Neutral Citation Number: [2024] EWCA Crim 21

Case No: 202203701 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
HHJ TOMLINSON
T20180071 and T20180084

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2024

Before :

LADY JUSTICE THIRLWALL
MRS JUSTICE STACEY
and
HIS HONOUR JUDGE POTTER

- -

Between :

Jacob Gross	**Appellant**
- and -	
Rex	**Respondent**

- -
- -

Jonathan Goldberg KC and Jeffery Israel (instructed by **Sonn Macmillan Walker)** for the **Appellant**
James Dawes KC (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates : 11.10.2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday, 23 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Thirlwall :

1. On 18th November 2022, after a trial before HH Judge Tomlinson and a jury in the Crown Court at Southwark, the appellant was convicted of Entering into an Arrangement to Use or Control Criminal Property contrary to s328 of the Proceeds of Crime Act 2002 (POCA) (Count one) and Acquiring Criminal Property contrary to s329 POCA (Count two).

2. On 2nd December 2022 he was sentenced to 21 months imprisonment concurrent on each count, suspended for 2 years, and disqualified for 3 years from being a company director.

3. This is his appeal against conviction brought with the leave of the Single Judge.

4. The criminal property was the proceeds of the unlawful sale by others of pharmaceutical products, namely prescription only medicines (POMs) and counterfeit medicines (CMs).

FACTS

5. An investigation started in 2012 in Austria into the illegal sale and distribution of Viagra, manufactured by Pfizer and Cialis manufactured by Eli Lilly. Both drugs are commonly prescribed for erectile dysfunction. At the time of these offences, they were available only on prescription in the UK. Austrian police identified individuals who had purchased drugs advertised as Viagra and Cialis online, through a variety of linked websites. The sales came to the attention of Pfizer and Eli Lilly who both conducted test purchases of the medication. The test purchases showed the medication was counterfeit. The test purchases also showed that the money from the sale of the counterfeit medication across Europe and in the UK was being paid to UK based companies.

6. The "Triangle companies", owned by the Appellant, were one network of companies receiving money from the illegal online sales. The Triangle companies advertised themselves as a linked group of companies in North London which offered motor vehicle repairs and vehicle parts.

7. In 2013 and 2014, three of the Triangle companies, all set up by the appellant (Epark, of which the appellant's wife was the named sole director, Galil, of which his brother was the named sole director and Calil of which the appellant was the sole named director) received a substantial increase in income from recently set up merchant accounts, seven in total. Merchant accounts are a financial service providing the facilities for retailers to accept card transactions for the payment for goods and services. The applications for opening the accounts, all made by the appellant, set out the purpose of the accounts as taking payments from customers for vehicle repairs, and taking payments from customers buying dress jewellery. In fact, the accounts were used for the process of the unlawful sale of pharmaceutical products.

8. After receiving money via the merchant accounts, the appellant arranged to send substantial sums to shell companies overseas. Some of the money that was sent abroad was traced to a man called Jacob Schnaidman (who has not been brought before the courts). The money was sent via foreign currency exchange (FOREX) accounts.

9. It was agreed that the amount going through the Merchant accounts from the unlawful sale of POMs and CMs in the indictment period (Count 1) was £1,623,728. The credits to the appellant's bank accounts or to accounts in respect of which he owed a debt (Count 2) were £223,478.

10. The appellant was interviewed under caution on 23 September 2014. He replied "no comment" to all questions. There was a very long delay before trial due in part to the pandemic and because the appellant was being treated for and recovering from a very serious illness.

Relevant provisions of the Proceeds of Crime Act 2002 (POCA)

11. Section 328 (1) of the Proceeds of Crime Act 2002 (POCA):

> 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.

12. Section 329 (1):

> A person commits an offence if he –
>
> a) acquires criminal property;
>
> ….

