R. v Haque (Mohammed)

No Substantial Judicial Treatment

Court
Court of Appeal (Criminal Division)

2019 WL 02869952

Neutral Citation Number: [2019] EWCA Crim 1028 No: 201802760/C3

IN THE COURT OF APPEAL CRIMINAL DIVISION

Royal Courts of Justice

Strand London, WC2A 2LL

Thursday 23 May 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE JEREMY BAKER

THE RECORDER OF CARDIFF HER HONOUR JUDGE REES

(Sitting as a Judge of the CACD)

R E G I N A

v

MOHAMMED HAQUE

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS Tel No: 020 7404 1400 Email: (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr S Reiz appeared on behalf of the **Appellant**

Miss D Breen-Lawton appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

LORD JUSTICE DAVIS:

Introduction

1. The appeal in this case, brought by leave of the single judge, involves consideration of some of the provisions relating to offences of money laundering set out in the Proceeds of Crime Act 2002. The appeal rests entirely on a technicality. It has no relation to the merits. But that is no bar to its success if it is well-founded. Put shortly, it is said on behalf of the appellant that, by reference to the facts and to the prosecution case as advanced at trial, the relevant count on the indictment, charged by reference to section 329(1)(a) of the 2002 Act, was the incorrect charge; and the trial judge should have accepted the submission of the defence to that effect.

Background Facts

2. The background position is this. The appellant is now aged 43. On 21 June 2018, after a trial in the Crown Court at Leeds, he was convicted by a jury on a count of acquiring criminal property, contrary to section 329(1)(a) of the 2002 Act. In due course he was sentenced to 27 months' imprisonment. He had during the course of the trial been found not guilty by the jury, on the judge's direction, on another count on the indictment, count 1, which was a count of conspiracy to defraud.

3. There had been a considerable number of co-accused. A number had pleaded guilty either to conspiracy to defraud or to acquiring criminal property contrary to section 329(1)(a) of the 2002 Act. One co-accused, a man called Hadi, was convicted at the trial on count 1. Another co-accused, Shah Abdal, was convicted on a count of acquiring criminal property.

4. The case had concerned a conspiracy to defraud which took place between July 2014 and October 2015. It had been directed largely against elderly and vulnerable people in West Yorkshire. The conspirators would contact victims by telephone pretending to be police officers and state that they were investigating allegations of bank fraud. If the victims doubted what was being said, they would be invited to call the bank or some other number to verify the story. If they did that, the conspirators would not hang up the phone and the line would be left open and any victim's subsequent call would then go to another fraudster who would confirm what had previously been stated. In such circumstances the victims were then instructed to withdraw and hand over large amounts of cash or to transfer money to bank accounts controlled by the fraudsters. It was estimated that some 42 individuals had been contacted in this manner and 13 of those had been defrauded, with around £240,000 being obtained from those individuals.

5. So far as the appellant was concerned, money from two of such individuals had been transferred to an account linked to him.

6. So far as the first instance was concerned, on 23 July 2014, the complainant was contacted by a man who stated that he was a police officer investigating fraud on her bank account. On his instructions she withdrew £2,000 in cash from her bank account and gave it to a driver who turned up to collect it. She then, on instructions,

transferred £22,000 into a bank account. This account was in fact the personal joint bank account held in the names of the appellant and his wife. At the time the account had a balance of less than £10. On the same day, cash withdrawals of £7,000 and

£10,000 were made from the account. It was never identified clearly at trial who had actually made those cash withdrawals, although it seems that the defence case statement (which we gather was never put into evidence) had indicated an acceptance that the appellant had himself withdrawn the cash: and in any event it was a clear inference that he had authorised them. A further transfer of nearly £5,000 was made to a particular limited liability partnership.

7. Then, on 13 August 2014, another complainant was contacted by a man who again stated that he was investigating fraudulent activity. As a result of his call, she withdrew £5,000 and gave it to a courier who attended her address. She also transferred the sum of £30,000, this being paid into the joint account of the appellant and his wife. Thereafter, £15,000 of that was transferred to an account in the name of a limited liability company which it seems was a company through which the appellant engaged in business and which he controlled. Cash withdrawals were also made from that account; and another transfer was made to the same limited liability partnership. Later, a further £1,300 was transferred to the business account of the appellant's limited liability company and just over £16,000 was subsequently withdrawn in cash from the business account.

8. The prosecution's case at trial overall was that by such transfers to the joint account the appellant had acquired criminal property as alleged.

