Trinity Term
[2019] UKPC 31
Privy Council Appeal No 0014 of 2017

JUDGMENT

Darroch (Respondent) *v* Her Majesty's Attorney General for the Isle of Man (Appellant) (Isle of Man)

From the High Court of Justice of the Isle of Man (Staff of Government Division)

before

Lord Reed
Lord Carnwath
Lady Black
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

27 June 2019

Heard on 7 March 2019

Appellant
John McGuinness QC

(Instructed by Attorney General's Chambers (IoM))

Respondent
Joel Bennathan QC
Paul Rodgers
(Instructed by Carters)

LORD LLOYD-JONES:

1. On 17 October 2014 the respondent, Mr Ian Darroch, was convicted following a trial in the Court of General Gaol Delivery (HH Deemster Birkett QC and a jury) of 13 counts of theft, false accounting, forgery and conspiracy to pervert the course of justice. He was sentenced on 26 November 2014 to a total term of nine years' custody. At the sentencing hearing counsel for the prosecution, Mr Mark Benson, stated that the prosecution did not intend to seek an order for costs against the respondent. By letter dated 17 December 2014 Mr Benson informed the court and the respondent that it did intend to make an application for costs. On 26 June 2015, following a confiscation hearing, a confiscation order was made. On 14 October 2015 Deemster Birkett ordered the respondent to pay prosecution costs in the sum of £175,000. On appeal, the High Court of Justice of the Isle of Man, Staff of Government Division ("Appeal Division") (HHJA Tattersall QC, HH Deemster Doyle) quashed the costs order. The Attorney General for the Isle of Man ("the appellant") now appeals to the Judicial Committee of the Privy Council by leave of the Board. The issue is whether, in the particular circumstances, the prosecution's statement that it would not seek an order for costs precluded it from making a subsequent application for costs.

2. The transcript of the hearing of 26 November 2014, at which the respondent was unrepresented, includes the following exchange between Mr Benson and Deemster Birkett immediately following the sentencing of the respondent and two co-defendants. At this point the respondent had already been sentenced and taken down to the cells.

> "Deemster Birkett: Are there any other Orders that the prosecution seek?
>
> Mr Benson: No. Matters like the disqualification of someone as a director have to be dealt with here by way of separate proceedings. They can't be dealt with at this hearing.
>
> Deemster Birkett: That is what I understood to be the position. In the circumstances there will be no other Orders in relation to costs or anything of that kind.
>
> Mr Benson: No.
>
> Deemster Birkett: Are there any other matters that you ask me to deal with?

> Mr Benson: No. Your Honour has already dealt with setting down a timetable as far as the confiscation matters are concerned."

3. At a hearing on 12 October 2015 Deemster Birkett was asked to make an order for costs pursuant to section 48 of the Criminal Jurisdiction Act 1993. In his ruling, delivered on 14 October 2015, he referred to the exchange on 26 November 2014. He stated that at the conclusion of the hearing on 26 November 2014 he had asked Mr Benson if he was being asked to consider any other order "in relation to costs or anything of that kind" and Mr Benson had replied "No". The prosecution had subsequently reconsidered that response and by letter of 17 December 2014 had invited the court to act under the slip rule, section 56 of the Criminal Jurisdiction Act 1993, and to "vary or rescind the sentence or order". Deemster Birkett considered that it appeared from the transcript and the formal court order that no order as to costs had been made. No application had been made, no determination sought, nor adjudication delivered. In those circumstances the slip rule under section 56 did not apply. Deemster Birkett considered that there was no reason in law why the prosecution was precluded from seeking an order for costs. He awarded costs against the respondent in the sum of £175,000.