13. Criminal property is defined (so far as relevant) in s340(3) POCA:

> Property is criminal property if (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly), and
>
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

14. The offences at sections 327-329 replaced money laundering offences in the Criminal Justice Act 1988 and the Drugs Trafficking Act 1994. Problems had arisen, particularly in cases of conspiracy where the prosecution could prove a conspiracy to launder the proceeds of crime but could not prove whether they were the proceeds of drug trafficking or of other criminal trafficking. The ss.328-329 POCA offences refer only to a person's benefit from criminal conduct.

15. In advance of the hearing of the appeal we were provided by the parties with a number of authorities directed to the question of what the prosecution had to prove by way of a predicate offence, which had generated the proceeds of crime allegedly being laundered contrary to section 328 and section 329. As was acknowledged at the hearing, it was not necessary to refer to most of them since there was no dispute that the monies allegedly being laundered were the proceeds of crime. We refer to two. In *R v Anwoir* [2008] EWCA Crim 1354 this court reviewed the case law and concluded that the prosecution must prove that the property (in this case the credits to the merchant accounts and to the appellant's account) derives from crime. At [21] the court said "there are two ways in which the Crown can prove the property derives from crimes a) by showing that it derives from conduct of a specific kind or kinds and that conduct of

that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime".

16. There is no requirement upon the prosecution to prove a specific predicate offence (unlike the predecessor provisions). However, where it is possible to give particulars of the nature of the criminal activity that has generated the monies being laundered, fairness requires that those particulars are given. See *DPP v Bholah on appeal from the Supreme Court of Mauritius* [2011] UKPC 44 at [34].

17. There was no argument about what was meant by suspicion in this case. It is, as is often said, an ordinary English word. In the context of this case, we have found it helpful to adopt Longmore LJ's description of the nature of suspicion in *R v Da Silva* [2006] EWCA Crim 1654 in the context of the Criminal Justice Act 1988, which applies equally to offences under POCA, "The defendant must think that there is a possibility which is more than fanciful that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be "clear" or firmly grounded and targeted on specific facts" or based upon "reasonable grounds"."

18. **The indictment**

It is necessary only to set out Count One which reads as follows:

Statement of Offence

Entering into or becoming concerned in an arrangement to use or control criminal property, contrary to section 328(1) of the Proceeds of Crime Act 2002.

Particulars of Offence

Jacob Gross...entered into or became concerned in an arrangement which he knew or suspected facilitated (by whatever means) the acquisition, retention, use or control of criminal property: namely credits to merchant accounts; by or on behalf of the operators of online pharmacies. **Jacob Gross knew or suspected the said credits constituted a person's benefit from criminal conduct or they represented such a benefit in whole or in part and whether directly or indirectly.**

The highlighted passage was removed from the particulars of offence after the jury retired in circumstances we shall explain later in the judgment. Nothing turns on that.

19. Below the Particulars of Offence, the following annotation appeared in square brackets and italics as shown below:

[*The criminal conduct referred to in this count is the online sale of prescription only medicines or counterfeit medicines. The merchant accounts and totalised credits referred to in this count are listed in Exhibit NGR/Tables 24 and 25 respectively*].

20. In due course the judge correctly described this section to the jury as an explanatory note. A similar note appeared below the Particulars of Offence of Count 2. The provision of an explanatory note did not have the effect of requiring the prosecution to prove that the criminal conduct was the online sale of prescription only medicines or

counterfeit medicines. The requirement remained to prove that the monies derived from criminal conduct.

21. During the course of the trial, it was accepted on behalf of the appellant that the credits to the merchant accounts, the subject of Count 1 "constituted in whole or in part the benefit from criminal conduct" as did the credits to the bank accounts (including the appellant's personal bank account) which were the subject matter of Count 2. These were agreed facts before the jury. These agreed facts, taken together with the appellant's setting up of the Merchant Accounts and the credits to them from the online pharmacies established the actus reus of Count 1. The payments to the appellant's accounts taken with the agreed facts established the actus reus of Count 2. The agreed facts made no reference to the sale of POMs or CMs. It was not necessary.

22. By the time the jury retired the only issue on both counts was the mens rea.

23. It was the prosecution case in opening and throughout the trial that the appellant knew perfectly well (and if not he surely suspected) what the accounts were being used for. His own actions were taken in the furtherance of a money laundering enterprise which he knew was facilitating the unlawful sale of pharmaceutical products, namely POMs and CMs.

