, the United Kingdom is a “designated country.” Paragraph 3(1) to the 1999 Order provides “each of the countries and territories specified in Schedule 1 is hereby designated for the purposes of sections 46 and 47 of the Act.” By virtue of para. 3(2) of the 1999 Order, the Act applies subject to such modifications specified in Schedule 2 and has effect as set out in Schedule 3 (“the Modified Act”).

11 Section 2(1) of the Modified Act defines an external confiscation order as—“any order falling within section 3.” Section 3(1) of the Modified Act defines an external confiscation order as—

“an order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is *referred to in this Act* as an ‘External Confiscation Order.’” [Emphasis supplied.]

12 It is submitted that the addition of the word “external” in the Modified Act is merely descriptive and so referred to in order to distinguish it from a domestic confiscation order. The definition of “drug trafficking” in both the Act and the Modified Act includes “conduct which is an offence under section 54 *or which would be such an offence if it took place in Gibraltar.*” [Emphasis supplied.] The reference to “section 54” in the Modified Act is a clear reference to s.54 of the Act.

### The indictment

13 The details of the indictment are as follows:

#### “Count 1: Statement of Offence

Conspiracy to conceal or transfer proceeds of drug trafficking contrary to s.11 of the Criminal Offences Act.

#### Particulars of Offence

Leonard Hughes, Joanne Hughes, Derek Linley and Alison Linley on diverse dates between April 7th, 2004 and May 4th, 2006, in Gibraltar, conspired together to conceal or transfer property, which in whole or in part directly or indirectly represented Leonard Hughes’ proceeds of drug trafficking for the purpose of avoiding the making or enforcement of a confiscation order contrary to s.54(1)(a) and (b) and s.54(2)(a) and (b) of the Drug Trafficking Offences Act.

#### Count 2: Statement of Offence

Concealing or transferring proceeds of drug trafficking contrary to s.54(2)(a) and (b) of the Drug Trafficking Offences Act.

**Particulars of Offence**

Joanne Hughes, Derek Linley and Alison Linley on or about August 2nd, 2004, in Gibraltar, knowing or having reasonable grounds to suspect that certain property, namely £80,000, in whole or in part directly or indirectly represented another person's proceeds of drug trafficking (namely Leonard Hughes'), did conceal or transfer that property for the purpose of assisting the said Leonard Hughes to avoid the making or enforcement of a confiscation order contrary to s.54(2)(a) and (b) of the Drug Trafficking Offences Act by causing a transfer in the sum of £80,000 to be made from account number . . . in the name of L. & J. Hughes."

**The proceedings before the Acting Chief Justice**

14 The defendants stand indicted, *inter alia*, of various counts of concealing or transferring proceeds of drug trafficking contrary to s.54(2)(a) and (b) of the Drug Trafficking Offences Act ("the Act") 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 Act. 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 within the jurisdiction of Gibraltar alone.

15 Section 46 empowers the Government to make provision for the application of the 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.]

16 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 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 Act are omitted from the Modified Act,

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therefore the penal sanctions found in Part V of the Act including s.54 do not form part of the Modified Act.

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

18 The learned judge ruled as follows (2007–09 Gib LR 317, at paras. 10–11):

“10 . . . 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.”

He then quashed both counts in the indictment.

### **The grounds of appeal**

19 The grounds of appeal are:

(i) The learned judge erred in law in finding that the ulterior intent to commit an offence under s.54 of the Drug Trafficking Offences Act 1995 was restricted to the intent to avoid the making or enforcement of a confiscation order made by the Supreme Court of Gibraltar pursuant to s.3 of the Drug Trafficking Offences Act 1995 and did not include an intent to avoid the making or enforcement of an external confiscation order in Gibraltar.

(ii) The learned judge erred in failing to look behind the intention of the Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999 which extended the Drug Trafficking Act 1995 to external confiscation orders made in designated countries for the purpose of registering and enforcing the same in Gibraltar.