4. The respondent appealed to the Appeal Division which in its decision of 23 September 2016 allowed the appeal. (The appeal decision is reported as *R v Darroch (No 1)* 2016 MLR 439.) The Appeal Division concluded that the prosecution's deliberate decision not to apply for costs at the sentencing hearing on 26 November 2014 prevented it from making a subsequent application for costs. However, the legal basis of this conclusion is not clear from the judgment. It referred generally to the importance of finality in criminal and civil proceedings. It considered that in this case no order for costs had been made. Furthermore, Mr Benson had stated that there would be no application for costs. That position could not be rectified under section 56 which was limited to varying or rescinding sentences or orders and here no order had been made in respect of costs. The Appeal Division then went on to say that, in any event, the prosecution should not be permitted to rely on section 56 in the particular circumstances of this case. The Appeal Division accepted that no application for prosecution costs could have been determined until after the confiscation hearing, but in its view that ignored the fact that there was no application. It then stated that the fact that the court order did not record any determination that there was to be no order as to costs was not decisive as, had defence counsel suggested at any time prior to 17 December 2014 that the order should be amended to include such a provision, the court could only assume that such an amendment would have been consented to by the prosecution and made by Deemster Birkett. It added:

> "If there is a lesson to be learnt from the matters set out above it is that when a prosecution (or defence) advocate informs the court that no application for an adverse costs order is to be made, such should be recorded in the court's order." (para 51)

Statutory framework

5. Section 48 of the Criminal Jurisdiction Act 1993 ("the 1993 Act") provides in relevant part:

> "**48. Award of costs against prosecution or defence**
>
> (1) The court before which a person is convicted on information may, if it thinks fit, order the offender to pay the whole or any part of the costs incurred in or in relation to the prosecution and conviction, including any inquiry under section 5 of the 1989 Act, as taxed. …"

Section 56 of the 1993 Act provides in relevant part:

> "**56. Power to re-open case to rectify mistake**
>
> The court or the Appeal Division may, within 28 days beginning with the day on which a sentence or other order made by it when dealing with an offender was made, vary or rescind the sentence or order. …"

6. Section 1 of the Criminal Justice Act 1990 ("the 1990 Act") confers the power to make a confiscation order. Sections 2 and 2A of the 1990 Act provide in relevant part:

> "**2. Making of a confiscation order**
>
> (1) A court shall not make a confiscation order unless the prosecutor has given written notice to the court to the effect that it appears to him that it would be appropriate for the court to determine whether it ought to make a confiscation order.
>
> (2) If the prosecutor gives the court such a notice, the court shall determine whether it ought to make a confiscation order.

(3) When considering whether to make a confiscation order the court may take into account any information that has been placed before it showing that a victim of an offence to which the proceedings relate has instituted, or intends to institute, civil proceedings against the defendant in respect of loss, injury or damage sustained in connection with the offence.

(4) If the court determines that it ought to make such an order, the court shall, before sentencing or otherwise dealing with the offender in respect of the offence or, as the case may be, any of the offences concerned, determine the amount to be recovered in his case by virtue of this section and make a confiscation order for that amount specifying the offence or offences.

(5) Where a court makes a confiscation order against a defendant in any proceedings, it shall be its duty, in respect of any offence of which he is convicted in those proceedings, to take account of the order before -

(a) imposing a fine on him;

(b) making any order involving any payment by him, other than an order under Schedule 6 to the Criminal Law Act 1981 (compensation orders); or

(c) making any order under -

(i) section 27 of the Misuse of Drugs Act 1976 (forfeiture orders); or

(ii) section 16 of the Criminal Law Act 1981 (deprivation orders);

but subject to that shall leave the order out of account in determining the appropriate sentence or other manner of dealing with him.

…

2A. Postponed determinations

(1) Where a court is acting under section 1 but considers that it requires further information before -

(a) determining whether the defendant has benefitted from any offence;

(b) …

(c) determining the amount to be recovered in his case under section 2,

it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.

(2) More than one postponement may be made under subsection (1) in relation to the same case.

(3) Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) which -

(a) by itself; or

(b) where there have been one or more previous postponements under subsection (1) or (4), when taken together with the earlier specified period or periods,

exceeds six months beginning with the date of conviction.

…

(7) Where the court exercises its power under subsection (1) or (4), it may nevertheless proceed to sentence, or

otherwise deal with, the defendant in respect of the offence or any of the offences concerned.