24. It was the appellant's case throughout that he neither knew nor suspected that he was participating in criminal activity. He believed he was facilitating the online sale of a lawful pharmaceutical product and knew nothing about the prescription only or counterfeit medication. He gave evidence about his business and financial dealings. He said that in 2004 he purchased a car dealership, trading under the name of Triangle. The business had some difficulties after the 2007 financial crash, and so after 2012 the business stopped selling motor cars but continued as Triangle Parts, a car parts and car repair business. In 2012 he went bankrupt after a failed property deal. He explained that he knew a man called Rabbi Jacob Schnaidman, and around the time of his bankruptcy they became closer and entered into a business arrangement. He had understood Mr Schnaidman to be a bona fide respectable businessman. He was well known in his local Hasidic Jewish community. The appellant was pleased and flattered to be associated with him.

25. The appellant said that Schnaidman asked to use his merchant account for the sale of pharmaceuticals. Schnaidman had told him he had a licence to sell a product called Maxxes in Europe. He believed him. He understood from Schnaidman that Maxxes were a lawful herbal supplement that helped with slimming and erectile dysfunction. He believed that too. In the course of evidence, he produced packages which were sent to him at the time of his conversations with Schnaidman which showed what Schnaidman intended to sell, namely Maxxes. There was also evidence before the jury that Maxxes were still available for purchase on the internet at the time of the trial.

26. The appellant said that at the time of these conversations he understood that a merchant account charge on pharmaceuticals would be around 13%, but the charge on car parts was only 3%. If the goods went through the accounts as car parts, there was money to be made. Mr Schnaidman offered him a deal; namely that 91% of the money paid for the product would go to the supplier of the product, 3% would go to the merchant company, 3% would go to Mr Schnaidman, and 3% to the Appellant.

27. The appellant accepted that he had used his merchant accounts to process payments that were not related to his car parts and car repair business. He accepted that he had sent fake invoices to an account provider in support of transactions he was asking it to process. He also accepted that he had set up companies in the name of his wife and his brother. He set up several merchant accounts so that the algorithms (which flag potential money laundering) would not be triggered, he said. The prosecution relied on this and other evidence, including his failure to submit tax returns for the companies, and his failure to answer questions at interview, in respect of which an adverse inference direction was given by the judge. There is no complaint about that.

The judge's directions on the law

28. In due course the judge provided draft legal directions to counsel. They included a direction on the elements of the offence and matters the jury needed to be sure of to convict. Firstly, that the monies going through the accounts were the proceeds of crime – about which there was no difficulty as this was admitted. Secondly, that the jury had to be sure that the appellant knew or at least suspected that the monies going through the accounts were the proceeds of crime. The defence objected to this proposed legal direction on the grounds that the prosecution had put its case throughout on the basis that the criminal conduct which it said the appellant knew about or suspected was the online sale of (POMs) or (CMs). They submitted that the judge's proposed direction had the effect of watering down the mens rea. There was short oral argument in court about the direction at the end of which the judge rejected the defence submissions.

29. The jury were given the written directions. The relevant paragraph, 8, reads as follows;

> "The Prosecution must satisfy you so that you are sure that D knew or at least suspected that these monies represented, IWIPWDWI (in whole or in part, whether directly or indirectly), the proceeds of crime. Though it is open to you to accept the Defence's contention that realistically this issue turns on whether or not the Crown has proved so that you are sure that D did not really believe that the relative online sales involved no more than vitamins or "Maxxes", that issue is one of fact for you to resolve and decide. There is no requirement on the prosecution to prove that D knew or suspected that the relative online sales involved POMs and / or CMs. What you have to be sure of is that during the indictment period D knew or at least suspected that these monies represented, IWIPWDWI, the proceeds of crime."

