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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 202400530/A4

NCN: [2024] EWCA Crim 553



Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 23 April 2024

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE HOLGATE
HER HONOUR JUDGE KARU
THE RECORDER OF SOUTHWARK
(Sitting as a Judge of the CACD)

REX
V
NDAYISHIMYE SHABANI

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MR T SMITH appeared on behalf of the Appellant

J U D G M E N T

1. MR JUSTICE HOLGATE: On 1 December 2023 in the Crown Court at St. Albans the appellant changed his pleas to plead guilty to one offence of money laundering contrary to section 328 of the Proceeds of Crime Act 2002 (count 9) and two offences of converting criminal property contrary to section 327 of that Act (counts 7 and 8).
2. On 8 February 2024 the appellant was sentenced by Miss Recorder Bartlett to an overall sentence of 14 months' imprisonment, comprising a sentence of 14 months on count 9 and concurrent terms of two months and six months on counts 7 and 8 respectively. He appeals against sentence with the leave of the single judge.
3. Count 9 related to transactions that passed through the appellant's bank account with Barclays Bank between February and July 2022 totalling £192,750. All of the money came from rogue trading. Other individuals were responsible for the primary offending. They offered the appellant an arrangement whereby he would set up a company and facilitate payments made by customers to that company. The appellant allowed money to be paid into his personal bank account and withdrew those funds in cash.
4. The offending under count 9 first came to the attention of Hertfordshire County Council's Trading Standards Department as a result of a complaint made by Jane Hopkinson, a lady who is deaf and has to lip read. On 19 March 2022 she agreed for the company to carry out roofing work on her property. Two men went to her home that day. Mrs Hopkinson had been looking for a contractor to deal with some minor leaks. The initial agreement was for work costing £1,600, with a £500 deposit in cash which she paid.
5. However, on 21 March 2022 when the men returned to the property with two others, Mrs Hopkinson and her daughter were told that further work would be required. An initial quote of £20,000 was given, then reduced to £18,000. At this stage Mrs Hopkinson paid a further £9,000 by bank transfer to the appellant's bank account, taking the total

amount paid to £9,500.

6. On 22 March 2022 further work was said to be required costing a further £1,500. By this stage all of the tiles had been removed from the roof. Mrs Hopkinson paid a further £6,000 by bank transfer to the appellant's bank account, taking the total to £15,500.
7. At this stage Mrs Hopkinson became very concerned. She contacted the Trading Standards Department. She told the contractors that she did not want any further work carried out until further notice. She sought to communicate with the company by email and text messages. She received replies in the name of N Shabani. Mrs Hopkinson ultimately paid £4,820 to another roofing company to return her property to a proper condition. A chartered building surveyor provided expert evidence that the work the company quoted for was unnecessary and had been priced at a grossly excessive cost.
8. Enquiries by the County Council following this complaint identified four other consumers who had made transfers to the appellant's bank account. Professor Vernon Trafford and his wife transferred £53,000 to that account between 1 and 15 February 2022. David Beale, whose uncle Robin Belcher is losing capacity, transferred £70,000 to the account in three instalments between 7 and 14 June 2022. Sharon Barnaby transferred £43,550 to the account between 7 and 26 July 2022. Adrian Nkwor, whose mother had been diagnosed with cancer and was recovering from an operation, transferred £10,700 to the account between 22 and 25 July 2022. Mr Nkwor went to his mother's house when she called him saying that she was having difficulties with workers who were threatening to remove tiles from her roof immediately if she did not pay for work. Their attitude was aggressive. One of the men made the same threats to Mr Nkwor to remove the tiles.
9. In relation to the payments made by Mrs Hopkinson into the Appellant's bank account,

on 22 March 2022 £2,300 was withdrawn in cash and £1,500 was transferred into a second account held by the appellant with Barclays Bank. On 23 March 2022 £4,800 was withdrawn in cash and £500 was transferred into that second account. These transactions were the subject of count 7.

10. In relation to the payments made by Mr Belcher into the Appellant's bank account, on 8 June 2022 £12,000 was withdrawn in cash and £12,850 was transferred into the second account, on 10 June 2022 £22,040 was withdrawn in cash and £3,247 was transferred into the second account and on 15 June 2022 £15,000 was withdrawn in cash and £2,600 was transferred into the second account. These transactions were the subject of count 8.
11. Extensive efforts were made unsuccessfully to interview the appellant under caution. The investigating officer received a telephone call from a person purporting to be the appellant using a Rwandan telephone number. The caller claimed to have returned to Africa as a result of his bank account being closed.
12. We have read the victim personal statement of Miss Evelyn Beales who describes the serious effects that the offending of the fraudsters had on her brother.
13. The appellant submitted a basis of plea which was agreed by the prosecution. The material parts as read as follows:

"2. The defendant briefly worked as a labourer for a group of Irish builders. These builders offered him an arrangement whereby he would be the director of a company. He agreed to this because he was told he would earn more money if he did this rather than work as a labourer. As a result, he agreed to become director of a company called Protek Property Solutions Ltd.

