



Criminal Justice (Scotland) Act 1987

1987 CHAPTER 41

PART I

CONFISCATION OF PROCEEDS OF DRUG TRAFFICKING ETC.

Confiscation orders

1 Confiscation orders

- (1) Subject to the provisions of this Part of this Act, where a person is convicted in the High Court of, or is under section 104(1) of the 1975 Act remitted to that Court for sentence as regards, an offence to which this section relates the Court may, on the application of the prosecutor made when he moves for sentence (or, if the case is one so remitted, made before sentence is pronounced), make an order (in this Act referred to as a "confiscation order") requiring the person to pay such amount as the Court considers appropriate, being an amount not exceeding—
 - (a) subject to paragraph (b) below, what it assesses to be the value of the proceeds of the person's drug trafficking; or
 - (b) if the Court is satisfied that the property that might be realised in terms of this Part of this Act at the time the confiscation order is made has a value less than that of the proceeds of the person's drug trafficking, what it assesses to be the value of that property.
- (2) This section relates to any of the following—
 - (a) an offence under section 4(2) (production, or being concerned in production, of controlled drug), 4(3) (supply of, or offer to supply, or being concerned in supply of, controlled drug), 5(3) (possession of controlled drug with intent to supply) or 20 (assisting in, or inducing commission of, certain drug related offences punishable under foreign law) of the Misuse of Drugs Act 1971;
 - (b) in connection with a prohibition or restriction on importation having effect by virtue of section 3 of the said Act of 1971, an offence under section 50(2) or (3) (improper importation), 68(2) (improper exportation) or 170 (fraudulent evasion of duty etc.) of the Customs and Excise Management Act 1979;

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- (c) an offence under section 43 of this Act;
 - (d) an offence of conspiring, inciting or attempting to commit an offence to which, by virtue of paragraph (a), (b) or (c) above, this section relates.
- (3) The Court shall take account of the provisions of any order made by it under subsection (1) above in determining the amount of any fine imposed on the person as regards the offence but not in determining any other matter as regards sentence.
- (4) For the purposes of any appeal or review, a confiscation order is a sentence.
- (5) No enactment restricting the power of a court dealing with a person in a particular way from dealing with him also in any other way shall by reason only of the making of an order under subsection (1) above (or the postponement of a decision as regards making such an order) restrict the High Court from dealing with a person in any way the Court considers appropriate in respect of an offence to which this section relates.
- (6) In this Part of this Act, "drug trafficking" means doing or being concerned in any of the following, whether in Scotland or elsewhere—
- (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the said Act of 1971;
 - (b) transporting or storing such a drug where possession of it contravenes section 5(1) of that Act;
 - (c) importing or exporting such a drug where the importation or exportation is prohibited by section 3(1) of that Act;
 - (d) producing, supplying, transporting, storing, importing or exporting such a drug in contravention of a corresponding law ("corresponding law" having the meaning assigned by section 36(1) of that Act);
- and includes, whether in Scotland or elsewhere, entering into or being otherwise concerned in an arrangement whereby—
- (i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or
 - (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment.

2 Postponed confiscation orders

- (1) The Court, if it considers that it requires further information before coming to any decision as regards making an order under section 1(1) of this Act, may subject to subsection (4) below postpone that decision for a period not exceeding six months after the date of conviction for the purpose of enabling that information to be obtained; but without prejudice to sections 179 and 219 of the 1975 Act may notwithstanding such postponement proceed, on the prosecutor's motion therefor, to sentence or to otherwise deal with the person in respect of the conviction:

Provided that no fine shall be imposed before the decision is taken.

- (2) Where under subsection (1) above a decision has been postponed for a period, any intention to appeal under section 228 of the 1975 Act against conviction or against both conviction and any sentence passed during that period in respect of the conviction, shall be intimated under section 231(1) of that Act not within two weeks of the final determination of the proceedings but within two weeks of—

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- (a) in the case of an appeal against conviction where there has been no such sentence, the day on which the period of postponement commences;
 - (b) in any other case, the day on which such sentence is passed in open court.
- (3) Notwithstanding any appeal of which intimation has been given by virtue of subsection (2) above, a person may appeal under the said section 228 against the confiscation order (if the decision is to make one) or against any other sentence passed, after the period of postponement, in respect of the conviction.
- (4) If during the period of postponement—
- (a) intimation is given by virtue of subsection (2) above by the person, the Court may, on the application of the prosecutor, extend that period to a date up to three months after the date of disposal of the appeal;
 - (b) the case is remitted under subsection (5) of section 3 of this Act, the Court may, on such application, extend that period to a date up to three months after the case is transmitted under that subsection by the Court of Session or, if there is an appeal against the decision of the Court of Session on such remit, the date of disposal of that appeal.

