

**BOOK REVIEW: "THE CONFISCATION OF
CRIMINAL ASSETS: LAW AND
PROCEDURE"**

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THE HON. MR. JUSTICE MICHAEL MORIARTY*

*Did that play of mine send out
certain men the English shot?¹*

Towards the end of his life, Yeats in "Man and the Echo" reflected on the degree to which his earlier work might have contributed towards the traumatic events in Ireland of two decades previously. Somewhat similar questions are raised by the present authors in this valuable and stimulating series of essays on the legislation introduced in 1994 and 1996 to enable confiscation of criminal assets; was the 1996 Proceeds of Crime Act in particular an emotive and excessively hasty response to the brutal killings of Detective Garda Gerry McCabe and Veronica Guerin, and did it wrongly and unconstitutionally seek to superimpose a civil standard of proof and set of procedures upon areas that ought to have remained the sole preserve of criminal law?

Lest any reminder of essential provisions be of benefit, the Proceeds of Crime Act, 1996, provides for the confiscation of property valued in excess of £10,000 where a court is satisfied that the property constitutes the Proceeds of

* Judge of the High Court.

¹ Finnegan (ed.), *W.B. Yeats: The Poems*, p. 345.

Crime. The scheme of the Act allows a court to make such an order on foot of an application grounded on the Affidavit of a member of An Garda Síochána not below the rank of Chief Superintendent. Sections 2 and 3 of the Act provide for the granting by a court of interim and interlocutory Orders, generally providing for the freezing of the respondent's assets. Section 6 allows a court, *inter alia*, to order that monies be made available to a respondent for the purpose of defraying his reasonable legal expenses. Section 7 provides for the appointment of a receiver over property governed by the Act. Section 8 allows the admission, in appropriate circumstances, of hearsay evidence, also providing that the standard of proof required to determine any question arising under the Act shall be that applicable to civil proceedings, in aggregate an appreciable quantum leap from having to persuade a jury beyond reasonable doubt on ordinarily admissible evidence of an accused person's guilt as charged. Section 9 entitles a court to require a person to file an affidavit specifying his property and income.

The Criminal Assets Act, 1996 establishes the Criminal Assets Bureau as a multi-agency body corporate combining the resources of the Garda Síochána, the Revenue authorities and the Social Welfare authorities and authorises the Bureau to take all necessary action for confiscation or freezing of assets identified as deriving from criminal activity and ensuring that proceeds of criminal activity are duly subjected to tax, together with related powers in regard to social welfare benefits. The earlier Criminal Justice Act of 1994 introduced the offence of money laundering into Irish law and further provides that a trial court can, on the application of the Director of Public Prosecutions, investigate the profit that a person convicted on indictment has made from drug-trafficking in the case of a drug-trafficking offence, with a view to making a Confiscation Order in the amount of such profit as assessed.

Apart from a much more detailed exploration of the relevant statutes and Irish case law that has arisen in relation

to them, the book includes helpful essays on the American and British experience in confiscation of criminal assets, and on the enforcement of money laundering legislation. Domestic contributors include Fachdna Murphy (now Assistant Commissioner for Human Resources of An Garda Síochána), Barry Galvin, solicitor, and Shane Murphy B.L., all persons emphatically at the cutting edge of the establishment and litigious experience of the Criminal Assets Bureau. Because the book is essentially based on the proceedings of a seminar held on 4 September 1998 at the University of Limerick, it is inevitable that not all recent developments have been incorporated, but some of the essays have been updated to the following year, and the authors have helpfully provided supplementary chapters both by way of an initial overview and a concluding post script.

The work accordingly incorporates much of the High Court jurisprudence that has arisen since the establishment of the Criminal Assets Bureau, including *M. v. D.*,² *Gilligan v. Ireland*³ and *M. v. M.*⁴ Each of the latter two cases upheld the constitutionality of the 1996 Proceeds of Crime Act, and rejected numerous arguments that its provisions represented an unjust attack on property rights, improperly introduced civil rules and standards to procedures of an essentially criminal nature, and otherwise offended against constitutionality. The judgments laid appreciable emphasis upon the pressing social need to control drug trafficking, the inclusion in the legislation of significant checks and balances to minimise the likelihood of injustice being done to respondents to applications, and concluded that there was due proportionality in the undoubted incursions made upon the property rights of such persons. The Supreme Court has yet to pronounce in substance upon the relevant arguments, but hearings of appeals in both cases were heard earlier this year

² [1998] 3 I.R. 175.

