Michaelmas Term
[2012] UKSC 42
On appeal from: [2010] EWCA Crim 1575

JUDGMENT

R *v* Varma (Respondent)

before

Lord Phillips
Lord Mance
Lord Clarke
Lord Dyson
Lord Reed

JUDGMENT GIVEN ON

10 October 2012

Heard on 27 June 2012

Appellant	*Respondent*
David Perry QC William Hays (Instructed by Crown Prosecution Service)	Hugh Southey QC Rupert Hallowes (Instructed by Frame Smith Solicitors)

LORD CLARKE (with whom Lord Dyson and Lord Reed agree)

Introduction

1. On 27 November 2008, at the Crown Court in Isleworth, the respondent, Aloke Varma, pleaded guilty to three offences of being knowingly concerned in the fraudulent evasion of duty, contrary to section 170(2)(a) of the Customs and Excise Management Act 1979. The offences were committed on 24 October 2007 and 3 and 13 April 2008. On each occasion the defendant was stopped at Gatwick Airport and found to be in possession of a quantity of tobacco which he had brought into the United Kingdom without payment of the relevant import duties. Following his pleas of guilty, the matter was adjourned for sentence.

2. I take these facts from the agreed statement of facts and issues. On 15 January 2009 His Honour Judge Katkhuda ("the judge"), exercising his powers under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000, sentenced Varma to a conditional discharge for a period of two years. In deciding that this was the appropriate sentence, the judge referred to Varma's psychological problems and facial neuralgia. Confiscation proceedings under Part 2 of the Proceeds of Crime Act 2002 ("the 2002 Act") were postponed.

3. The confiscation hearing was held on 3 April 2009. The judge found the value of the defendant's benefit to be £7,257.86 and the available amount to be £1,500. Each of these figures had been agreed between the parties. A confiscation order was made in the sum of £1,500, which was ordered to be paid by 31 March 2010, with a term of imprisonment of 45 days in default of payment.

4. On 13 July 2009 Varma sought leave to appeal out of time against the confiscation order. He relied on *R v Clarke* [2009] EWCA Crim 1074, [2010] 1 WLR 223, in which the Court of Appeal (comprising Hooper LJ, Cox J and the Recorder of Nottingham) held in a reserved judgment that the Crown Court does not have the power to make a confiscation order against a defendant following conviction for an offence if he or she is made the subject of an absolute or conditional discharge in respect of that same offence. The essential reasoning was that it was inappropriate to punish a defendant by imposing a confiscation order in a case in which (by virtue of the fact that a conditional discharge had been imposed) the court thought that punishment was inexpedient.

5. Varma's appeal was heard on 10 June 2010, together with three similar cases. The defendant in each of the four cases before the Court of Appeal had pleaded guilty in the Crown Court to one or more offences, had received a conditional discharge and had been made the subject of a confiscation order under the 2002 Act. The ground of appeal in each case was that, following *Clarke*, the Court had no power to make a confiscation order. According to the agreed statement of facts and issues, oral argument was constrained by the Court of Appeal's clear indication that it wished to focus on whether it was bound by *Clarke*. On 8 July 2010 the Court of Appeal (Lord Judge CJ, Goldring LJ and Rafferty, Wilkie and King JJ) handed down their judgment in each of the four appeals: *R v Magro, R v Brissett, R v Smith* and *R v Varma* [2010] EWCA Crim 1575, [2011] QB 398.

6. The Court of Appeal held that, following the decision in *Clarke*, the Crown Court did not have power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge in respect of that offence. Giving the judgment of the court, Lord Judge CJ made clear (at para 29) that, but for the decision in *Clarke*, the court would have reached a contrary conclusion. On this basis, the Court of Appeal extended time to appeal in the case of Varma, allowed the appeal against sentence and quashed the confiscation order. The court held that a point of law of general public importance was involved in their decision and certified the following question:

> "Does the Crown Court have power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence?"

This court subsequently granted permission to appeal. The three remaining applications for leave to appeal against sentence were adjourned pending the outcome of this appeal.

7. As agreed in the statement of facts and issues, the issue which arises for consideration in this appeal is whether the Crown Court has power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence.

The statutory framework

8. Section 12 of the Powers of Criminal Courts (Sentencing) Act 2000, provides:

> "(1) Where a court by or before which a person is convicted of an offence ... is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment, the court may make an order either -
>
> (a) discharging him absolutely; or
>
> (b) if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding three years from the date of the order, as may be specified in the order ...
>
> (7) Nothing in this section shall be construed as preventing a court, on discharging an offender absolutely or conditionally in respect of any offence, from making an order for costs against the offender or imposing any disqualification on him or from making in respect of the offence an order under section 130, 143 or 148 below (compensation orders, deprivation orders and restitution orders)".

As is apparent, there is no reference in subsection (7) to confiscation orders.

9. At the date when section 12 of the 2000 Act came into force, section 2(6) of the Drug Trafficking Act 1994, repeating section 1(6) of the Drug Trafficking Offences Act 1986, provided:

> "No enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way shall by reason only of the making of an order under this section restrict the Crown Court from dealing with an offender in any way the court considers appropriate in respect of a drug trafficking offence."

Similar provision was made, with necessary alterations to the language, to deal with non-drug trafficking offences, by section 72(6) of the Criminal Justice Act 1988.