3 Assessing the proceeds of drug trafficking

- (1) For the purposes of this Act—
- (a) any payments or other rewards received by a person at any time (whether before or after the commencement of section 1 of this Act) in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking, and
 - (b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.
- (2) Without prejudice to section 4 of this Act the Court may, in making an assessment as regards a person under section 1(1) of this Act, make the following assumptions, except in so far as any of them may be shown to be incorrect in that person's case—
- (a) that any property appearing to the Court—
 - (i) to have been held by him at any time since his conviction, or
 - (ii) to have been transferred to him at any time since a date six years before his being indicted,was received by him, at the earliest time at which he appears to the Court to have held it, as a payment or reward in connection with drug trafficking carried on by him,
 - (b) that any expenditure of his since the date mentioned in paragraph (a)(ii) above was met out of payments received by him in connection with drug trafficking carried on by him, and
 - (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.
- (3) Subsection (2) above does not apply if the only offence by virtue of which the assessment is being made is an offence under section 43 of this Act.
- (4) The Court shall, in making an assessment as regards a person under section 1(1) of this Act, leave out of account any of his proceeds of drug trafficking that are shown to

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the court to have been taken into account in a case where a confiscation order (whether under this Act or under and within the meaning of—

- (a) section 1 of the Drug Trafficking Offences Act 1986; or
- (b) any corresponding provision in Northern Ireland),

has previously been made against him.

- (5) Where in making an assessment as regards a person under section 1(1) of this Act the Court at any stage is of the opinion that a difficult question of law or a question of fact of exceptional complexity is involved, it may of its own accord, or on the application of the prosecutor or of the person (or on their joint application), remit the case to the Court of Session for a decision as regards that question; and the Court of Session shall on deciding the question transmit the case to the High Court.

4 Statements relating to drug trafficking

- (1) Without prejudice to section 150 of the 1975 Act, where the prosecutor has, as regards a person, moved for an order under section 1(1) of this Act the prosecutor may lodge with the clerk of court a statement as to any matters relevant to the assessment of the value of that person's proceeds of drug trafficking and if the person accepts to any extent any allegation in the statement the Court may, for the purposes of that assessment, treat that acceptance as conclusive of the matters to which it relates.

- (2) Where—

- (a) a statement is lodged under subsection (1) above, and
- (b) the Court is satisfied that a copy of that statement has been served on the person,

the Court may require the person to indicate, within such period as the Court may specify, to what extent he accepts each allegation in the statement and, in so far as he does not accept any such allegation, to indicate the basis of such non-acceptance.

- (3) If the person fails in any respect to comply with a requirement under subsection (2) above, he may be treated for the purposes of this section as accepting every allegation in the statement apart from any allegation in respect of which he has complied with the requirement.

- (4) Without prejudice to section 150 of the 1975 Act, where—

- (a) there is lodged with the clerk of court by the person a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made, and
- (b) the prosecutor accepts to any extent any allegation in the statement,

the Court may, for the purposes of that determination, treat that acceptance as conclusive of the matters to which it relates.

- (5) No acceptance by the person under this section that any payment or other reward was received by him in connection with drug trafficking carried on by him or another shall be admissible in evidence in any proceedings, whether in Scotland or elsewhere, in respect of an offence.