9. The defence case, albeit the appellant gave no evidence at trial, was that the appellant was not involved in any conspiracy and did not acquire any criminal property. He had stated in interview that he did not know the co-accused and did not know

or suspect that the money put into his account was the proceeds of crime. He had accepted in interview that the money was successively put into the two accounts, the personal account held jointly with his wife and then (in part) the business account in his company's name. He accepted also in interview that he had control of those accounts. His position was that the funds were payments for clothing and that he had used the money to buy stock and for other expenses connected with his clothing business.

Proceedings at trial

10. So far as the indictment itself is concerned, the count of acquiring criminal property was set out as count 3:

"STATEMENT OF OFFENCE

Acquiring criminal property, contrary to section 329(1)(a) of the Proceeds of Crime Act 2002

PARTICULARS OF OFFENCE

Mohammed Haque, between 1st July 2014 and 30th December 2015 acquired criminal property, namely bank transfers, knowing or suspecting

them to represent in whole or in part the proceeds of fraud."

11. At the close of all the evidence in the case (including that of Hadi), a submission was made by counsel then appearing for the appellant that there was no case to answer on count 3. Quite why such submission had not been made at an earlier stage, as on the face of it it most certainly should have been, is not clearly identified. It seems to have been a conscious tactical decision on the part of counsel then appearing for the appellant.

12. At all events, what was submitted, in reliance in particular on the decision of the Supreme Court in the case of *GH [2015] UKSC 24* , *[2015] 2 Cr.App.R 12*, was that the appellant had not "acquired" any criminal property as alleged. Consequently it was submitted that that count should be withdrawn from the jury's consideration.

13. That submission was disputed by the Crown. The judge ruled shortly in favour of the Crown at that time; the matter was summed-up; and the jury then retired. Subsequently, the judge provided written reasons for his ruling. In those written reasons he accepted that the case of GH had been decided on essentially the same facts as those in the instant case. The judge in his written ruling concluded that money obtained by fraud constituted "criminal property" for the purposes of section 329 of the 2002 Act and that an offence was committed by someone who acquired such money knowing or suspecting it to be criminal property. As to whether the appellant had "acquired" the criminal property in the present case, the judge said that it could properly be so inferred by a jury. He explained: "Withdrawals from an account can, in the normal course of events, only be made by the account holder ... the fraudsters would not have put monies into Mr Haque's account unless they knew he would return the monies to them." He said there were matters entitling a reasonable jury to draw such an inference.

The statutory scheme

14. We turn then to the statutory scheme. Part 7 of the 2002 Act deals with money laundering. So far as the offences are concerned, section 327 relates to concealing or other disposition of criminal property and in the relevant respects is in these terms:

"327 Concealing etc

1. A person commits an offence if he—

1. conceals criminal property;

2. disguises criminal property;

3. converts criminal property;

4. transfers criminal property;

5. removes criminal property from England and Wales or from Scotland or from Northern Ireland."

15. Section 328 in the relevant respects provides as follows: "328 Arrangements

1. A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

16. Section 329 in the relevant respects provides as follows: "329 Acquisition, use and possession

1. A person commits an offence if he—

1. acquires criminal property;

2. uses criminal property;

3. has possession of criminal property."

17. "Criminal property" is to be interpreted in accordance with section 340 of the 2002 Act. In particular subsections (3) and (5) provide as follows:

"340 Interpretation

...

3. Property is criminal property if—

1. it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

2. the alleged offender knows or suspects that it constitutes or represents such a benefit.

...

(5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct."

18. Various of these statutory provisions have been the subject of a number of legal decisions. For present purposes it suffices to refer to just two. In *Loizou and others [2004] EWCA Crim. 1579* , *[2005] 2 Cr.App.R 37*, the defendants had been charged with transferring criminal property under section 327(1)(d) of the 2002 Act. Amongst

other things, the Crown had sought to argue that the relevant sums of money could become "criminal property" within the meaning of section 340 of the 2002 Act, by reason of the very transfer in question. A constitution of this court rejected that argument. At paragraph 30 of his judgment, being the judgment of the court, Clarke LJ said this:

"In our view, the natural meaning of section 327(1) of the 2002 Act is that the property concealed, disguised, converted or transferred, as the case may be, must be criminal property at the time it is concealed, disguised, converted or transferred (as the case may be). Put the other way round, in a case of transfer, if the property is not criminal property at the time of the transfer, the offence is not committed."

19. Thus that case establishes that the conduct which was the subject of indictment could not of itself render the property "criminal property". The property had to be already criminal by the time of the transfer in question.