10. Section 14 of the 2000 Act provides:

> "(1) Subject to subsection (2) below, a conviction of an offence for which an order is made under section 12 above discharging the offender absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the

proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under section 13 above.

…

(3) Without prejudice to subsections (1) and (2) above, the conviction of an offender who is discharged absolutely or conditionally under section 12 above shall in any event be disregarded for the purposes of any enactment or instrument which -

(a) imposes any disqualification or disability upon convicted persons; or

(b) authorises or requires the imposition of any such disqualification or disability.

…

(6) Subsection (1) above has effect subject to section 50(1A) of the Criminal Appeal Act 1968 and section 108(1A) of the Magistrates' Courts Act 1980 (rights of appeal); and this subsection shall not be taken to prejudice any other enactment that excludes the effect of subsection (1) or (3) above for particular purposes."

11. Section 6 of the Proceeds of Crime Act 2002, as amended, provides:

"(1) The Crown Court must proceed under this section if the following two conditions are satisfied.

(2) The first condition is that a defendant falls within any of the following paragraphs –

(a) he is convicted of an offence or offences in proceedings before the Crown Court; …

(3) The second condition is that -

(a) the prosecutor asks the court to proceed under this section, or

(b) the court believes it is appropriate for it to do so.

(4) The court must proceed as follows—

(a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount.

(6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.

(7) The court must decide any question arising under subsection (4) or (5) on a balance of probabilities. ..."

Section 13 of the 2002 Act provides:

"(1) If the court makes a confiscation order it must proceed as mentioned in subsections (2) and (4) in respect of the offence or offences concerned.

(2) The court must take account of the confiscation order before –

(a) it imposes a fine on the defendant, or

(b) it makes an order falling within subsection (3).

(3) These orders fall within this subsection -

(a) … (compensation orders);

(b) … (forfeiture orders);

(c) … (deprivation orders);

(d) … (forfeiture orders).

(4) Subject to subsection (2), the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant ..."

Section 14 of the 2002 Act provides:

"(1) The court may -

(a) proceed under section 6 before it sentences the defendant for the offence ... or

(b) postpone proceedings under section 6 for a specified period.

…

(11) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.

(12) But subsection (11) does not apply if before it made the confiscation order the court –

(a) imposed a fine on the defendant;

(b) made an order falling within section 13(3);

(c) made an order under section 130 of the Sentencing Act (compensation orders)."

Section 15 of the 2002 Act provides:

"(1) If the court postpones proceedings under section 6 it may proceed to sentence the defendant for the offence (or any of the offences) concerned.

(2) In sentencing the defendant for the offence (or any of the offences) concerned in the postponement period the court must not -

(a) impose a fine on him,

(b) make an order falling within section 13(3), or

(c) make an order for the payment of compensation under section 130 of the Sentencing Act.

(3) If the court sentences the defendant for the offence (or any of the offences) concerned in the postponement period, after that period ends it may vary the sentence by -

(a) imposing a fine on him,

(b) making an order falling within section 13(3), or

(c) making an order for the payment of compensation under section 130 of the Sentencing Act.

(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.

…

(7) The postponement period is the period for which proceedings under section 6 are postponed."

Statutory construction

12. In my opinion the question whether the Crown Court has power to make a confiscation order under Part 2 of the 2002 Act in a case where the court has given the defendant an absolute or conditional discharge depends upon the true construction of sections 6 and 13 to 15 of that Act. I have reached the clear conclusion that there is, not only such a power, but in most cases a duty to make such an order for the reasons set out below.

13. It is first important to have regard to the duties imposed upon the court by section 6. Those duties are contained in section 6(1), (4), (5) and (7). The duties are absolute, subject to subsection (6), which qualifies subsection (5). By subsection (1), the court must proceed under the section if the two conditions in subsections (2) and (3) are satisfied. Subsection (2)(a) is satisfied if the defendant is convicted. Subsection (3) is satisfied if, as in this case, the prosecutor asks the court to proceed under the section. If the prosecutor does not ask the court to proceed under the section, subsection (3) will also be satisfied if the court believes that it is appropriate to do so. There was no argument in this case as to the correct approach of the judge in such a case and I therefore say nothing about it.

14. If those conditions are met (as they were in this case), the court must proceed as set out in subsection (4), under which it must decide whether the defendant has a criminal lifestyle and, if so, whether he has benefited from his general criminal conduct and, if he does not have a criminal lifestyle, whether he has benefited from his particular criminal conduct. There are specific provisions relating to those questions which are not relevant for the purposes of resolving the issue in this appeal. By subsection (5), if the court decides that the defendant has benefited from his general criminal conduct or his particular criminal conduct, it must decide the recoverable amount and make a confiscation order requiring him to pay that amount. Subsection (6) converts that duty into a power in circumstances which are not relevant for present purposes. Sections 7 to 12 are also for the most part irrelevant for present purposes.

15. It can be seen that there is nothing in section 6 which suggests that the court should not make a confiscation order where it gives or proposes to give the defendant an absolute or conditional discharge. On the contrary section 6(1) is expressed in absolute terms in that it leaves the court with no discretion whether or not to make a confiscation order if the conditions in subsections (2) and (3) are satisfied. Subsection (4) then provides how the court must proceed and subsection

(5) provides that, where the court decides that the defendant has benefited from relevant criminal conduct, it must decide the recoverable amount (in accordance with section 7) and must make a confiscation order requiring him to pay that amount.