³ [1998] 3 I.R. 185.

⁴ High Court, unreported, O'Higgins J., 4 June 1999.

and the judgments stand adjourned to the forthcoming Michaelmas term.

As any High Court judge charged with the hearing of Criminal Assets Bureau applications will readily attest, there has been no shortage of arguments raised over the past five years at the behest of those faced with confiscation of valuable assets under the legislation, and the incidence of these is likely to be compounded by the forthcoming incorporation into Irish domestic law of the European Convention on Human Rights. The European Convention on Human Rights Bill, 2001, is at present in the course of passage through the Dáil. Whilst this will obviously not affect the resolution of the appeals currently pending, Claire Hamilton B.L. has written a perceptive article on the possible implications for Irish assets forfeiture law of this development in the May 2001 edition of the *Bar Review*.⁵ Extensive consideration is given to two recent decisions of the Scottish and English Courts, that of the Appeal Court of the High Court of Justiciary of Scotland in *McIntosh v. Her Majesty's Advocate*,⁶ and the subsequent and somewhat conflicting decision of the English Court of Appeal in *R. v. Benjafield*.⁷ Space does not permit an adequate synopsis or analysis of either, particularly the detailed principal judgment of Lord Prosser. In the former, a majority of the Scottish Court held in favour of the petitioner McIntosh on appeal, upholding his challenge to a portion of the Proceeds of Crime (Scotland) Act, 1995, by virtue of its incompatibility with Article 6 (2) of the European Convention on Human Rights. Essentially, it was found that the application by the Crown for a confiscation order under the Act was sufficient to constitute a “criminal charge” capable of attracting the presumption of innocence guaranteed by that article, and that

⁵ Hamilton, “Asset Forfeiture and the European Convention on Human Rights”, (2001) 6 *Bar Review* 414.

⁶ *Times Law Reports*, 31 October 2000.

⁷ *Times Law Reports*, 28 December 2000.

the provisions of the Section permitting certain assumptions to be made were not within the "reasonable limits" allowed by the article. Whilst the subsequent English case ultimately reached a different conclusion in finding that the presumption providing for reversal of the onus of proof in analogous English legislation was a reasonable and proportionate response to a substantial public interest in ensuring that those who had offended should not profit from such offending and be enabled to fund further offending, it was again found that the confiscation procedure should in all the circumstances be regarded as at least part of the determination of a criminal charge.

Assuming that the European Convention on Human Rights Bill, 2001, is duly enacted, it is almost inevitable that these authorities, and other grounds of argument, will be raised and argued in the Irish courts. Despite the haste with which the 1996 legislation was enacted, it may be argued that its various saving provisions, allied to the consistent disinclination of the High Court to uphold applications founded only upon blanket hearsay evidence, could constitute "reasonable limits" as envisaged by the Convention. It is scarcely open to doubt that the 1996 legislation addressed a predominant social evil, namely the relevant impunity in a context of criminal sanctions with which those at the head of drug trafficking pyramids in particular were able to conduct their operations, and that authorities here have understandably exulted in criminals having been put demonstrably on the back foot. By the same token, however, the most laudable objectives cannot justify laws that are unconstitutional, draconian or oppressive, and a culture in which a suspect against whom no admissible evidence of substantive criminal conduct can be tendered may nonetheless face over readily the sanctions of wholesale expropriation plainly has its pitfalls. Between these polar positions, much remains to be heard. More may also be heard for that matter in relation to the Criminal Justice Act, 1994, with perhaps its somewhat uneasy co-existence of indictable

trial procedures and potential but separate confiscation orders following conviction being vested in the same court of trial.

Whilst the present volume is a slim one in comparison with Mr. McCutcheon's subsequent ground-breaking and formidable work on *Criminal Liability*, co-authored with Professor Finbarr McAuley, its authors are to be commended for a thoughtful and not uncritical survey from differing viewpoints of a dramatic new series of innovations in our statute law, and of the early years of its workings. To all concerned with the study or practice of Irish criminal law and related disciplines it is a further valuable source of information and informed comment and, together with other valuable projects undertaken by the Centre for Criminal Justice in the University of Limerick, proof positive that such sources are not exclusively located within the Pale!

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