20. This approach was endorsed by the Supreme Court in the case of GH. That was a case charged under section 328 of the 2002 Act. The defendant there had arranged to receive money into his account at the behest of a fraudster (B), and which was then to be paid out to B. It was decided in that case that it did not matter whether or not the criminal property existed when the arrangement was first planned. What mattered was that the property should be criminal when the arrangement actually operated on it. But in the course of that decision, the Supreme Court considered various of the preceding Court of Appeal authorities, including Loizou, and plainly approved them. Thus this was said in the judgment of Lord Toulson, with whom the other members of the court agreed, at paragraph 20 of GH:

"There is an unbroken line of Court of Appeal authority that it is a prerequisite of the offences created by sections 327, 328 and 329 that the property alleged to be criminal property should have that quality or status at the time of the alleged offence. It is that pre-existing quality which makes it an offence for a person to deal with the property, or to arrange for it to be dealt with, in any of the prohibited ways. To put it in other words, criminal property for the purposes of sections 327, 328 and 329 means property obtained as a result of or in connection with criminal activity separate from that which is the subject of the charge itself. In everyday language, the sections are aimed at various forms of dealing with dirty money (or other property). They are not aimed at the use of clean money for the purposes of a criminal offence, which is a matter for the substantive law relating to that offence."

21. It may be noted that in GH, the charge under section 328 had been framed by reference to "retention, use or control". It had *not* been framed by reference to "acquisition", as pointed out by Lord Toulson at paragraph 43 of his judgment. But Lord Toulson then went on to say this at paragraph 44:

"Looking at the substance of the matter, the money paid by the victims

into the accounts was lawful money at the moment at which it was paid into those accounts. It was therefore not a case of the account holder acquiring criminal property from the victims..."

He went on at paragraphs 47 and 48 to say this:

"... The character of the money did change on being paid into the defendant's accounts. It was lawful property in the hands of the victims at the moment when they paid it into the defendant's accounts. It became criminal property in the hands of B, not by reason of the arrangement made between B and the defendant but by reason of the fact that it was obtained through fraud perpetrated on the victims...

The same reasoning applies to sections 327 and 329. A thief is not guilty of acquiring criminal property by his act of stealing it from its lawful owner, but that does not prevent him from being guilty thereafter of an offence under one or other, or both, of those sections by possessing, using, concealing, transferring it and so on. The ambit of those sections is wide..."

Submissions

22. Against that background, the respective submissions of counsel before us on this appeal can be shortly summarised. Mr Reiz (who had not appeared in the court below) in the course of his excellent submissions submitted that the case of GH was directly in point. He placed particular reliance upon what Lord Toulson had said at paragraphs 44, 47 and 48 of his judgment. At the time when the money was paid from the victims in this case into the appellant's joint bank account it was not criminal property; it was the lawful property of the complainants which the fraudsters had induced them to pay out. It was therefore, adopting the words of Lord Toulson in paragraph 44 of GH, "not a case of the account holder acquiring criminal property from the victims." Mr Reiz freely accepted that the appellant could have been charged and properly convicted on counts framed under section 328 relating to retention, use or control, or indeed counts framed under section 329(1)(b) or (c). That

is because once the money had come into the account, it then became criminal property. But that was not the position so far as "acquisition" of criminal property was concerned.

23. For her part, Miss Breen-Lawton, who appeared on behalf of the Crown, submitted that this was criminal property by virtue of the money having been obtained through fraudulent deception perpetrated on the victims. She submitted, in her words, "as soon as they [the victims] pressed the button to effect the transfer" the money in question became criminal property. She asserted in oral argument that it was criminal property before the money had reached the appellant's bank account. Thus, she said, the criminal property had indeed been "acquired" by the appellant just because it had been transferred into the joint account. She further submitted that the word "acquisition" was not to be construed narrowly.

Disposal

24. We are reluctantly driven to conclude that Mr Reiz' submissions are well-founded. Loizou and GH are clear that in cases of this kind the property in question must be criminal property prior to the transfer in question. The transfer cannot of itself suffice to make it criminal property - see the above cited paragraphs of Lord Toulson in GH. That explains why it was central that in GH the matter had been charged not by reference to acquisition of criminal property, but by reference to retention, use or control. Moreover, the word "acquired" (as used in section 329(1)(a) of the 2002 Act) must have a meaning which is not coextensive with use or possession as provided for in section 329(1)(b) and (c). Yet it is noticeable that the judge was driven in his ruling to rely on conduct occurring after the money had been transferred into the account in order to support his conclusion on acquisition. Such further dealing with the money can readily be accepted as consistent with use or possession of criminal property, pursuant to section 329(1)(b) or (c); but it is not of itself an "acquisition" of criminal property at the time when the money was first paid into the bank account. Indeed the position, as it seems to us, corresponds precisely with the example given by Lord Toulson in GH with regard to the thief. It therefore follows, as Mr Reiz has conceded, that had the case been appropriately charged under section 328 or had it been charged under section 329(1)(b) or (c) a conviction would have been good. But charged and particularised, as it was, by reference to section 329(1)(a) it is not.