16. Section 13 expressly provides what the court is to do if it makes a confiscation order. By subsection (1) it must proceed as mentioned in subsections (2) and (4). By subsection (2) it must take account of the confiscation order before it imposes a fine on the defendant or imposes any of the financial penalties specified in subsection (3). Subsection (5) and (6) contain provisions which relate to a case where the court makes both a confiscation order and a compensation order under section 130 of the 2000 Act.

17. Section 13(4) is of significance in the context of this appeal. It provides that, subject to subsection (2), the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant. It is important to note that the purpose of section 13(4) is not to limit the scope of the confiscation order, let alone to prohibit the making of such an order. It could not have that effect because it assumes that a confiscation order has been made. However that may be, as I see it, the expression "in deciding the appropriate sentence for the defendant" must be a reference to the sentencing process, at which the court will consider how the defendant should be dealt with. As part of that process the court will no doubt consider all the options open to it, including the option of giving the defendant an absolute or conditional discharge. It is sometimes said that an absolute or conditional discharge is not a sentence because, under section 12(1) of the 2000 Act, the court may make such an order only if it is of the opinion that "it is inexpedient to inflict punishment". Whether such an order is a sentence or not, it is in my opinion an order made as a result of "deciding the appropriate sentence" within the meaning of section 13(4).

18. The effect of section 13(4) is that, in making that decision, the court must leave the confiscation order out of account. It was not suggested in argument that it would not be open to the court which had made a confiscation order to give the defendant an absolute or conditional discharge. The Court of Appeal thought (at para 28) that it would in principle be free to do so. I agree, although whether it would have power to do so would depend upon whether the court was of the opinion that it was inexpedient to inflict punishment. In deciding that question, by reason of section 13(4), it must, subject to subsection (2), leave the confiscation order out of account. All naturally depends upon the circumstances and it will no doubt be a rare case in which it will be appropriate to make an order in the form of an absolute or conditional discharge. However, it does not seem to me to be necessarily wrong in principle for a court to conclude that it is inexpedient to inflict punishment in a case where the defendant has benefited from his criminal conduct and a confiscation order has been made. For example, it may be

inappropriate to impose a fine or other financial penalty in the light of the confiscation order, perhaps because of the defendant's means, and there may be strong mitigation which persuades the court that it would not be appropriate to impose a sentence of imprisonment or a community order.

19. Some assistance is also to be derived from sections 14 and 15. Subsections (1) to (4) of section 14 provide that the court may either (a) proceed under section 6 before it sentences the defendant or (b) postpone proceedings under section 6 for a period or periods up to a maximum of two years, although the maximum does not apply if there are exceptional circumstances. Section 15(1) provides that, if the court postpones proceedings under section 6, it may proceed to sentence the defendant. Although sections 14 and 15 contemplate the postponement of the section 6 proceedings, they do not nullify the duty of the court to act under section 6. Thus, where, as is common in practice, the court proceeds to sentence before the confiscation proceedings under section 6, the duty of the court to proceed under section 6 remains. The Court of Appeal has correctly so held on a number of occasions: see eg *R v Hockey* [2007] EWCA Crim 1577, [2008] 1 Cr App R (S) 279.

20. The effect of section 15(2) and (3) is that, where the confiscation proceedings are postponed and the defendant is sentenced during the postponement period, the court may not impose a fine or other financial penalty upon him, but (subject to subsection (4)) the court may subsequently vary the sentence, by imposing a fine or other financial penalty, after the postponement period. Those provisions expressly contemplate confiscation proceedings after the end of the postponement period. They are consistent with section 13(2), which provides that the court must take account of the confiscation order before it imposes a fine or other specified financial penalty. Thus a sentence passed before a confiscation order is made cannot include a fine or other financial penalty because to do so would be inconsistent with section 13(2). By section 15(3) the Act contemplates that in those circumstances, when a confiscation order is made after the end of the postponement period, the court may then think it appropriate to impose a fine or other financial penalty, in which case it must take account of the confiscation order in accordance with section 13(2). The importance of these provisions for present purposes is that they show that the statutory scheme envisages, indeed requires, that confiscation proceedings take place after the end of the postponement period.

21. In summary, the position as I see it on the true construction of the 2002 Act is that the court remains under a duty to proceed under section 6 and, subject to the express terms of the section, must make an order. In the case in which the section 6 proceedings take place before the defendant is sentenced, as stated above I can see no basis upon which it could be submitted to the court that no confiscation order should be made because it would be appropriate to give the defendant an absolute or conditional discharge. There is nothing in the Act which gives the court

power to decline to discharge its duty to make a confiscation order under section 6 on that or any other ground.

22. On the other hand, if the court decides (as it is entitled to do under section 15(1)) to postpone the confiscation proceedings under section 6 and proceed to sentence the defendant, if it makes an order for an absolute or conditional discharge, again I can see no basis upon which the making of such an order could absolve the Crown Court from its duty to proceed under section 6 or, having done so, from its duty to make a confiscation order under that section. If the relevant subsections of section 6 were satisfied, it would be bound to make such an order by reason of the plain words of subsection (1).

23. I turn to consider those conclusions in the light of the decision in *Clarke*, the history of the 2002 Act, the meaning of punishment in section 12(1) of the 2000 Act and the position in Scotland.