3. The defendant did not have any role in the activities that were undertaken under this company name. The defendant never attended the properties of any complainant or customer, or undertook any building work under the name Protek Property Solutions Ltd.

4. He was also asked to open a business account in the name of the company, which he agreed to do, believing that this is where the customers would make payments for services provided by the company.

5. Funds from customers were in fact paid into his personal bank account. He agreed to withdraw these funds in cash and pay them to the builders. He would receive a payment for doing so. He would go to a cash point and withdraw cash, which would then be paid to the Irish builders.

6. The defendant, at first, did not suspect that the builders were involved in criminal activity. However, over time, he grew to suspect that they may be involved in crime, although he did not know the precise nature of the activity.

7. Even after these suspicions arose, he continued to allow money to be paid into his account and continued to withdraw the funds as cash to pay the Irishmen. This was both because he needed the money and because he feared what might happen if he interrupted the arrangement. The defendant moved to Derby to try and avoid the builders, but they kept on calling telling him to come back and continue the arrangement."

14. The appellant was aged nearly 50 at sentence. He was of previous good character. We have read the pre-sentence report. In 1979 he arrived in the United Kingdom as a refugee from Burundi. He was granted indefinite leave to remain. He has two children aged 18 and 10 who live with his ex-wife. He provides some support. The appellant was assessed as posing over the next two years a low risk of reconviction and a low risk of committing a seriously harmful offence. He poses a low risk of causing serious harm to the general public and to individuals.

15. Since the offending ended in July 2022 the appellant had not committed any further offences. The author said that if the court were to decide to impose a community punishment, the appellant had no rehabilitative needs and a rehabilitation activity requirement would be inappropriate. Given the low risk of reconviction there was no need for him to undergo an offender behaviour program but he was suitable for an unpaid

work requirement. The appellant said he would comply with any such order.

16. In her sentencing remarks the judge treated the overall money laundering under count 9 as the lead offence. She said that the appellant's culpability was at the lower end of Category B, that is medium culpability, because the appellant was involved in the offending over a considerable period. He withdrew cash and transferred money into other accounts which demonstrated planning. The appellant was motivated by personal gain, albeit that threats had been made. The harm represented by the value of the money laundered fell within Category A4. She decided that the underlying offending, that is the builders' fraud on innocent members of the public described above, did not justify any uplift under harm B. The judge said then said this, which lies at the heart of this appeal:

"You have admitted that you had suspicions about the situation, and I find that this understates your knowledge and involvement.

These were very large payments, and you must have been aware that the use of your account for such payments involved criminal enterprise. You withdraw large amounts of cash, in person, numerous times, and took these, in person, to pass on to others. The criminal activity that was behind all of this cannot take place without the use of the bank account facilities that you provided."

17. The judge said that Category A4 harm for Category B culpability had a starting point of three years' custody based on the amount laundered being £300,000, within a category range from 18 months to four years. There were no statutory aggravating factors and the appellant's good character was a mitigating feature. Taking into account the pre-sentence report, the judge said that after a trial the sentence would have been 18 months' custody on count 9. She reduced that by credit of 20 per cent for the guilty plea to 14 months. She then imposed the concurrent sentences on counts 7 and 8 to which we have referred.
18. The judge then referred to the guideline on the imposition of community and custodial

sentences. She summarised the relevant factors identified in the guideline. She then said that balancing all those factors the seriousness of the offence was such that immediate custody was the only appropriate sentence. She therefore decided not to suspend the sentence.

19. We are grateful to Mr Smith, who appeared in the court below and before us, for his oral and written submissions.

20. The judge's sentencing concluded by 1.15 pm. Mr Smith was quick off the mark. By 3.15 pm he had submitted to the judge a well-conceived, written application to certify grounds of appeal and was making oral submissions to her. He referred to paragraphs 6 and 7 of the basis of plea. He rightly submitted that the judge's finding in her sentencing remarks that the appellant had understated both his knowledge and involvement contradicted the agreed basis of plea. The judge did this without giving any notice to the parties, calling for a Newton hearing or hearing any evidence. This approach taken by the judge to seriousness had affected her decisions both on length of custody and not to suspend the terms imposed. All factors other than the seriousness of the offending supported a suspension of the sentence and so, he submitted, seriousness had been decisive on the issue of suspension.