30. The second sentence of the direction, as Mr Goldberg submitted to us, is somewhat lengthy and characterises the defence as a contention which it was open to the jury to accept but did not direct them, that if they accepted the defendant's account, that he thought the online sales involved no more than vitamins or Maxxes, he would be entitled to be acquitted. However, the judge made it plain in writing and in the course of his summing up, that if they accepted the appellant's explanation or thought it may be true, then he was not guilty of the offences (see page 20B and C of the Summing Up). The second sentence of the direction was consistent with that written direction.

31. In answer to a question from this court, Mr Goldberg accepted that the first and last sentences, to which he had objected before the directions were handed out, were

accurate statements of the law but he submitted that they did not reflect the way the case had been put. The prosecution had relied specifically on the unlawful sale of POMs and CMs. Now, the jury were being invited to speculate about other potential types of criminal activity that might have led to the monies going through the merchant accounts. His complaint at trial and on appeal was not that the judge's direction was wrong in law but that it rendered the trial unfair. Mr Goldberg said, that had he known that this was going to be the approach the judge was intending to take in the summing up, he would have conducted his defence differently. We shall return to this later in the judgment.

The Jury Note

32. The jury retired and on 16 November 2022 (as Mr Goldberg had predicted they would) they sent a note which read as follows;

> "Referring to paragraph 8, page 2 to 3 of the jury handout, it states there is no requirement for the prosecution to prove the defendant knew or suspected the money specifically came from prescription only medicines and/or counterfeit medications, and that we must be sure he suspected the money was proceeds of crime. This appears to contradict the particulars of offence on both counts, which appears to specifically highlight that Mr Gross knew or suspected the sale of prescription only medicines and/or counterfeit medications. Can it therefore be clarified as to if we must be sure he knew or suspected prescription only medicines and/or counterfeit medications were being sold specifically rather than if he thought it was criminal ?"

33. There was legal argument about the note at the end of which the judge provided a further written legal direction to the jury, which he read into the summing up. It occupies 5 pages of the transcript. The first four pages were directed to the provisions of POCA, beginning with the question of interpretation. The judge gave the jury a verbatim recital of section 340 (2), (3), (4), (5), (9), (10) and (11). He then explained the effect of the provisions. There is no complaint about the explanation. It was all correct and was, in our view, helpful. Mr Goldberg submits that this exercise was not necessary and did not assist the jury with their question. He makes the same submission in respect of the judge's subsequent recital of sections 328 and 329 which were followed by paragraph 7 of the direction, which reads: "addressing your question: The words knew or suspected appeared in the particulars of offence on count 1 in two places. It is understandable that this has led to the question raised by you. The words need only have appeared once, and I have specified below where they should appear to conform to the relevant section of the Proceeds of Crime Act….They appear once in count 2 which is rightly the case."

34. We pause there to observe that we are not persuaded that the jury question arose out of the repetition of the words "knew or suspected" in the particulars of offence on count 1. Their question was directed to what seemed to them to be a difference between what appeared on the face of the indictment and the direction of law they had been given. Their focus was not, however, on the Statement or Particulars of either offence but on the explanatory note which was the way the case had been put.

35. The judge continued:

> "And so, count 1's statement of offence, entering into or being concerned in an arrangement to use or control criminal property contrary to section 328 (1) of the Proceeds of Crime Act 2002, particulars of offence: Jacob Gross, together with Jacob Schnaidman, between 5 April 2012 and 4 April 2015 entered into or became concerned in an arrangement which he knew or suspected facilitated, by whatever means, the acquisition, retention, use of control of criminal property, namely credits to merchant accounts by or on behalf of the operators of online pharmacies.

He continued,

> "And you have that explanatory detail at the conclusion of the count: The criminal conduct referred to in this count is the online sale of prescription only medicines or counterfeit medicines. …"

He then set out the statement of offence in count 2 and the particulars of the offence.

36. The judge concluded with a direction divided into two. The first part reads:

> " it is open to you to agree with the submission on behalf of Mr Gross if you think it is right or if it may be right that there is no other way of looking at the question of knowledge or suspicion on his part other than to conclude that if the prosecution has not proved so that you are sure that he knew or suspected that the online sales were generated by the sale of prescription only medicines or counterfeit medications, he is not guilty".