The decision in Clarke

24. In *Clarke* the Court of Appeal said at para 48, in my opinion correctly, that, if the 2002 Act is read on its own, there could be no doubt that the court has jurisdiction to make a confiscation order. Equally it recognised at para 77 that the fact that the 2002 Act imposes a mandatory regime is "obviously" a powerful argument for saying that the court must proceed under section 6 even though the defendant is being absolutely or conditionally discharged, but in the remainder of para 77 it summarised its reasons for rejecting the argument.

25. However before doing so, it considered the position under section 14 of the 2000 Act. It first rejected the argument that, as a matter of jurisdiction, section 14 prevented the court from making both a confiscation order and an order for an absolute or conditional charge. It did so on two bases. The first (at para 46) was that the court had jurisdiction to make a confiscation order under section 14(1)(a) of the 2002 Act before proceeding to sentence the defendant. There was nothing in section 14 of the 2000 Act retrospectively to deprive the court of that jurisdiction. The second was this. By section 14(1) of the 2000 Act, a conviction of an offence for which an order is made under section 12 of the 2000 Act discharging the offender absolutely or conditionally "shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made". The court held that a conviction which leads to the conditional or absolute discharge in the circumstances of the instant case is a conviction in the same proceedings as those in which the confiscation order is made, so that the conviction is not deemed not to be a conviction, within section 14(1): see paras 68

and 70 in *Clarke* and para 17 in the Court of Appeal's judgment in the instant case. I agree with that analysis.

26. The critical question was whether section 12 of the 2000 Act prevents the Crown Court from making a confiscation order and an absolute or conditional discharge order. The reasons given by the court in *Clarke* for answering that question in the affirmative were these (at para 77):

> "However, in the light of *R v Savage* (1983) 5 Cr App R (S) 216 and *R v Young* (1990) 12 Cr App R (S) 262, section 12(7) [of the 2000 Act] and the history of section 12(7), we have reached the conclusion that the Crown Court has no power to make a confiscation order against a defendant following conviction of an offence if he or she receives an absolute or conditional discharge for that offence. If Parliament had wanted to include confiscation orders within the 1973 predecessor to section 12 (see para 37 above) or in the 2000 Act, it could easily have done so. We are mindful of the fact that the orders which had been made in *R v Savage* and *R v Young* were made under legislation which gave the power to make the order but did not require the making of an order, but we do not think that this affects the conclusion which we have reached."

27. The argument accepted by the court in *Clarke* was that, as a matter of principle or law, section 12 of the 2000 Act prevented the Crown Court from making both an order for an absolute or conditional discharge and a confiscation order. The court concluded (at para 31) that there is a general principle or rule of law that no punitive order may be made in conjunction with an absolute or conditional discharge unless (a) it is listed in section 12(7) of the 2000 Act (viz orders for costs or disqualification, compensation orders, deprivation orders or restitution orders) or (b) the enactment which permits or requires the punitive order to be made expressly or impliedly provides for the making of that punitive order notwithstanding section 12(7).

28. As it said in para 77, the court derived that principle from the two earlier decisions of the Court of Appeal in *Savage* and *Young*. The issue in *Savage*, in which the appellant pleaded guilty to handling stolen goods, was whether a deprivation order under section 43 of the Powers of Criminal Courts Act 1973 in respect of a motor car could stand with a conditional discharge for the handling. The issue in *Young*, in which the appellant pleaded guilty to managing a company as an undischarged bankrupt, was whether a disqualification under section 2 of the Company Directors Disqualification Act 1986 could stand with a conditional discharge on the count on which he had pleaded guilty. It was held in both cases

that it could not. As Brooke J put it in *Young* at p 267, it was "quite inappropriate for a [disqualification] to be linked with a conditional discharge".

29. As is plain from section 12(7) of the 2000 Act, which re-enacted earlier statutes, the result in both those cases was reversed by statute. However that may be, in my opinion the principle in those cases does not apply to the problem under consideration in this appeal. As expressly recognised in *Clarke*, in *Savage* and *Young* the court was considering whether a discretionary order (ie of deprivation or disqualification) could stand with an absolute or conditional discharge. In the instant case, for the reasons given above, the confiscation order was not made in the exercise of a power to impose it but in the discharge of a duty to do so. This is in my view a critical distinction. See further paras 33 to 39 below.

30. The Court of Appeal in *Clarke* accepted the force of that point but held that Parliament must have intended that the court should not have a power or duty to make a confiscation order in circumstances in which an order for an absolute or conditional discharge was made because the Act did not include a reference to confiscation in section 12(7). However, it was accepted in *Clarke* at paragraph 46 (and it is not and could not be in dispute) that the Crown Court has jurisdiction under section 6 of the 2000 Act to make a confiscation order before the judge decides on sentence. The court added that such an order "would (presumably) have to be quashed if, subsequently, an order of absolute or conditional discharge was made" but it recognised that there was no express power to do that. For my part, I can see no mechanism by which a lawful confiscation order made by a court pursuant to its duty under section 6 could be quashed. The Crown Court would have no jurisdiction to quash it and I can see no basis upon which the Court of Appeal could properly quash it either. In *Clarke* the court's only solution to this problem was as stated in para 78, namely that, given that a confiscation order can, "at least in theory", be made before passing sentence it would, as the court put it, "obviously be prudent in those very rare cases where an absolute or conditional discharge is a possibility, to decide upon sentence first". In the instant case the Court of Appeal described that suggestion as "an extra legislative process" (para 28) and described the removal of the confiscation order as one which does not easily fit with the structure of the legislative provisions in sections 6, 14 and 15 of the 2002 Act. I would go further. In my opinion it is inconsistent with them.

