

Confiscation against defendants convicted in absence: a lacuna?

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A confiscation order can be made against a defendant who absconds during his trial where proceedings “are not concluded”, under s.28 Proceeds of Crime Act 2002 (“POCA”). An order can also be made against a defendant who absconds after conviction (s.27). But it would appear that no order can be made against a defendant who absconds during his trial and is convicted in his absence. This appears to be the position on anything other than an extremely loose interpretation of the relevant provisions. This cannot, it is submitted, have been the intention of Parliament. It is a serious and exploitable lacuna.

Section 6 of POCA enables a confiscation order to be made against a defendant after conviction. S.6(8) disapplies the provision in the case of an absconder, but states that s.27 “may apply”. Sections 27-30 are headed “Defendant Absconds”. Section 27 (entitled “Defendant convicted or committed”) only applies “if a defendant absconds *after* he is convicted ...”. This would seem therefore, unequivocally, not to apply to an absconder convicted in absence. Section 28 (entitled “Defendant neither convicted nor acquitted”) subs.(2) applies the section only to a case where “(a) proceedings are started against a defendant but are not concluded, (b) he absconds, and (c) the period of two years ... has ended”. By the title alone it seems equally clear that this section cannot apply to an absconder convicted in absence. There are no other provisions for absconding defendants.

A defendant who absconds during his trial, where the jury are then discharged without reaching a verdict, is given a two year grace period before a confiscation order can be made; a defendant who absconds immediately after conviction is given no such protection—a confiscation order can be made under s.27 without delay. It seems contrary to common sense for a defendant who absconds the night before the jury return a guilty verdict to be immune from confiscation altogether. Could it be then that the title of s.28 should be ignored (or read as “Defendant neither convicted nor acquitted *at the time of his absconding*”) and such a person be brought within that section? i.e. the two year grace period is intended to apply to both unconvicted defendants and defendants who might be unaware of their conviction? It is a requirement under s.28(2) (a) that proceedings are “not concluded”. Are proceedings taken to be “not concluded” when an absconder is convicted in his absence? The interaction between s.28 and s.85, which gives instances of proceedings being “concluded”, is somewhat circular, but in any event it seems that proceedings would indeed be “not concluded” in our example. However, sections 29 and 30 strongly suggest that s.28 does *not* apply to a defendant convicted in absence. Section 29 provides for a confiscation order under s.28 to be varied where the de-

fendant ceases to be an absconder, he is convicted, and he applies *within 28 days of conviction* to vary the order. This would be impossible for a defendant convicted in absence unless he fortuitously returned within 28 days, which cannot be what the section has in mind. Section 30 (discharge of confiscation order after acquittal) points the same way. Furthermore s.6(8) (see above) only puts forward s.27, not s.28, as an alternative for a convicted absconder. It seems therefore that neither option, s.27 or s.28, is available. Could this be deliberate?

Previous Legislation

The confiscation regime in the Criminal Justice Act 1988 (“CJA”) is silent on the point, but does allow for an order to be made against an absconder convicted in absence (see e.g. *R. v Spearing* [2011] 1 Cr.App.R.(S) 101). The Drug Trafficking Act 1994 (“DTA”) did make specific provision for absconders, and as with the CJA 1988 the defendant in our example could have had an order made against him—and in contrast to the case of an unconvicted defendant the court would not have had to wait for two years to elapse. Parliament’s intention was, broadly, to import the provisions from the DTA into POCA: in the words of Lord Rooker, “The key change made by the clause is to extend—not invent—the power to make a confiscation order in absentia against an absconding drug trafficker to cases involving those who have been charged with other crimes” (said in reference to s.28 in particular, but this appears to be the intention more generally). It seems then that the lacuna is not deliberate.

Section 27: Absconding as a continuing act?

The only significant problem with bringing our example within s.27 is the requirement that a defendant have absconded *after* he is convicted. A possible way around this, which to the author’s knowledge has been employed by at least one judge in the Crown Court, is to take the act of absconding as being continuing so that a defendant who absconds and is then convicted also “absconds” *after* the conviction. Alternatively the words “before or after” could be substituted. To bring our example within s.27 rather than s.28 preserves the difference in the application of the mandatory two-year delay between convicted and unconvicted defendants.

But would this piece of purposive interpretation be a step too far? The power to substitute words is “confined to plain cases of drafting mistakes” (*per* Lord Nicholls in *Inco Europe Ltd And Others v First Choice Distribution* [2000] 1 W.L.R. 586, at 592), and penal legislation demands a strict interpretation (*Western Bank Ltd v Schindler* [1977] Ch. 1). It would seem that an amendment is needed to prevent potential injustice.