(8) Where the court has so proceeded, section 2 shall have effect as if -

(a) in subsection (4), the words from 'before sentencing' to 'offences concerned' were omitted; and

(b) in subsection (5), after 'determining' there were inserted 'in relation to any offence in respect of which he has not been sentenced or otherwise dealt with'.

(9) In sentencing, or otherwise dealing with, the defendant in respect of the offence, or any of the offences, concerned at any time during the specified period, the court shall not -

(a) impose any fine on him; or

(b) make any such order as is mentioned in section 2(5)(b) or (c).

(10) Where the court has sentenced the defendant under subsection (7) during the specified period it may, after the end of that period, vary the sentence by imposing a fine or making any such order as is mentioned in section 2(5)(b) or (c) so long as it does so within a period corresponding to that allowed by section 56 of the Criminal Jurisdiction Act 1993 (variation of sentence) but beginning with the end of the specified period. …"

Was there an order?

7. The first question for consideration is whether an order was made on 26 November 2014 that there should be no order as to the prosecution's costs. On that occasion Deemster Birkett had set a timetable for the confiscation proceedings and adjourned the confiscation hearing pursuant to section 2A of the 1990 Act before proceeding to sentence. In those circumstances the combined effect of section 2A(9)(b)

and section 2(5)(b) prohibited the making of an order for costs against the respondent until after the conclusion of the confiscation hearing. An order for costs would have been an "order involving any payment by him" within section 2(5)(b). Moreover, at 26 November 2014 the court would not have had sufficient knowledge of the respondent's financial circumstances to enable it to make a costs order.

8. In *R v Constantine* [2011] 1 WLR 1086 the Criminal Division of the Court of Appeal of England and Wales (Aikens LJ, Openshaw J, Judge Jacobs) held (at paras 19-21, 30) that under the similar but not identical provisions in sections 13(2) and 13(3)(a) of the Proceeds of Crime Act 2002 and in corresponding circumstances, there would be no power to make, expressly or impliedly, an order that there should be no order for costs against a defendant. It noted that under those provisions the court must take account of a confiscation order before making an order "involving payment by the defendant".

> "That wording must embrace both an order that the defendant pay costs and one that he pay nothing. Either way the order 'involves' payment by the defendant in the sense that it affects or concerns payment. This means that the court must take account of a confiscation order before making an order 'involving payment by the defendant' of costs relating to all of the proceedings that have gone on so far." (para 19)

It should be noted that, just as in section 13(2) and (3), section 2(5) of the 1990 Act, with which we are concerned, states that it is the duty of the court, in respect of any offence of which a defendant is convicted in those proceedings, to take account of the confiscation order before making "any order involving any payment by him". The policy underlying these provisions is that the confiscation order should be given priority in this regard and then taken into account when other financial orders, the consideration of which has been postponed, are considered. That policy and the effective exercise of the court's powers to award costs could be undermined if the court were able to decide prior to the conclusion of confiscation proceedings that there should be no order as to costs. For these reasons, the Board considers that Deemster Birkett had no power on 26 November 2014 to make an order that there should be no order as to costs. Therefore, and contrary to the view expressed by the Appeal Division, it is not the case that the position of the prosecution might have been reflected in an order had anyone proposed that prior to 17 December 2014.

9. Furthermore, the Board has come to the clear view that there was no purported order to that effect. First, this is not reflected in the formal order of the court. Secondly, while Mr Benson made clear that the prosecution would not seek an order as to costs, he said nothing to indicate that that should be reflected in an order. Thirdly, it is clear from the observations of Deemster Birkett on 14 October 2015 that he did not consider that he had made such an order. On the contrary, these observations make clear that the

following words in the transcript "[i]n the circumstances there will be no other Orders in relation to costs …" were a question and not a pronouncement. The Board therefore agrees with Deemster Birkett and the Appeal Division that there was no order that there should be no order as to the prosecution's costs.