**The appellant's submissions**

20 The learned Chief Justice found that Counts 1 and 2 of the indictment alleged offences unknown to the law, in that the avoidance of a confiscation order as pleaded by the Crown had to refer to a domestic confiscation order. The learned Chief Justice in coming to this view relied heavily on the point made by the respondent, namely that the omission from the 1999 Order of s.54 of the Act meant that s.54 could refer only to a domestic confiscation order.

21 It is submitted that the learned Chief Justice erred in coming to this view and the mere fact that s.54 of the Act is not transposed to the 1999 Order does not mean that the penal sanction cannot bite when a defendant attempts to avoid a confiscation order made in a designated country by counts amounting to money laundering. It is further submitted that s.54 should be given a purposive construction given that part of the rationale behind the legislation was to transpose the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which was signed in Vienna on December 20th, 1988 (“The Vienna Convention”) into local legislation. It is submitted that the Vienna Convention stresses the supranational nature of drug trafficking and responses thereto.

22 The Act was introduced into Gibraltar law to give, in part, effect to the Vienna Convention and Council Directive 91/308/EEC. The Vienna Convention was the first of the global initiatives to combat money laundering by introducing into the domestic law of Member States, a specific offence of laundering the proceeds of drug-related crime. The central purpose of the Vienna Convention is set out in art. 2 as being “to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.”

23 The 1999 Order in effect gives a confiscation order made in a designated country the status of a domestic confiscation order. Section 3 of the Drug Trafficking Offences Act 1995 [as modified by the 1999 Order] provides:

“ . . . an order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking . . . is referred to in this Act as an “External Confiscation Order.”

**Conclusions**

24 I acknowledge that if the respondent's contention is correct, a literal interpretation of s.54 is confined to “confiscation orders” alone and it cannot be construed to include “external confiscation” orders. The



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expression can only be construed in accordance with the definition in s.3 of the Act.

25 However, I recognize that such a strict interpretation can easily lead to odd results. If correct, a person could travel to Gibraltar with moneys derived from his own drug trafficking in the United Kingdom and seek to “conceal or disguise” those moneys by paying them into a Gibraltar financial institution with total impunity. He would have committed no offence of money laundering in Gibraltar under s.45. Conversely if, contrary to s.55, he assists another person to retain the benefit of drug trafficking, he commits an offence in Gibraltar. Similarly, if he acquires, possesses or uses the proceeds of another person’s drug trafficking, he is guilty of an offence under s.56. Yet if he is in possession or uses proceeds of his own drug trafficking, he commits no offence.

26 In order to avoid such startling anomalies, I am persuaded that this court is under an obligation to consider whether a purposive construction is appropriate and, if adopted, whether it would augment the legislation as a whole, or whether it is permissible to contradict a specific provision in the Act. I take as my starting point the long title to the Act which reads as follows:

“An Act to consolidate and amend the Drug Trafficking Offences Act 1988 and to give, in part, effect to the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which was signed in Vienna on the 20th of December, 1988, and Council Directive 91/308/EEC.”

27 The Vienna Convention was the first of the global initiatives to combat money laundering by introducing into the domestic law of member states a specific offence of laundering the proceeds of drug-related crime. Article 3, para. 1 of the Convention provides:

“Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

. . .

- (b)(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions . . .” [Emphasis supplied.]

28 Article 5(4) of the Convention specifically foresees and allows for

transnational identification, tracing, freezing and seizing of proceeds of drug trafficking. Thus, the Act was implemented into Gibraltar law. *Goatley v. Brixton Prison Governor* (1) is an example of a purposive interpretation of a statute where the offence under review is concerned with the giving of effect to an international obligation, namely the UK Extradition Act 1989, and the Vienna Convention. Nelson, J. stated ([2002] EWHC 1209 (Admin), at para. 41):

“Again I am satisfied that the Respondents’ submissions are correct. Where section 22(6) [of the Extradition Act] applies, which on its face it does here, the offences are deemed to be committed within the territory of the foreign state, and that fiction is continued when the matter is transposed for consideration under section 2(1)(a). Section 18 of the Criminal Justice (International Co-operation) Act 1990 provides that anything which will constitute a drug trafficking offence, if done on land in any part of the United Kingdom, shall constitute that offence if done on a British ship. The purpose of both that section and the Vienna Convention is *to facilitate jurisdiction* in order to deal with the evils of drug trafficking. Section 22(6) should be construed in accordance with that purpose and I see no reason why such a construction should be said to wrongfully diminish the rights of the subject . . .” [Emphasis supplied.]

