SHERIFF APPEAL COURT

[2024] SAC (Crim) 5
SAC/2023/000493/AP

Sheriff Principal A Y Anwar
Sheriff Principal S Murphy KC
Sheriff Principal D C W Pyle

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL S F MURPHY KC

in

in a Stated Case Appeal against Conviction

by

BAIJUN LIU

Appellant

against

PROCURATOR FISCAL, STIRLING

Respondent

Appellant: S. Collins (sol ad); Collins & Co for Virgil M. Crawford (Stirling)
Respondent: A. Prentice KC (sol ad), AD; Crown Agent

23 April 2024

Introduction

[1] The appellant was convicted at Stirling Sheriff Court on 14 September 2023 of a contravention of section 327(1)(a), (b), (c) and (d) of the Proceeds of Crime Act 2002 (money laundering). The charge in its final form was in the following terms:

> "Between 25 February 2021 and 23 April 2021 both dates inclusive at Post Office WH Smith, Thistle Shopping Centre, both Stirling and elsewhere in Scotland you

> BAIJUN LIU did conceal, disguise, convert and transfer criminal property within the meaning of the aftermentioned Act, namely £16, 850, in cash or thereby in that you did (ii) pay sums of cash into bank accounts in your name; and (iii) transfer cash into bank accounts in other names, transfer cash overseas, and pay university fees; CONTRARY to the Proceeds of Crime Act 2002, section 327(1)(a), (b), (c) and (d)"

[2] The Crown led evidence that on 6 April 2021 undercover officers observed two Asian females carrying brown paper bags enter a vehicle which was under surveillance. They were driven into Stirling town centre where they entered a post office and handed over cash at the travel money section. Neither female was identified by the officers. On that day £6,000 in cash was deposited into the appellant's bank account.

[3] It was agreed in a joint minute that the appellant was a Chinese national who had come to Scotland to study at Stirling University; that her visa was valid from 23 January 2021 until 12 February 2022; that its terms entitled her to work for a maximum of 20 hours per week during term time; that she had no recourse to public funds during her period in the UK; that she had not received any benefits from the Department of Work and Pensions ("DWP") after her arrival in the UK; and that she operated a designated account with the Starling Bank.

[4] Between 25 February 2021 and 23 April 2021 a total of £16,850 was credited to the appellant's Starling Bank account by cash deposits. Between 20 February 2021 and 23 April 2021 a total of £297.60 was transferred into her account by third parties.

[5] Between 26 February 2021 and 1 May 2021 a total of £12,309 was transferred out of the account. This included transfers totalling £8,200 to another, overseas account in the name of Baijun Liu via TransferWise, £2,001 to two separate accounts in the name of Xiaotong Huang, and £2,001 to Remitly UK. Separate expenditure totalling £883.03 was made from the account apparently to pay for various items and two payments to Stirling University each of £754.84 were made in March and April of 2021.

[6] TransferWise and Remitly Ltd are platforms used to transfer money internationally. A Chinese national cannot enter the UK bearing more than £10,000 in cash without declaring it.

Submissions by the appellant

[7] The appellant submitted that there had been insufficient evidence to identify the appellant as being involved in concealing, disguising, transferring or converting criminal property. Accordingly the sheriff had erred in repelling the submission of no case to answer which had been made on the appellant's behalf during her trial in terms of section 160 of the Criminal Procedure (Scotland) Act 1995.

[8] The sheriff was said to have erred in making finding-in-fact (20), *viz* that the appellant had no legitimate source of income, and was not in receipt any student loan or funds from family. The finding was not supported by the evidence. Findings in fact (21) and (22) flowed from (20) and were crucial to the sheriff's decision to convict.

[9] The sheriff had further erred by concluding that there had been no innocent explanation for the cash deposits totalling £16,850 which had been made to the appellant's account in February, March and April 2021. By coming to that conclusion he had placed an evidential burden on the appellant, inverted the onus of proof, compromised the presumption of innocence and the appellant's right to silence, and had breached her right to a fair trial in terms of Article 6 of the European Convention on Human Rights.

[10] While the circumstances might have supported an inference of criminal property being involved, there was no irresistible inference here as had been the case in *R* v *Anwoir* EWCA 2008 Crim 154. The facts in the present case fell far short of those which had given

rise to an inference in *Ahmad* v *HMA* 2009 SCCR 821. On the facts stated, the sheriff had not been entitled to convict the appellant.

Submissions by the respondent

[11] In response the advocate depute accepted that the sheriff had been correct to hold that the appellant had not been identified as one of the two women who had gone into the post office. However, the evidence which identified her lay within the joint minute which established that several cash deposits were made into the Starling bank account which was in the appellant's name and which she operated. She had managed the account through which suspicious transactions were made.

[12] The sheriff had identified certain circumstances which gave rise to an irresistible inference that the transactions related to criminal property. These were: (i) large amounts had been deposited in cash into the appellant's Starling bank account; (ii) this had been done frequently over a short time period; (iii) the appellant operated the account in question; and (iv) she had no legitimate source of income which was capable of funding such deposits. (i), (ii) and (iii) had been proved by joint minute. Taken together these circumstances were capable of supporting the inference that the deposits were criminal property: *R* v *Anwoir* and *Ahmad* v *HMA*.

[13] The Crown accepted that point (iv) and finding in fact [20] were not supported by the evidence. The absence of evidence of a legitimate source of income such as support from family, a student loan or employment was a neutral factor. Nevertheless the identification of the appellant as the person who operated the bank account and the inference which could be drawn from points (i), (ii) and (iii) were sufficient to overcome the submission of no case to answer.