5 Realisable property

- (1) Subject to subsection (3) below, the following property is realisable in terms of this Part of this Act—

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- (a) the whole estate of a person suspected of, or charged with, an offence to which section 1 of this Act relates, being an offence in respect of which (either or both)—
 - (i) warrant to arrest and commit him has been granted;
 - (ii) a restraint order has been made against him; and
 - (b) the whole estate of a person to whom any person whose whole estate is realisable by virtue of paragraph (a) above has (directly or indirectly and whether in one transaction or in a series of transactions) made an implicative gift,
- if the proceedings as regards the offence have not been concluded.
- (2) In subsection (1) above, "the whole estate of a person" means his whole estate, wherever situated, at the date on which, in respect of the suspected or charged person, the warrant to arrest and commit was granted, or on which the restraint order was made (whichever first occurs), and includes—
- (a) any income or estate vesting in the holder of the realisable property on that date; and
 - (b) the capacity to exercise, and to take proceedings for exercising, such powers in, over or in respect of any property as might have been exercised by the holder of the realisable property for his own benefit as at that date.
- (3) Property is not realisable if—
- (a) held on trust by a person mentioned in subsection (1)(a) or (b) above for a person not so mentioned; or
 - (b) an order under—
 - (i) section 27 of the Misuse of Drugs Act 1971 (forfeiture orders), or
 - (ii) section 223 or 436 of the 1975 Act (forfeiture of property), or
 - (iii) section 43 of the Powers of Criminal Courts Act 1973 (deprivation orders), or
 - (iv) any other statutory provision providing specifically for forfeiture in relation to an offence,is in force in respect of the property.
- (4) Subject to subsection (7) below, for the purposes of sections 1(1)(b) and 4(4)(a) of this Act, the amount that might be realised at the time a confiscation order is made in respect of a person is the total value at that time of all realisable property owned, and all implicative gifts which have been made, by him; except that where there are obligations having priority at that time the amount that might be realised is the aforesaid total value less the total amount payable in pursuance of those obligations.
- (5) In assessing, for the purposes of section 1(1)(b) of this Act, the value—
- (a) of realisable property (other than money) owned by a person in respect of whom it proposes to make a confiscation order, the High Court shall have regard to the market value of the property at the date on which the order would be made; but it may also have regard to any security or real burden which would require to be discharged in realising the property or to any other factors which might reduce the amount recoverable by such realisation;
 - (b) of an implicative gift, the Court shall, subject to section 6(2) and (3) of this Act, take it to be—
 - (i) the value of the gift when received, adjusted to take account of subsequent changes in the value of money, or

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- (ii) where subsection (6) below applies, the value there mentioned, whichever is the greater.
- (6) If at the date on which the order would be made the recipient holds—
- (a) the property which he received (not being cash), or
 - (b) property which, in whole or in part, directly or indirectly represents in his hands the property which he received,
- the value referred to in subsection (5)(b)(ii) above is, subject to section 6(2) and (3) of this Act, the value at that date of the property mentioned in paragraph (a) above or, as the case may be, of the property mentioned in paragraph (b) above so far as it represents the property which he received.
- (7) Without prejudice to section 47(3) of this Act, the Court may, notwithstanding subsections (5)(b) and (6) above, for the purposes of section 1(1)(b) of this Act disregard the amount (or part of the amount) of an implicative gift if it considers it improbable that such amount (or part) could be realised.
- (8) For the purposes of subsection (4) above, an obligation has priority at any time if it is an obligation of the person in respect of whom the confiscation order is made to—
- (a) pay an amount due in respect of—
 - (i) a fine or order (not being a confiscation order or an order mentioned in sub-paragraph (ii) below) of a court, imposed or made on conviction of an offence, where the fine was imposed or order made before the confiscation order;
 - (ii) a compensation order (within the meaning of the Criminal Justice (Scotland) Act 1980), made on conviction of an offence, where such order was made before, or in the same proceedings as, the confiscation order; or
 - (b) pay any sum which would be included among—
 - (i) the preferred debts (as defined in section 51(2) of the 1985 Act) were his estate being sequestrated in accordance with the provisions of that Act and were the date on which the confiscation order would be made the date of sequestration;
 - (ii) the preferential debts (within the meaning given by section 386 of the Insolvency Act 1986) in the person's bankruptcy or winding up were that bankruptcy commencing on the date of the confiscation order or as the case may be were the winding up under an order of the court made on that date.