This sets out a defence submission on the law which the judge tells the jury it is open to them to accept. The second part is a clear direction of law, the effect of which was to dismantle the defence submission,

> "However, it remains the law that while the prosecution must identify the reason why the proceeds of these online sales in this case represented criminal property, it is sufficient for them to prove so that you are sure that Mr Gross knew or suspected that the criminal property was criminal property."

37. The effect of the direction was that even if the jury were not sure that the defendant knew or suspected that the online sales were generated by the sale of prescription only medicines or counterfeit medications, it did not follow that he was not guilty. For the jury to convict it was sufficient for the prosecution to prove to the criminal standard that the appellant knew or suspected that the monies going through the accounts were criminal property. This was correct, as Mr Goldberg accepts.

38. In answering the question, the judge did not take the course suggested to him by the defence that the jury should be told that the defence was that the appellant honestly believed that the monies came from the lawful sale of Maxxes. If that were true or may

be true, then he was entitled to be acquitted. Mr Goldberg repeated that submission on the appeal. As we have already said, the judge had made that point in the summing up and in writing. He had also set out the details of the defence at length and very fairly. The question the jury were asking, was whether they had to be sure that he knew or suspected that the monies going through the accounts derived specifically from the sale of POMs and CMs or whether it was sufficient to be sure that he knew or suspected that the monies derived from crime. Had they accepted that the evidence about Maxxes may have been true, they would not have been concerned to establish the answer to the question they asked. They would have acquitted him.

The appeal

39. Mr Goldberg's principal submission on the appeal, as it had been at trial, was that whilst the statement of law was correct, in the context of a trial where the emphasis had been on the sale of POMs and CMs, its effect was to water down the mens rea. This happened so late in the trial as to be unfair and to render the conviction unsafe. He said, that had he known the judge would take that approach, he would have conducted the defence differently.

40. We probed Mr Goldberg's submission that he would have conducted the trial differently had he known that the judge was going to direct the jury in accordance with the statute rather than in accordance with the way the prosecution case had been presented.

41. What it came to was that Mr Goldberg would have asked the appellant whether he had ever considered that the money going through the accounts came from (e.g.) drug dealing, or drug smuggling or human trafficking. To which he inevitably would have said no. But the answer to those questions would have been no more illuminating than the answer to the question: what did you think was the source of the money going through the accounts? To which the answer was the proceeds of sale of Maxxes, which he understood to be a legal product. In answer to the question did he suspect the money was the proceeds of criminal conduct, his answer would have been no. A litany of questions about whether he suspected different varieties of crime would not have elicited a different answer, just a repeated one. Mr Goldberg also said that he would have adduced further evidence of the religious community to which the appellant belonged. That would have underlined the inherent unlikelihood of the appellant thinking that the money going through his account was the proceeds of criminal conduct. But Mr Goldberg did adduce from the appellant and others very many details of the nature of the community of which the appellant was a part. There was no real argument about it. It is socially conservative and consciously separate from other communities and ways of living. Access to the internet is very restricted. The judge rehearsed the evidence about it at length and in detail. It was, for example, a matter for the jury whether they believed that Viagra and similar drugs were unknown in the orthodox community, as the appellant asserted. The appellant said that he had never heard of it. There was also evidence about Rabbi Schnaidman and the high regard in which he was held within the community, until his criminal activities came to light, and he disappeared.

42. The room for a different approach to the defence was very limited and we are not persuaded that Mr Goldberg's approach to the case could have been different had he known that the judge was going to say that the prosecution had to prove that his client

knew or suspected that the proceeds of online sales were criminal property. That, after all, is the law. Mr Goldberg further submitted that the judge's direction would have led to a risk that the jury would speculate about other forms of criminal conduct. We do not accept that. It is to be remembered that the appellant knew the monies represented the online sale of pharmaceuticals. The only question was whether he knew or suspected the sales were unlawful. There was no scope for speculation about other types of crime. In any event, he had given a careful and correct direction about not speculating in respect of evidence of the appellant's admitted failure to submit tax returns in respect of the online sales to two of the Triangle companies, upon which the prosecution relied in support of their case. He also reminded the jury about the defendant's explanation for not submitting his returns and directed them fairly that it was only if they were sure that he was not telling the truth that they may consider whether it was relevant to the issue of knowledge or suspicion about the true origin of the monies. Finally, he reminded them that an adverse finding on that issue would not necessarily be determinative of his knowledge or suspicion as to the nature of the monies that he arranged to process and proceeded to process.