25. We did raise in the course of oral argument today the possibility that the appellant nevertheless had "acquired" the money, or some of it, by virtue of the subsequent dealings with it: in that in at least some instances the money had gone out of the joint account of the appellant and his wife and had gone into the business account in the name of his limited liability company and arguably had also gone out to him in terms of cash withdrawals.

26. Mr Reiz did not accept that. Whilst it may be that so far as the joint account was concerned each of the appellant and his wife was jointly and severally entitled to the whole of such money, nevertheless that connoted, he submitted, that the appellant himself was also entitled to deal with all the money in the bank account and consequently it would be giving, he said, too broad an interpretation to the word "acquire" to say that he then acquired it again when he transferred the money into the business bank account in the name of his company or when he withdrew some of it in cash (if he did withdraw it in cash) himself.

27. Ultimately, we need express no concluded view on that point: because we are satisfied that it would not be right now to approach the case on this basis. It would not be right just because that was never the way in which the prosecution had put the case on the indictment or at trial. The prosecution case at trial had focused, for these purposes, on the initial transfers from the victims into the joint account of the appellant and his wife. Moreover, had a point of the kind which we raised with Mr Reiz in argument before us been raised at trial below, it cannot be excluded that the defence might then have chosen to put their defence case differently; and indeed it might have impacted upon the decision that the appellant should not give

evidence. By way of example, there might have been more examination of the circumstances in which the cash withdrawals from the joint account were made and by whom, and there might have been more

examination of whether or not the company controlled by the appellant was to be deemed to be an alter ego company or a separate legal entity: and so on.

28. Given all that, we do not think it would be right for this particular way of approaching the matter, even if it were potentially well-founded, to be a feature on this particular appeal.

29. In the course of her written arguments, Miss Breen-Lawton submitted that if this appeal were to be allowed then at all events this court should substitute a conviction for an alternative offence by reference to its powers under section 3 of the Criminal Appeal Act 1968. She was somewhat vague when we pressed her as to what particular alternative offence she was proposing would be relied upon.

30. Be that as it may, that is not, in the circumstances of this case, an option open to this court. We are constrained by the terms of section 3. No doubt, given the facts, a jury could and would have convicted on a count under section 328 or section 329(1)(b) or

3. had that been charged. But that does not suffice: because section 3 is quite specific that the other offence must also be one on which "on the indictment" the jury could have convicted; and that cannot be said of section 328 or section 329(1)(b) or (c).

31. There has in fact been some debate in some quarters as to whether section 329 creates one offence, albeit capable of being fulfilled in three different ways, or whether it creates three different offences. The explanatory notes to the 2002 Act seem to treat section 327, 328 and 329 as each containing one offence. We have to say, however, that we consider that very questionable. Both section 327 and section 329 (which are, for whatever reason, drafted in a way very different from section 328) are on their face worded and structured so as to connote, ostensibly, different offences. But even aside from that, the point remains that on this particular indictment not only had the statement of case been drafted solely by reference to section 329(1)(a) - which may perhaps not of itself have been fatal - but in addition the particulars of the offence had solely and expressly focused on "acquiring" criminal property in the form of the bank transfers. That being the position, the wording of section 3 would seem to preclude the court from substituting an alternative verdict. Moreover, the drafting of the indictment here cannot be said to have been by way of drafting slip or clerical error: compare, for example, cases such as *Wilson [2014] 1 Cr.App.R 10* ; *D(A) [2016] 2 Cr.App.R 16* ; *TF [2019] 1 Cr.App.R 23* . Indeed, the Crown had maintained its stance at trial when the point was taken, albeit admittedly late in the day, by the defence and never sought to amend. It is not attractive that, they having further continued to maintain their position on this appeal but having, as we have decided, been unsuccessful, they should now be permitted to change tack.

Conclusion

32. In all the circumstances, we must allow the appeal. This case stands as an illustration of the care which needs to be taken when formulating and particularising charges under the money laundering provisions of the 2002 Act. Failure to

formulate and particularise the charges correctly can have serious consequences unless any error is identified in time: as the outcome of this appeal illustrates.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS Tel No: 020 7404 1400