10. The following consequences follow from this. First, the trial court was not *functus officio* so far as the making of a costs order was concerned. However, it could make such an order, if at all, only after the completion of the confiscation hearing. Secondly, section 56 of the 1993 Act could have no application as there was no order to vary or rescind. Thirdly, the prosecution application made by letter dated 17 December 2014 was made on an unsustainable basis.

11. It is not necessary, therefore, to consider three further matters which might otherwise arise. The first is whether, had there been such an order as to costs, section 56 could have been prayed in aid in these circumstances where the purpose would not have been the rectification of a mistake but to permit the prosecution to resile from a deliberate decision not to seek an order for costs. In the same way, it is not necessary to consider, secondly, compliance with the time limit set by section 56 in this context or, thirdly, the effect, if any, of the irregularity that on 26 November 2014 the matter of costs was discussed in court in the absence of the respondent.

12. Accordingly, the Board considers that there was no order of the court which prevented the prosecution from applying for its costs.

Abuse of process

13. It seems to the Board that the real force of the respondent's complaint is that the prosecution, having taken a deliberate decision not to seek an order for costs and having announced that decision in court, later sought to go back on that and to seek an order for costs in a very substantial sum. On behalf of the respondent it is said that it would be unfair to permit the appellant to go back on his original stance. It is therefore appropriate to consider whether this constitutes an abuse of process.

14. Courts have a duty to secure fair treatment for all those who come before them and to uphold fundamental notions of justice and propriety in their proceedings. There was undoubtedly in the present case a clear and unequivocal statement by Mr Benson on behalf of the prosecution that it would not seek an order for costs. A difficulty with the respondent's case in this regard, however, is that, because he was not present in court when the question of costs was raised and was not legally represented on that occasion, neither he nor his legal representative was aware of the statement by the prosecution. Accordingly, there can be no question of his having relied on it or having changed his position as a result.

15. Furthermore, even when the respondent and his legal advisers were informed, by the letter of 17 December 2014, that the prosecution wished to obtain an order for its costs, they were not made aware of precisely what had been said on the subject in court on 26 November 2014. The letter of 17 December 2014 stated:

> "At the hearing on 26 November 2014, when asked by the Deemster if there would be any other orders in relation to costs or anything of that kind, the Prosecution did not invite the court to make any order as to Costs in respect of any of the defendants.
>
> On reflection, the Prosecution now indicate that they wish to apply for the offenders to pay the whole or any part of the costs incurred in or in relation to the prosecution and conviction."

This account of what occurred at the hearing on 26 November is inaccurate. It is not correct that the prosecution merely did not invite the court to make an order as to costs; it indicated that it would not make an application for costs. As a result, on receipt of the letter of 17 December 2014, the respondent and his legal adviser were unaware of the true nature of the original statement because it had been misrepresented. There can, in these circumstances, have been no change of position by the respondent in reliance on the statement made to the court.

16. It is, no doubt, for this reason that Mr Bennathan QC on behalf of the respondent seeks to found this part of his case on unfairness resulting from a failure of the prosecution to act efficiently and timeously. He submits that there is a public interest that statements made by the prosecution in open court should be binding. He also submits that the Appeal Division is better placed than the Board to appreciate the significance of prosecutorial inefficiency and errors in the Isle of Man legal system and what outcome of the appeal would be most likely to ensure the smooth running of courts there in future.

17. The Board accepts that the Appeal Division was well placed to assess the impact of the prosecution's conduct on the legal system in the Isle of Man. In the Board's view, however, abuse of process is not made out here. It should first be stated that this unhappy episode does not reveal any lack of timeousness on the part of the prosecution. As previously stated, the effect of sections 2A(9)(b) and section 2(5)(b) of the 1990 Act is that costs should have been addressed after the confiscation hearing. Moreover, secondly, while the attempt by the prosecution to change its position is unattractive, it has to be assessed in the particular factual circumstances of this case. It has to be balanced against the total absence of any detrimental reliance on the part of the respondent. It is also necessary to take account of what the Appeal Division described as the respondent's "deeply unattractive" case. In this regard the Appeal Division noted (at para 39) that, as it transpired, the respondent "could well afford to pay some or all of the costs incurred by the prosecution in securing his conviction". Moreover, there are

alternative and less drastic methods of dealing with inefficiency on the part of the prosecution. Having regard to all the circumstances, the Board considers that this case falls short of the high threshold required to establish an abuse of process.