31. As I see it, the fact that there is no reference to a confiscation order in section 12(7) of the 2000 Act does not lead to the conclusion that Parliament intended that such an order could not stand with an absolute or conditional discharge. Whether it can or not depends upon the true construction of the 2002 Act, which to my mind is in clear terms.

32. For these reasons I would reject the first of the two reasons given in para 31 in *Clarke*, namely that no punitive order may be made in conjunction with an absolute or conditional discharge unless (a) it is listed in section 12(7) of the 2000 Act (viz orders for costs or disqualification, compensation orders, deprivation orders or restitution orders). The second reason was that no such order may be made unless (b) the enactment which permits or requires the punitive order to be made, here the 2002 Act, expressly or impliedly provides for the making of that punitive order notwithstanding section 12(7).

33. I would not accept the second reason precisely as formulated, if only because it assumes that the principles in *Savage* and *Young* apply in the present context, whereas to my mind they do not apply to duties imposed upon the court as opposed to powers conferred upon it. It is true that there is an argument, which was advanced on behalf of the respondent, that the principle in *Savage* and *Young* applies to duties as well as powers. Thus attention was drawn to *Taylor v Saycell* [1950] 2 All ER 887 and *Dennis v Tame* [1954] 1 WLR 1338 and to section 46 of the Road Traffic Offenders Act 1988. In this regard the submission made on behalf of the respondent can be summarised in this way.

34. Historically, an important forerunner of section 12(1) of the 2000 Act was section 7(1) of the Criminal Justice Act 1948 ("the 1948 Act"), which contained the original section which provided for an absolute or conditional discharge if it was inexpedient to inflict punishment. Section 12(2) of the 1948 Act, which was a forerunner of section 14(3) of the 2000 Act, provided that the conviction of an offender who is discharged absolutely or conditionally shall be disregarded "for the purposes of any enactment which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability".

35. These sections were considered in the cases of *Taylor v Saycell* and *Dennis v Tame*, which were both decisions of the Divisional Court presided over by Lord Goddard CJ. In *Taylor v Saycell* the respondents were convicted by magistrates of using a vehicle without insurance. They were fined and disqualified from holding a licence for 12 months. They appealed to the Crown Court, which quashed the fines and the disqualifications and substituted conditional discharges. On a case stated by the prosecutor, the Divisional Court quashed the conditional discharges on the basis that there was no evidence upon which it could be said that it was inexpedient to inflict punishment. Moreover no special reasons had been advanced to avoid what would otherwise be a mandatory disqualification. At p 889H Lord Goddard said, obiter, that convictions under the Road Traffic Act 1930 ("the RTA 1930") were within section 12(2) of the 1948 Act, that it was within the jurisdiction of the court to make an order for a conditional discharge and that such an order would avoid the necessity for disqualification. In *Dennis v Tame* the defendant was given a conditional discharge, which had the effect under section

12(2) of avoiding disqualification. The conditional discharge was set aside on the basis that the Divisional Court had said more than once that the conditional discharge provisions should not be used in order to avoid disqualification in cases where, under the RTA 1930, the defendant must be disqualified in the absence of special circumstances. It further held that there were no special circumstances on the facts.

36. Attention was also drawn to section 46 of the Road Traffic Offenders Act 1988 ("the RTOA 1988"), which was relied upon on behalf of the respondent. It provides, so far as material (and as set out in *Clarke* at para 52):

> "Notwithstanding anything in section 14(3) of the Powers of Criminal Courts (Sentencing) Act 2000 … a court in England and Wales which on convicting a person of an offence involving obligatory or discretionary disqualification makes . . . an order discharging him absolutely or conditionally"

may or must disqualify or endorse. It was noted in *Clarke* that the reference to section 14(3) must have been included because of *Taylor v Saycell*. In *Clarke* the court said at para 52 that it followed from the reference to section 14(3) in section 46 of the RTOA 1988 that the draftsman was "accepting" Lord Goddard's interpretation of what is now section 14(3), namely that it prevented the imposition of any disqualification or disability in the proceedings for the offence for which the conditional discharge had been granted, subject to any contrary enactment.

37. It was submitted on behalf of the respondent that the effect of *Taylor v Saycell* and *Dennis v Tame* was that sentencing courts should not impose absolute or conditional discharges in an attempt to avoid disqualification because such a result was inconsistent with the statutory requirement that special circumstances (or special reasons) must be found before disqualification could be avoided.

38. For my part, I am not persuaded that either those cases or section 46 of the RTOA 1988 carry the present debate much further forward. The cases do no more than reflect the position as it stood under the statutes then in force. Otherwise all that the cases did was to say that, as a matter of principle, the courts should not use an absolute or conditional discharge in order to avoid the effect of the RTA 1930, which required disqualification in the absence of special circumstances. The reason the cases were decided as they were was because of section 12(2) of the 1948 Act. They were concerned with the circumstances in which the court should impose an absolute or conditional discharge where to do so would avoid the effect of the statute. They treated the provisions of the statute as paramount. They were

not concerned with the position we have here, where the terms of the statute are said to yield to the fact of a conditional discharge.