21. We have had the advantage of reading the transcript of the hearing of Mr Smith's application for a certificate. Prosecuting counsel accepted that the judge's finding was not something which had been raised before the sentencing exercise. Taken in context that acceptance could only mean that the judge's finding did contradict the agreed basis of plea without her taking any steps to hold a Newton hearing.

22. In response to these submissions, the judge simply said that her sentencing remarks had "to be taken as a whole, not a couple of words in isolation". In our judgment, that

response was unjustified. The judge had the benefit of a clear and accurate written application from counsel. Mr Smith was not taking a few words in isolation. His contentions did do justice to the sentencing remarks read as a whole. Very properly, prosecuting counsel made no attempt to say otherwise. The judge's reaction was unfortunate. She could have dealt with the matter differently, for example under the slip rule, in which event it is possible that no appeal to this court would have been necessary.

23. Mr Smith now makes the same submissions in support of this appeal. He submits that the procedure adopted was unfair. Applying the principles in R v Underwood [2004] EWCA Crim 2256, the judge could not properly have decided that the part of the basis of plea from which she departed was "manifestly false". Accordingly, although the judge was not bound to accept the basis of plea, in these circumstances she had been obliged to hold a Newton hearing.

24. He submits that when seriousness is properly assessed in accordance with the basis of plea, the sentence imposed was wrong in principle and manifestly excessive. On the issue of suspension, he referred to the appellant's strong prospects of rehabilitation on the basis of his guilty plea, the absence of previous convictions, his previous work history and lack of subsequent offending. It was noted that unusually he had been assessed by probation as not requiring any rehabilitative intervention. Secondly, Mr Smith submits that the defendant had strong personal mitigation as a result of his previous good character. Thirdly, he says that a sentence of immediate custody would impact on the defendant's children and ex-wife to whom he provided limited financial support. Fourthly, there was no suggestion that the defendant posed a continuing risk to the public. Fifthly, the defendant had complied with all court orders and attended court when required. Finally, he submits that the seriousness of the offence when properly assessed

did not outweigh the combined weight of all these factors telling in favour of suspension.

Discussion

25. We accept that the procedure followed by the judge was unfair for the reasons given by Mr Smith and for the reasons we have given already. The judge departed significantly from the agreed basis of plea without any notice to the parties. She should have called for a Newton hearing if the offender continued to maintain a basis of plea with which she was minded to disagree. There was no justification for the judge to have taken the course she did.
26. For our part, we see no reason to question the agreed basis of plea. Accordingly, the appellant is entitled effectively to be resentenced by this court on that basis.
27. We deal first with the length of the overall custodial term on the basis of the concurrent sentences passed on counts 7 and 8. The money laundered was just below £200,000, the mid-point between the starting point for Category A4 harm based on £300,000 and the bottom of the category range based on £100,000. For medium culpability, that is Category B, the sentence before any further adjustments would be about two years three months. The judge said that the appellant's culpability was at the bottom of that culpability category and that was on the basis of her erroneous view of the basis of plea.
28. Sentencing in accordance with that basis of plea we should have regard to the starting point and range for lesser culpability, Category C, in a case of Category A4 harm. In our judgment a sentence of two years three months would have to be reduced to about 18 months before allowing for mitigation. In this case the appellant's previous good character is a significant factor and we consider that prison conditions should also be taken into account in line with the decision in R v Manning. Accordingly, the sentence after trial should be reduced to 14 months and then, after allowing credit of 20 per cent

for the guilty plea, to 11 months.

29. That leaves the issue as to whether the sentence should be suspended. We have concluded that the combined effect of the factors favouring suspension set out above, are outweighed by the particular seriousness of the Appellant's offending. In saying this we have paid particular attention to the appellant's previous good character.

30. Although the guideline leads to a relatively low sentence, we should not underestimate, even on the basis of plea, that the appellant was fully aware over a period of several months of large sums of money passing through his bank account which he suspected to be criminal in nature. Even though he did not know of the underlying offending, or take part in that underlying offending, his involvement included the conversion of sums of money. All of this was essential to that enterprise and therefore to the consequential losses which were suffered by the victims in this case.

31. For these reasons, we allow the appeal. We quash the sentence of 14 months' imprisonment imposed by the judge and we substitute a sentence of 11 months' imprisonment. To that extent only this appeal is allowed.

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

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