6 Implicative gifts

- (1) Subject to subsection (4) below, in this Part of this Act references to an "implicative gift" are references to a gift (whether made before or after the commencement of section 1 of this Act)—
- (a) made not more than six years before the date mentioned in section 5(2) of this Act; or
 - (b) made at any time if the gift was—
 - (i) of property received by the giver in connection with drug trafficking carried on by him or another, or

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- (ii) of property which, in whole or in part, directly or indirectly represented in the giver's hands property received by him in that connection.
- (2) For the purposes of subsection (1) above, the circumstances in which a person is to be treated as making a gift shall include those of a case where he transfers an interest in property to another person, directly or indirectly, for a consideration significantly less than the value of that interest at the time of transfer. In subsection (3) below the said consideration is referred to as "consideration A" (or as "A") and the said value as "consideration B" (or as "B").
- (3) In the case mentioned in subsection (2) above, section 5 of this Act shall apply as if the reference in sub-paragraph (i) of subsection (5)(b) of that section to "the value of the gift when received" were a reference to the amount by which consideration A is exceeded by consideration B and as if in sub-paragraph (ii) of the said subsection (5) (b) the reference to "the value there mentioned" were a reference to a value determined in accordance with the formula—

$$\frac{C(B-A)}{B}$$

where C is what the value referred to in the said sub-paragraph (ii) would be had the gift been an outright gift.

- (4) A gift made for a charitable purpose to a person who is not an associate of the giver, being a gift which having regard to all the circumstances it was reasonable to make, is not an implicative gift.
- (5) In subsection (4) above, "charitable purpose" means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.

7 Application of provisions relating to fines to enforcement of confiscation orders

- (1) Sections 196 and 203 of the 1975 Act and, as applied by section 194 of that Act, the provisions of that Act specified in subsection (2) below shall, subject to the qualifications mentioned in subsection (2) below, apply in relation to confiscation orders as they apply in relation to fines; and section 91 of the Magistrates' Courts Act 1980 and Article 96 of the Magistrates' Courts (Northern Ireland) Order 1981 (provisions relating to transfer of fines from Scotland etc.) shall be construed accordingly.

- (2) The provisions mentioned in subsection (1) above are—
section 396:

Provided that any allowance under that section (or section 397) of time (or further time) for payment shall be without prejudice to the exercise by any administrator appointed in relation to the confiscation order of his powers and duties under this Act; and the court may, pending such exercise, postpone any decision as to refusing or allowing time (or further time) for payment;

section 397;

section 398;

section 399:

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Provided that any order of payment by instalments shall be without prejudice to such exercise as is above mentioned;

section 400;

section 401(2) and (3);

section 403, except that for the purposes of subsections (4) and (6) of that section "confiscation order" in subsection (1) above shall be construed as including such an order within the meaning of the Drug Trafficking Offences Act 1986 or of any corresponding provision in Northern Ireland;

section 404;

section 406;

section 407:

Provided that where a court imposes a period of imprisonment both in respect of a fine and of a confiscation order the amounts in respect of which the period is imposed shall, for the purposes of subsection (1A) of that section, be aggregated:

Provided also that before imposing a period of imprisonment to which there is a liability by virtue of that section the court shall, if an administrator has been appointed in relation to the confiscation order, require a report from him as to whether and in what way he is likely to exercise his powers and duties under this Act and shall take that report into account; and the court may, pending such exercise, postpone any decision as to such imposition;

section 408;

section 409, except that the reference in subsection (1) of that section to the person paying a sum to the governor of the prison under conditions prescribed by rules made under the Prisons (Scotland) Act 1952 shall be construed as including a reference to an administrator appointed in relation to the confiscation order making such payment under this Act in respect of the person;

section 411, except the proviso to subsection (3):

Provided that an order for recovery by civil diligence shall not be made under the section where an administrator is appointed in relation to the confiscation order; Schedule 7.

- (3) Where in any proceedings an order has been made under section 1(1) of this Act as regards a person and a period of imprisonment or detention is imposed on him in default of payment of its amount (or as the case may be of an instalment thereof), that period shall run from the expiry of any other period of imprisonment or detention (not being one of life imprisonment or detention for life) imposed on him in the proceedings.
- (4) The reference in subsection (3) above to "any other, period of imprisonment or detention imposed" includes (without prejudice to the generality of the expression) a reference to such a period on default of payment of a fine (or instalment thereof); but only where that default has occurred before the warrant for imprisonment is issued for the default in relation to the order.