39. In all these circumstances I remain of the view that there is an important distinction between the correct approach where the court has a power to impose a penalty together with an absolute or conditional discharge and the correct approach where the court has a duty to do so on the true construction of the statute.

40. However, whether that is correct or not, all turns on the true construction of the 2002 Act. In my opinion, for the reasons I have given in paras 12 to 22 above, on its true construction the 2002 Act imposes a duty upon the court to make a confiscation order, whether the section 6 proceedings take place before or after the sentencing process.

41. As to the second reason in para 31 of *Clarke*, the court's reasoning may be summarised in this way. Parliament had enacted legislation empowering courts to make various other punitive orders and had in the same legislation specified that such orders could be made even where an absolute or conditional discharge had been imposed. Examples of such punitive orders were orders disqualifying a person from driving under section 46(1) of the RTOA 1988, "exclusion orders" made under section 1 of the Licensed Premises (Exclusion of Certain Persons) Act 1980, designed to deal with persons who commit violent offences on licensed premises, "banning orders" made under the Football (Disorder) Act 2000 and orders made under the Sex Offenders Act 1997 requiring a defendant to comply with notification requirements. The 2002 Act does not expressly provide for the making of a confiscation order where an order for discharge is imposed. The absence of a specific provision in the 2002 Act could be taken to show Parliament's intention that confiscation orders should not be coupled with an order for absolute or conditional discharge. This was so notwithstanding the fact that the 2002 Act imposed a mandatory regime for confiscation orders.

42. The difficulty with this general point is that identified on behalf of the appellant. Each of the statutes referred to empowered or required the court to impose a "disqualification or disability" of one kind or another. The explicit reference in those statutes to the regime for conditional and absolute discharges appears to have been designed principally to ensure that courts do not interpret section 14(3) of the 2000 Act as preventing the court from making such orders. However, first, section 14(3) would have no application to confiscation orders because a confiscation order is not a disqualification or disability. Secondly, it does not necessarily follow from the fact that other legislation contains an express provision permitting a punitive order and an absolute or conditional discharge to be made in respect of the same offence that the absence of such a provision in the

2002 Act has the effect of preventing a court from imposing both a confiscation order and an absolute or conditional discharge.

43. All depends upon the scheme of the particular Act and, for the reasons I have given, I would accept the submission made on behalf of the appellant that the scheme of the 2002 Act demonstrates an intention on the part of Parliament to put in place a mandatory scheme of confiscation designed to deprive offenders of the benefit of their offending.

The history of the 2002 Act

44. Some reliance was placed upon the history of the 2002 Act, which was considered in detail by the Court of Appeal in *Clarke.* The first statute which provided for confiscation to which we were referred was the Drug Trafficking Offences Act 1986 ("the 1986 Act"). Section 1(1)-(5) were very similar to what became section 6 of the 2002 Act. In summary, they required the court to take certain steps when a person appeared before the Crown Court for sentencing. They required the court to determine whether he had benefited from the drug trafficking offence or offences for which he was to be sentenced.

45. Section 1(4), (5) and (6) then provided:

> "(4) If the court determines that he has so benefited, the court shall, before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with section 4 of this Act the amount to be recovered in his case by virtue of this section.
>
> (5) The court shall then, in respect of the offence or offences concerned -
>
> (a) order him to pay that amount,
>
> (b) take account of the order before -
>
> (i) imposing any fine on him, or
>
> (ii) making any order involving any payment by him, or
>
> (iii) making any … (forfeiture orders), … or … (deprivation orders), and
>
> (c) subject to paragraph (b) above, leave the order out of account in determining the appropriate sentence or other manner of dealing with the defendant.

> (6) No enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way shall by reason only of the making of an order under this section restrict the Crown Court from dealing with an offender in any way the court considers appropriate in respect of a drug trafficking offence."

46. The 1986 Act was followed by the Criminal Justice Act 1988 ("the 1988 Act"), which extended the confiscation regime beyond drug trafficking. Section 72(5) and (6) of the 1988 Act were in very similar terms to sections 1(5) and (6) of the 1986 Act. The 1988 Act was amended by a number of subsequent Acts. Those amendments included the addition of section 72A, which provided for the postponement of the confiscation proceedings in very similar terms to the equivalent provisions of the 2002 Act. It is of interest to note the following. Section 72A(7) provided that, where the court exercised its power of postponement, it might "nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the offence or any of the offences concerned". See also section 72A(8)(c) and section 72A(9), which provided that in "sentencing, or otherwise dealing with, the defendant during the period of postponement, the court must not impose a fine or other financial penalty on him".

47. The Drug Trafficking Act 1994 ("the 1994 Act") repealed and replaced the 1986 Act. It was limited to drug trafficking offences but was in very similar terms to the 2002 Act. The equivalent of section 13(2), (3) and (4) in the 2002 Act was section 2(5) of the 1994 Act, although by section 2(5)(c) it provided that, subject to paragraph (b) (which was the equivalent of section 13(2) and (3)), the court must leave the confiscation order out of account "in determining the appropriate sentence or other manner of dealing with" the defendant. Section 3 provided for postponed determinations in very similar terms to section 15 of the 2002 Act, save that in subsection (7) it gave the court power during the postponement to "proceed to sentence, or otherwise deal with" the defendant and in subsection (9) it prohibited the court from imposing a fine or other specified financial penalty "in sentencing, or otherwise dealing with, the defendant".