Section 2A(10) of the 1990 Act

18. In their written case on behalf of the respondent, Mr Bennathan and Mr Paul Rodgers, neither of whom appeared below, took a new point. They submit that the costs order made on 14 October 2015 was unlawful because it was made after the expiry of the time limit for making such an order. As this is a purely legal point and as Mr John McGuinness QC, counsel for the appellant, who also did not appear below, made no objection, the Board will address the matter.

19. Under the 1990 Act, where a court is considering making a confiscation order but considers that it requires further information it may, for the purpose of obtaining that information, postpone making a determination of benefit and the amount to be recovered for such period as it may specify (section 2A(1)). Where the court exercises this power, it may nevertheless proceed to sentence (section 2A(7)). Where the court has sentenced the defendant under section 2A(7) during the specified period it may, after the end of that period, vary the sentence by imposing, *inter alia*, an order involving a payment by him, so long as it does so within a period corresponding to that allowed by section 56 of the 1993 Act (variation of sentence) but beginning with the end of the specified period (section 2A(10), section 2(5)(b)). The period allowed by section 56 of the 1993 Act is 28 days.

20. The respondent was convicted on 17 October 2014. On 26 November 2014 the confiscation proceedings were adjourned and the respondent was sentenced. On 17 December 2014 the appellant gave notice to the court and the respondent of its intention to apply for costs. On 19 December 2014 Deemster Birkett ordered that any application for costs be adjourned for hearing on 6 May 2015, the initial date set for the confiscation hearing. On 3 March 2015, on the appellant's application, the confiscation hearing was adjourned to a date to be fixed. On 20 April 2015 the appellant applied for an extension of the confiscation enquiry on the ground of exceptional circumstances under section 2A(3). In correspondence, hearings were arranged for 22 to 26 June 2015. On 26 June 2015 Deemster Birkett made a confiscation order. He certified that the respondent had benefited from criminal conduct in the sum of £1,003,122.99 and that his realisable assets were £2,502,715.00. He made a confiscation order in the sum of £1,003,122.99 to be paid within six months with a term of ten years' custody, consecutive to the term imposed on 26 November 2014, in default. On 26 June 2015 the prosecution's application for costs was adjourned to be dealt with administratively unless any party took the view that a hearing should take place. Directions were given for particulars of the costs sought to be lodged. On 13 July 2015 the appellant made his application for costs and it was adjourned to 12 to 14 October 2015. At a hearing on 12 October 2015, prosecuting counsel incorrectly informed Deemster Birkett that there were no statutory

time limits in relation to the application for costs. On 14 October 2015, Deemster Birkett made an order that the respondent pay a contribution to the prosecution's costs in the sum of £175,000.00.

21. The respondent now submits that the specified period expired on 26 June 2015, when the confiscation order was made, and that, although the application for costs was made on 13 July 2015, the costs order of 14 October 2015 was made more than 28 days after 26 June 2015. Accordingly, he submits, there was no jurisdiction to make the costs order.

22. In *R v Menocal* [1980] AC 598, the House of Lords considered the effect of section 11(2) of the Courts Act 1971 ("the 1971 Act") which provided that a sentence imposed or other order made by the Crown Court might be varied or rescinded within 28 days. The appellant had pleaded guilty to an offence of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug and had been sentenced to a term of imprisonment. More than three months after sentence the Crown Court made an order forfeiting the money found in her possession on her arrest. The House of Lords held that, by virtue of the definition of "sentence" in section 57 of the 1971 Act, the word "sentence" in section 11(2) included a forfeiture order. Section 11(2) laid down very clearly that any sentence or other order may be varied or rescinded within 28 days beginning with the day on which the sentence or other order was made, but there was no such power in the Crown Court after the expiry of that period. Lord Salmon considered (at pp 604E-H, 605H) that section 11(2) was clearly intended to put a judge sitting in the newly created Crown Court in the same position as a judge of assize. A judge of assize had the power to alter any sentence passed before the end of the assize but, once he had signed the criminal calendar setting out all the sentences passed during the assize, that power ceased.