43. Mr Goldberg relied in support of his case about unfairness and the safety of the conviction upon two decisions of this court in *R v Acheampong* [2018] 1 Cr.App.R 7 and in *R v Ali* [2014] EWCA 948 which was sent to us after the hearing with a request that we note specifically paragraph 22. Each appeal concerns a late change of the prosecution case. In *Acheampong* the change in case came, without notice to the defence, during the prosecution closing speech. The appellant was charged with perverting the course of justice by supplying false details of a nominated driver in his response to a notice of intended prosecution for speeding. Well before trial, the appellant informed the prosecution that he was in Ghana at the time the NIPs were completed. This was confirmed by UK Borders at the beginning of the trial. The trial was conducted on the basis of the original allegations, i.e., that he had signed the NIPs. In his closing speech, the prosecutor submitted to the jury that they could be sure that the appellant had coordinated from Ghana, acts by others that had taken place subsequent to his departure from the UK in furtherance of his plan to pervert the course of justice. Allowing the appeal against conviction, this court said, that the Crown should have alerted defence counsel to the change in the way the case was to be put before addressing the jury. She could then have objected, and the judge would have prevented the change of course by the Crown. Additionally, the judge should have made it clear to the jury that there should be no prejudice to the appellant by this change in the prosecution case. He had not done so, and the prejudice was such that the conviction was unsafe.

44. In *Ali* a jury in retirement asked whether a different set of facts from the ones relied on by the prosecution could found a conviction on a count of assault occasioning actual bodily harm. This was in a case where the Crown alleged the harm had been caused by the use of a knife and led evidence from the complainant to that effect. There was some expert evidence that the injury could have been self-inflicted. The jury wanted to know whether they could find that the harm had been caused by an implement other than a knife. The evidence permitted such a finding, but the case had never been put on that basis and the defendant had not been asked anything about it. The judge directed the jury that such a finding was possible in law. The jury convicted the appellant of assault occasioning actual bodily harm but acquitted him of possession of an offensive weapon (the knife). This court quashed the conviction. The very late change to the route to

verdict caused real prejudice to the appellant whose case had been conducted on the basis that the prosecution said he used a knife to injure the complainant. If another implement was to be considered, it should have been put to him so that he could deal with it.

45. Mr Goldberg submits that the prosecution in this case jumped on the bandwagon when the judge gave the direction on mens rea and so changed their case. That is not correct. Whilst the prosecution contended throughout that the underlying criminal conduct was the unlawful sale of POMs and CMs they were required to prove only what the law required. It was admitted that the monies going through the accounts represented the benefit from criminal conduct. There was no reference in the admissions to the sale of POMs or CMs and it was not necessary for the jury to find that the appellant knew or suspected (as the law required) that the monies came from such sales. There was no change of case. There was plenty of evidence (see for example at paragraph 27) of the appellant's dishonest conduct from which the jury were entitled to infer that he suspected that the monies going through the accounts represented the benefit from criminal conduct.

46. What this appeal comes to really is this: until the judge gave the direction about mens rea, the defence thought there was a chance that at least some of the jury would not have been sure that the appellant knew or suspected that the monies were the proceeds of sale of POMs or CMs. But, for the reasons we have explained, they did not have to be sure of that. The explanatory note went further than fairness required by referring to POMs and CMs. That led to the jury question, but it did not have the effect of changing the mens rea. The judge's directions were correct. The trial was fair.

Conclusion

47. Notwithstanding Mr Goldberg's elegant and comprehensive submissions, we are satisfied that these convictions are safe. The appeal is dismissed.