48. The 2002 Act has replaced both the 1988 Act and the 1994 Act. In the Court of Appeal in the instant case the court noted in para 28 that the position when the 2002 Act came into force was that the effect of section 72(6) of the 1988 Act and of section 2(6) of the 1994 Act, which was of course the successor to section 1(6) of the 1986 Act, was that the court was not deprived of its power to make a confiscation order in addition to an absolute or conditional discharge or vice versa. In summary, the position when the 2002 Act came into force was that the court had both the duty (or in rare cases power) to make a confiscation order and also had the power to make an order for an absolute or conditional discharge in an appropriate case.

49. The Court of Appeal noted that an equivalent provision to section 2(6) of the 1994 Act was included as clause 14(7) of the Bill which led to the 2002 Act but that the clause was removed from the Bill before it was enacted. The Court of Appeal plainly thought that it was very unlikely indeed that Parliament intended to change that position, when enacting the 2002 Act. It held (or would have held) that section 13(4) was in sufficiently clear terms to make such a provision unnecessary. It is of interest to note that, according to the explanatory note to section 13, it reproduces the effect of the existing legislation.

Conclusions

50. I would accept the approach of the Court of Appeal to the position as it was when the 2002 Act came into force. However, I am aware that the distinguished commentator, Dr David Thomas QC, has expressed the view in [2010] Crim LR 64 and 790 that, in so far as the argument of the appellant rests upon section 1(6) of the 1986 Act and section 72(6) of the 1988 Act it rests on what he calls an uncertain foundation. Fortunately the conclusion which I have reached does not depend upon that foundation, whether uncertain or not. It depends upon my view of the true construction of the relevant provisions of the 2002 Act, which I have set out in paras 12 to 22 above. I note in passing that Dr Thomas does not express a view on the Court of Appeal's opinion that *Clarke* was wrongly decided. For my part, I agree with the Court of Appeal that section 13(4) is in clear terms and that *Clarke* was wrongly decided. In para 77 (quoted at para 26 above) the court in *Clarke* referred to the fact that the 2002 Act required the making of a confiscation order but simply said that it did not think that that affected the conclusion they had reached. I respectfully disagree. The issue was one of construction of the 2002 Act, which in my opinion required the making of a confiscation order whatever order was made as a result of the sentencing exercise. In short it is my view that in *Clarke* the court placed insufficient weight upon the mandatory provisions of the statute.

51. On behalf of the appellant some reliance was placed upon the obligations of the United Kingdom under what is known as the Framework Decision, namely the Council Framework Decision of 26 June 2001 "On Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime" (2001/500/JHA). In the light of the conclusion which I have reached above, it is not necessary further to lengthen this judgment by referring to its provisions.

Punishment

52. There was some discussion in the course of the argument as to whether the making of a confiscation order is or is not punishment within the meaning of section 12(1) of the 2000 Act. The relevance of the issue is that, if a confiscation order is not punishment, it is not inconsistent with an order for an absolute or conditional discharge, which can only be made if it is inexpedient to inflict punishment, whereas if it is punishment, it is said to be inconsistent with an absolute or conditional discharge.

53. The argument that a confiscation order is not punishment is that it is not intended to punish the defendant but to ensure that he disgorges any benefit he has made from crime, at any rate to the extent of his assets. On the other hand, the court in *Clarke* expressed the clear view that such an order is punishment: see in particular paras 65 and 74. It noted in para 65 that it has been treated as part of the process of sentencing and that, at least for some purposes, has been held to be a penalty: see eg *R v Briggs-Price* [2009] 1 AC 1026, paras 30, 63, 112, 113, 115 and 134. At para 74 the court said:

> "There can be no doubt that confiscation orders constitute punishment. The regime under what is now the 2002 Act is aptly described as 'Draconian'. The use of the offender's realisable assets to recover any benefit (not merely profit), including benefits from criminal activity unassociated with the index offence with a maximum of ten years' imprisonment in default must constitute punishment. Thus, applying these cases, the making of a confiscation order is inconsistent with a finding that it is inexpedient to inflict punishment."

54. It seems to me that must be correct. However, it is not necessary to reach a final conclusion on that question because section 13(4) of the 2002 Act expressly provides that the confiscation order must be left out of account in deciding the appropriate sentence for the defendant. It follows that whether a confiscation order is punishment or not is irrelevant to the question whether or not to make an order for an absolute or conditional discharge.

Scotland

55. The conclusions which I have reached seem to me to receive strong support from the position in Scotland, which is governed by Part 3 of the 2002 Act. Section 92 of the 2002 Act is almost identical to section 6, most of which is set out above. Section 92, however, provides three conditions rather than two. So far as relevant to the question in this appeal, section 92 provides:

> "(1) The court must act under this section where the following three conditions are satisfied.
>
> (2) The first condition is that an accused falls within either of the following paragraphs –
>
> > (a) he is convicted of an offence or offences, whether in solemn or summary proceedings,
>
> or
>
> > (b) in the case of summary proceedings in respect of an offence (without proceeding to conviction) an order is made discharging him absolutely.
>
> (3) The second condition is that the prosecutor asks the court to act under this section.
>
> (4) The third condition is that the court decides to order some disposal in respect of the accused; and an absolute discharge is a disposal for the purpose of this subsection."