> "There is however no power in the Crown Court to vary or rescind a sentence or any other order after the expiry of that period [28 days] … The learned judge had 28 days to vary the sentence he had passed by adding to it a monetary penalty, namely the forfeiture … of upwards of £4,000. Had he done so within the statutory time limit, the forfeiture could not have been questioned. As it is, in my opinion, it cannot be defended." (p 607F-H)

He added (at p 607H-608A) that the principle that a sentence cannot be varied by the judge who imposed it, by adding a forfeiture order after the statutory time limit of 28 days has lapsed, is of very great importance, and of far greater importance than any undeserved benefit which might be left in the hands of the appellant.

23. Similarly, Lord Edmund-Davies considered (at p 613A-B) that the sole power of a Crown Court judge to alter his sentence was that conferred by section 11(2). Once again, the conclusion was expressed in categoric terms:

> "[T]he action of the trial judge in this case would, as I think, have been entirely proper had it been done timeously. But it was not, and he was therefore without jurisdiction to make the forfeiture order when he purported to make it." (p 613A)

As a result, there had been no power in the Crown Court to make a forfeiture order.

24. This strict approach should be contrasted with that of the House of Lords in *R v Soneji* [2006] 1 AC 340 which concerned the statutory timetable for confiscation proceedings under section 72A of the Criminal Justice Act 1988, as amended, subsections 72A(1) to (7) of which were materially identical to subsections 2A(1) to (7) of the 1990 Act in the Isle of Man. The defendants, who had pleaded guilty to conspiracy to convert property and to remove it from the jurisdiction knowing or suspecting that it represented the proceeds of criminal conduct, appealed against confiscation orders on the ground that the judge, in extending time beyond six months from the date of conviction had failed to consider whether exceptional circumstances existed to justify the further extension. They maintained that, accordingly, he lacked jurisdiction to make the orders. The House of Lords, upholding the forfeiture orders, considered that the correct approach was to concentrate on the consequences of non-compliance and to ask whether Parliament could be taken to have intended total invalidity (per Lord Steyn at para 23, per Lord Rodger of Earlsferry at para 40, per Lord Cullen of Whitekirk at para 52, per Lord Carswell at para 62, per Lord Brown of Eaton-under-Heywood at para 78). The House considered that section 71 of the 1988 Act as amended imposed a duty on the court to consider confiscation proceedings and made provision for the sequence of events in order to make the sentencing process rather than the confiscation procedure as effective as possible. The judge's failure to adhere to the requirements of section 72A(3) had caused no prejudice to the defendants in respect of their sentences. Any prejudice to the defendants resulting from delay was not significant and decisively outweighed by the countervailing public interest in not allowing convicted offenders to escape confiscation for what were no more than bona fide errors in the judicial process.

25. In the present case the appellant relies heavily on *R v Constantine*, which concerned confiscation proceedings to which sections 13 to 15 of the Proceeds of Crime Act 2002 ("the 2002 Act") applied. Section 15(4) provided:

> "(4) But the court may proceed under subsection (3) only within the period of 28 days which starts with the last day of the postponement period."

The defendant pleaded guilty before magistrates to offences of applying a false trade description to goods and was committed to the Crown Court for sentence. At a hearing in March 2009 the judge sentenced him to concurrent terms of imprisonment and postponed the confiscation proceedings. No mention was made of the costs of the prosecution at that hearing. On 10 December 2009 the judge made a confiscation order

and adjourned the Crown's application for costs of both the substantive proceedings and the confiscation proceedings. On 4 February 2010 the judge made an order for costs. The defendant appealed against the order that he pay the costs of the substantive proceedings on the ground that the judge had no power to adjourn that costs issue beyond a period of 28 days beginning on the date of the confiscation order (the last day of the postponement period), that being the time limit imposed by section 15(4).