29 Thus it might be open to this court to deem the expression “confiscation order” to include “external confiscation order” in order to facilitate jurisdiction to the Gibraltar Supreme Court. The learned judge appears to reason that because s.54 was not transposed into the 1999 Order, it ceases to have effect. I prefer the Attorney-General’s argument that the Modifying Act was not concerned with the penal provisions in Part V of the Act. Schedule 3 of the Act was primarily concerned with the “mechanisms of enforcement” of the profits to be found in Part III of the Act, headed “Mutual Legal Assistance.” As he put it: “It is not surprising that there was no transposition of s.54.”

30 A further (but perhaps less significant) pointer to a purposive construction appears at s.2(1) of the Act which provides: “In this Act, *unless the context shall otherwise require* . . . ‘confiscation order’ means an order made under section 3 . . .” [Emphasis supplied]. This qualification might be read within the context of the long title referred to above. However, I consider this would be to strain after a conclusion which is not open for this court to reach.

31 A purposive construction must not override or contradict an express provision in the legislation. Section 54 provides in its terms that a person is guilty of an offence if he conceals or disguises property for the purpose of avoiding the making or enforcement of a “confiscation order” which is defined in s.2(1) and means an order made under s.3. It is not in dispute

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that this definition is confined to a Gibraltar (“domestic”) confiscation order and is not wide enough to encompass an “external confiscation order.” The latter is defined as s.3 of the 1999 Order in the following terms:

“An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is referred to in this Act as an ‘External Confiscation Order.’”

32 In my judgment, the definition of a “confiscation order” in the Act cannot and should not be extended or expanded to include an “external confiscation order.” This is particularly so as the learned judge stated (2007–09 Gib LR 317, at para. 10): “. . . [T]o afford the provisions the interpretation urged by [the appellant] would also, in my view, offend the principle which requires strict construction of penal enactments.”

33 I respectfully agree. I would therefore dismiss this appeal and uphold the judge’s order that the two counts in the indictment be struck out.

34 **KENNEDY, J.A.:** I agree. Undoubtedly, the main purpose and effect of the 1999 Order was to provide a mechanism to enforce external confiscation orders but nothing was done to extend the reach of s.54 of the 1995 Act and, indeed, para. 17 of Schedule 2 to the Order expressly provides that ss. 37–69 are omitted so I am driven back to the problem of whether on the basis of the original Act, without resort to the 1999 Order, it is possible to read s.54 as extending to include confiscation orders made abroad.

35 Having regard to the clear definition of a confiscation order in s.2(1), I do not see how that can be done. Reliance on the opening words of that section—“unless the context shall otherwise require”—cannot be a satisfactory means of extending criminal liability even in a situation in which implementation of the Vienna Convention would seem to require the local legislature to extend that liability.

36 The Attorney-General sought to persuade us that a purposive construction of the words of the Act is all that is required to give effect to Convention obligations. I disagree. The words of the Act seem to me to be clear. For those reasons I too would dismiss this appeal.

37 **STUART-SMITH, P.:** I agree that this appeal should be dismissed for the reasons already given, and I would only add two points. First, if Parliament had wished to apply the penal provisions of s.54 to external confiscation orders, it could very easily have done so. The provisions of s.46(a) (which have already been cited) provide ample machinery for doing so. Section 54 could have been included in the Modified Act and this would have effected what the Attorney-General submits (wrongly in

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my view) was achieved without such inclusion. But the Modified Act did not include s.54. On the contrary, it specifically omitted it.

38 Secondly, although it may be thought that there is a lacuna in Gibraltar law if, as we hold s.54 applies only to Gibraltar confiscation orders, I agree with Mr. Salter that the respondents' conduct in this case could almost certainly have been subject to prosecution in England if the English authorities chose to pursue this course. The appeal, therefore, is dismissed.

*Appeal dismissed.*

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