[14] The conclusion drawn from these circumstances might be undermined by an innocent explanation. The absence of such an explanation was a neutral factor. It did not place any burden on the appellant but simply meant that there was no evidence to contradict a Crown case which was sufficient to establish guilt. It transferred only a tactical burden on to the appellant: *HMA* v *Hardy* 1938 JC 144*; Langan* v *HMA* 1989 SCCR 379.

[15] The appeal should be refused.

Decision

[16] We consider that the sheriff was correct to repel the submission of no case to answer. The offence charged related to concealing, disguising, transferring and converting criminal property in terms of section 327(1)(a),(b), (c) and (d) of the 2002 Act. Criminal property is defined in section 340(3) of the Act in these terms:

> "(3) 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"

[17] The sheriff decided (see paragraph 28 of his stated case) that the agreed facts within the joint minute relating to the deposits into and the transfers out of the account operated by the appellant, where the appellant had no legitimate income which was capable of funding the deposits, was capable of supporting the inference that the cash had been derived from criminal property. We agree with the position adopted before us by both Crown and defence that there was no more than an absence of evidence that the appellant had a legitimate source of income capable of funding the deposits. Accordingly that factor was

not capable of supporting the Crown case or giving rise to an adverse inference. The sheriff erred insofar as he took that into account as a factor which supported the Crown case.

[18] In *R* v *Anwoir* Lathan LJ stated, at paragraph 21:

> "We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or 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."

In *Ahmad* v *HMA* Lord Kingarth stated, at paragraph 12:

> "It is not difficult to conceive of circumstances, particularly perhaps relating to the handling or movement of large sums of cash, which could readily be said to yield an inference, in the absence of any innocent explanation, that the cash was acquired as a result of criminal conduct, even if the particular offence, or offences, was, or were, unknown."

We consider that the absence of an innocent explanation means no more than this: where the circumstances are such as to give rise to the inference that the cash in question is criminal property that inference may be rebutted if evidence of an innocent explanation is led; if no such explanation is offered there can be no such rebuttal. Evidence of an innocent explanation may make it more difficult for the Crown to prove its case beyond reasonable doubt but it has no part to play in the assessment of sufficiency at the stage of a no case to answer submission.

[19] In the present case there was in our view sufficient evidence to support the inference that the appellant had committed the offence. It was agreed that the appellant operated the account in question. The pattern of the cash payments into and out of her account was unusual. These were large sums compared to the amounts which were transferred in electronically. £8,200 was transferred into another account in the name of the appellant and a further £2,000 had been sent to unknown recipients overseas. The appellant was a student

whose working hours were restricted by her visa conditions. The appellant submitted that the sums in *Ahmad* v *HMA* were very large indeed, around £5.9 million, which clearly distinguishes it from the present case which involves a total of the order of £16,850. In our view the issue is one of context. The total sum in the present case was a large one in the context of the bank account of a student who was restricted in terms of any employment and the cash sums deposited were much larger than any incoming electronic credits. The source of the cash was not traced, nor were the ultimate destinations of some of the transfers out of the account. In that context the quantities of cash and the movement of the sums into and out of an account operated by the appellant are capable of supporting the inference that the funds were criminal property as defined in the Act and that the appellant must at least have suspected that to be the case. It follows that we consider that there was a sufficiency of evidence without taking into account the absence of an innocent explanation, so that the submission of no case to answer was bound to fail.

[20] The sheriff made the following findings in fact:

> (20) The appellant has no legitimate source of income, is not in receipt of any student loan or funds from family.
>
> (21) These foregoing findings-in-fact yield the inference that the cash was acquired as a result of criminal conduct.
>
> (22) From the amounts and frequency of those cash deposits, the appellant, having no legitimate income, would have suspected she had benefited from criminal property.
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> (23) Cash amounting to £16,850 having been deposited into the Starling account, the appellant concealed the source thereof.

(24) In using the cash to pay for items, the appellant variously disguised its nature to make it appear legitimate and converted criminal property.

(25) In transferring money abroad, the appellant transferred criminal property.

[21] Both parties submitted that finding in fact (20) was not supported by the evidence. We consider that the sheriff was not entitled to make that finding. For the reasons stated above, we consider that the remaining facts could yield the inference that the cash was acquired as a result of criminal conduct, so that the sheriff was entitled to make finding in fact (21) on the basis of the other findings, even if finding in fact (20) was disregarded, and the same applies to finding in fact (22), except for the phrase "having no legitimate income", which is derived from finding in fact (20). Findings in fact (23), (24) and (25) were inferences which the sheriff was entitled to make on the basis of the nature of the transactions on the appellant's account.

[22] There simply was no innocent explanation apparent in the evidence for the depositing of £16,850 in cash into the appellant's account between 20 February 2021 and 23 April 2021. The sheriff had limited information about the appellant's circumstances. Accordingly there was no basis on which he might infer, for example, that she was receiving funds from her family; that would have amounted to speculation on his part. By coming to that conclusion that there was no innocent explanation the sheriff did not err, nor did he place an evidential burden on the appellant or invert the onus of proof by so doing. His conclusion did not compromise the presumption of innocence, nor the appellant's right to silence. His conclusion did not breach the appellant's right to a fair trial in terms of Article 6 of the European Convention on Human Rights. As we explained in paragraph 18 above, an innocent explanation might have rebutted or at least cast doubt on the drawing of

the adverse inferences which formed the basis of the Crown case, but the absence of one does not of itself advance the Crown case.

[23] For reasons already stated, we consider that there was a sufficiency of evidence in this case and that the sheriff was entitled to draw from it the inferences which he did. It follows that we consider that he was entitled to convict the appellant.

[24] We shall answer questions (1), (3), (4) and (5) in the affirmative and question (2) in the negative insofar as it relates to finding in fact (20); and we refuse the appeal.