26. The Court of Appeal dismissed the appeal. It considered that, notwithstanding section 15(4), the court had the power to adjourn the whole or part of the sentencing exercise for more than the stipulated 28-day period if it were necessary to do so and to conclude an adjourned part of the sentencing process after the expiry of that period. Aikens LJ, delivering the judgment of the court, noted (at para 26) that the wording of section 15(4) was mandatory and, referring to the decision of the House of Lords in *Menocal*, observed that it could be argued that the same principle should apply, by analogy, to section 15(4). However, the Court of Appeal came to the opposite conclusion (at paras 27-30). First, drawing on *R v Hayden* [1975] 1 WLR 852, Aikens LJ noted that an order that a defendant should pay all or part of the prosecution costs is itself a part of a sentence, because it is an order made by the court when dealing with an offender in respect of his sentence. Secondly, he referred to *R v Annesley* [1976] 1 WLR 106 and *R v Gordon (Practice Note)* [2007] 1 WLR 2117 which establish that the court has a jurisdiction at common law to adjourn the whole or a part of the exercise of passing a sentence if it is necessary to do so. Accordingly, thirdly, he concluded that the judge had the power to adjourn part of the sentencing exercise, namely the issue of costs of the substantive proceedings, on 10 December 2009 if it was necessary to do so. On a proper analysis of the facts, all the judge did on 10 December 2009 was to exercise his power to adjourn the final element in the sentencing exercise that the judge had to carry out, namely whether or not to make a costs order as to the substantive proceedings. He had the power to adjourn that issue for more than the 28-day period mentioned in section 15(4) of the 2002 Act. Therefore, the Court of Appeal concluded that the judge had the power to make the costs order he did on 4 February 2010.

27. In a case note on *Constantine* in the Criminal Law Review ([2011] Crim LR 164 at 168), Dr David Thomas questioned whether the approach of the Court of Appeal in that case can be considered legitimate. He pointed to the express limitation imposed by section 15(4) of the 2002 Act and observed that in *Annesley* the court was not taking steps which contradicted an express statutory provision. The Board shares Dr Thomas's concerns in this regard. In the Board's view, it is not permissible to employ a common law power to defeat the policy of section 2A of the 1990 Act which is, amongst other things, to ensure that costs are dealt with within the further period stipulated in section 2A(10).

28. Indeed, the route followed by the Court of Appeal in *Constantine* had already been considered and rejected by the House of Lords in *Soneji* in the context of postponement of confiscation proceedings. In *Soneji* an alternative argument was advanced to the effect that the prosecution could rely on a common law power to

adjourn confiscation proceedings. This submission was roundly rejected by the House of Lords.

> "For the sake of completeness, I deal briefly with two remaining issues which were debated at the oral hearing. First, lower courts have accepted that, in parallel to the statutory confiscation postponement proceedings, there exists a common law jurisdiction to adjourn confiscation proceedings. In my view section 72A(3) rules out such co-existing powers. I would rule that there is no such common law jurisdiction." (per Lord Steyn at para 27)

> "As my noble and learned friend, Lord Steyn, has explained, in the present case it is said that, in good faith, the court postponed a relevant determination beyond six months from the date of Mr Soneji's and Mr Bullen's convictions, even though there were no exceptional circumstances to justify this. I respectfully agree with him that the court had no common law power to postpone the determination to obtain information." (per Lord Rodger of Earlsferry at para 33)

> "I do not consider that there is a common law power to postpone determinations which coexists with the power provided for in section 72A. There is no need to regard the terms of section 72A as so limited in scope as to indicate that such a common law power must exist." (per Lord Cullen of Whitekirk at para 50)

29. More recently, in *Gordon*, Sir Igor Judge P referred (at para 41) to this aspect of *Soneji* in the following terms:

> "For present purposes we must take note that the consequence of the detailed legislative arrangements governing possible postponement of confiscation proceedings removed the common law powers of the court to order the adjournment of confiscation proceedings."