The remaining provisions are identical or almost identical to those in Part 2 relating to England and Wales which are quoted above. The significant provisions for present purposes are subsections (2)(b) and (4). Subsection (2)(b) provides that the first condition is satisfied in the case of summary proceedings if, without proceeding to a conviction, an order is made discharging the defendant absolutely and subsection (4) provides that the third condition is satisfied if the court decides to order a disposal, an absolute discharge being a disposal for that purpose.

56. It is thus plain that, at any rate in the case of Scotland, Parliament expressly contemplated that the court will have a duty to make a confiscation order in circumstances in which it thinks it right to make an order for an absolute discharge, both where there is a conviction and where there is not. It seems inconceivable that Parliament intended that in England and Wales the making of an order for an absolute discharge should be a bar to the making of a confiscation order. In these circumstances, the position in Scotland seems to me to give some force to the underlying rationale of the construction of the 2002 Act set out in paras 12 to 22 above.

Postscript

57. There was a suggestion that confiscation proceedings after an absolute or conditional discharge were or might be an abuse of process or an infringement of the appellant's rights under Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1"). However, the duty of the court to make a confiscation order arises where the defendant has benefited from either general or particular

criminal conduct and the court has determined the recoverable amount, which is defined in section 7(1) of the 2002 Act as an amount equal to the defendant's benefit from the conduct concerned. I do not see how such proceedings could be an abuse of process. The present case is not concerned with the determination of the amount of that benefit or with the possible application, for example, of the provisions of A1P1 to that determination. A1P1 may have its part to play on issues of proportionality but not in the context of this appeal.

Disposition

58. As stated in para 6 above, the certified question is

> "Does the Crown Court have power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence?"

For the reasons I have given, I would answer that question in the affirmative but I would go further. I would hold that, where the criteria in section 6 of the 2002 Act are satisfied, subject to subsection (6), the Crown Court has a duty to make a confiscation order against a defendant following conviction for an offence, whether or not he or she receives an absolute or conditional discharge for that offence. Where subsection (6) applies, that duty must be treated as a power. In all the circumstances I would allow the appeal and restore the confiscation order in the sum of £1,500.

LORD PHILLIPS

59. I am in full agreement with the judgment of Lord Clarke. I wish, however, to add a footnote, based on information supplied pursuant to a request from the Court. The prosecuting authority responsible for the prosecution of Mr Varma and for the decision to seek a confiscation order was the Revenue and Customs Prosecutions Office ("the Customs"). Where the Customs seize goods that a defendant is seeking to bring into the country without paying duty it would be open to them to confiscate the goods, to prosecute the defendant and to exact the duty payable on them. It is, however, their practice, where they prosecute in such circumstances, not to seek to exact payment of the duty but to initiate confiscation proceedings in the amount of the duty payable instead. That is what they did in the case of Mr Varma. This practice may well be convenient, but I doubt whether it is legitimate.

60. Mr Varma pleaded guilty to section 170(2)(a) of the Customs and Excise Management Act 1979, which provides, in so far as material:

> "if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion *or attempt at evasion* - (a) of any duty payable on the goods…" (my emphasis).

I consider it questionable whether, in confiscation proceedings, it is legitimate to treat a defendant in the position of Mr Varma as having evaded duty when the only reason that he has done so is that the Customs have chosen not to exact it. If I am correct, then it is doubtful whether there was any basis for bringing confiscation proceedings in this case. I am aware that I am questioning the assumption that underlay the decision of the House of Lords in *R v David Smith* [2002] 1 WLR 54, but that aspect of that decision (at least) calls out for review. It has not, however, been challenged in this case so the confiscation order made must stand.

LORD MANCE

61. I agree with the judgment delivered by Lord Clarke and with his proposed disposal of this appeal.

62. As a member of the Court of Appeal with whose judgment the House of Lords disagreed in *R v David Smith* [2001] UKHL 68, [2002] 1 WLR 54, I have read with a particular interest Lord Phillips's supplementary judgment. In it he doubts "whether, in confiscation proceedings, it is legitimate to treat a defendant …as having evaded duty when the only reason that he has done so is that the Customs have chosen not to exact it". That, he suggests, was the assumption underlying the decision in *David Smith*.

63. A problem about this suggestion appears to me to be that the evasion relied upon by the Customs in such cases as *David Smith* and the present lies in the initial importation of the dutiable goods without declaration or payment of duty, not in any non-payment resulting from Customs' failure to pursue the defendant. On that basis, therefore, the argument resolves itself into a question "whether he has benefited from his particular criminal conduct". That was the question which the Court of Appeal answered in the favour of, and the House of Lords answered against, the defendant in *David Smith*.

64. As I understand Lord Phillips's current suggestion, it would be impossible to treat any smuggler as having actually evaded any duty payable on the goods,

unless and until it was clear that Customs could not pursue him for - and presumably actually recover - the duty. All that could be said until then was that the defendant was, by not declaring the importation and by not paying the duty, *attempting* to evade the duty payable. Without having heard argument on the point, I see some difficulty in thinking that this analysis reflects the ingredients of the criminal offence created by section 170(2) of the Customs and Excise Management Act 1979.

65. That does not mean that I do not consider that the proper scope of confiscation orders in the present area merits further consideration at the highest level.