30. The rejection of such an approach in *Soneji* applies with even greater force to both the circumstances of *Constantine*, where the implied power contradicted an express statutory provision, and the present case where it would contradict an express restriction derived via section 56 of the 1993 Act, the equivalent to section 11(2) of the Courts Act 1971, which, as we have seen, was upheld in *Menocal* in the most categorical terms. As a result, it is not possible to resort to a common law power to adjourn sentence so as to override a statutory provision limiting the time within which sentencing must

occur. A common law power cannot in these circumstances defeat the intention of the statutory provision.

31. Moreover, the appellant is not assisted by *Soneji*. In *Gordon* the Court of Appeal addressed section 155 of the Powers of Criminal Courts (Sentencing) Act 2000, which repeated the provision originally enacted in section 11(2) of the Courts Act 1971, and is, therefore, another equivalent provision to section 56 of the 1993 Act. In delivering the judgment of the court, Sir Igor Judge P referred (at para 42) to the temptation to seek to apply *Soneji* to section 155 and treat it as authority which enables the court to vary or rescind a sentence beyond the 28-day limit. However, he considered that that route was not available because of the categorical terms in which the House of Lords in *Menocal* had referred to the importance of applying that provision. He referred (at para 43) to the critical importance of finality in the sentencing process. Section 155 allowed a small degree of latitude and the 28-day limit would not prohibit what is in effect a later curing of a mere procedural irregularity in the way in which the order of the courts was recorded, or a later procedural step to complete an inchoate order, but without affecting what had already been announced. However, subject to such considerations, the limitation point applied. He continued:

> "On analysis *R v Soneji* was concerned with a different problem, namely, whether the process which would be expected to culminate in a confiscation order, or a decision that a confiscation order would be inappropriate, should, after the prescribed time had elapsed, automatically preclude that question being addressed at all."

32. The Board agrees that *Soneji* is concerned with a wholly different statutory provision and that the reasoning on which it is based is simply not applicable to the present case.

33. It is necessary to consider the submissions of Mr McGuinness for the appellant against this background. First, he submits that the issue of costs was alive, having been adjourned from 19 December 2014 until, ultimately, 12 to 14 October 2015. The issue had not been determined but remained for consideration throughout this period. Therefore, section 2A(10) did not apply because the court was not varying sentence in any way, but was simply dealing with a part of the sentence which had been adjourned. He submits that where the court has adjourned part of the sentence the principle in *Annesley* displaces the 28-day time limit. However, this is no more than an attempt to apply the reasoning in *Constantine* which, for the reasons stated above, is in the Board's view wrongly decided.

34. Secondly, Mr McGuinness submits that the sentence of nine years' custody imposed on 26 November 2014 was not imposed under section 2A(7) of the 1990 Act as the specified period began only after the end of the hearing on 26 November 2014.

The Board is unable to accept this submission. Where the prosecution has given written notice under section 2(1), section 2(4) requires that, if the court determines that it ought to make a confiscation order, the court shall make the required determinations before sentencing or otherwise dealing with the offender. Section 2A creates an exception which permits the determinations to be postponed and the court to proceed to sentencing. The Board also notes that where confiscation proceedings are to be adjourned for the purpose of obtaining further information, the usual practice is for the confiscation proceedings to be adjourned before passing sentence. That is what occurred at the hearing on 26 November 2014. Deemster Birkett decided to postpone the confiscation proceedings and to proceed to sentence. The transcript confirms that he set the timetable for the confiscation proceedings before sentencing the respondent. The only basis on which he could proceed to sentence was section 2A(7). In the Board's view, there is no basis for the suggestion that the specified period begins only after the hearing at which the confiscation proceedings are postponed. In this case, Deemster Birkett, having decided to postpone confiscation proceedings, was clearly acting under section 2A(7).

Conclusion

35. For these reasons, the Board considers that Deemster Birkett did not have jurisdiction to make a costs order on 14 October 2015. The Board will, accordingly, humbly advise Her Majesty that the appeal should be dismissed.