

Neutral Citation Number [2019] EWCA Crim 1076

No: 201804489 B3

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Tuesday, 11 June 2019

**B e f o r e:**

**LORD JUSTICE HOLROYDE**

**MR JUSTICE MARTIN SPENCER**

**HIS HONOUR JUDGE PICTON**

**R E G I N A**

v

**PETER DRUZYC**

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**Mr J Evans** appeared on behalf of the **Appellant**

**Ms K Mahmutaj** appeared on behalf of the **Crown**

**J U D G M E N T**

(Approved)

1. LORD JUSTICE HOLROYDE: On 1 October 2018, in the Crown Court at Warwick, this appellant was convicted of two offences of fraudulent trading contrary to section 993(1) of the Companies Act 2006 (counts 1 and 2) and an offence of fraudulently removing property in anticipation of the winding-up of a company contrary to section 206(1)(b) of the Insolvency Act 1986 (count 3). He was sentenced to concurrent terms of two years' imprisonment on each count. He now appeals against his conviction on count 3 by leave of the single judge, who granted a necessary extension of time.
2. The relevant facts can be summarised briefly. In 1996, Secure Systems Limited ("SSL") began carrying on business in the design, building and supply of surveillance equipment. The appellant became a director of SSL on 1 January 1999. With effect from 1 August 2005, he was the only director. He was also the major shareholder in the company, and so effectively owned and controlled SSL.
3. In March 2003 the appellant established another company, Lemon Tree Estates Limited, for the purpose of buying a commercial property in Coventry known as 2020 House. That property was bought for £1.2 million, financed by loans to Lemon Tree Estates Limited from a bank and from SSL. SSL subsequently carried on business from the ground floor of those premises.
4. In addition to controlling SSL and Lemon Tree Estates Limited, the appellant also controlled Maxsys Electronics Limited, a company which was incorporated in May 1999 but never traded. It was dissolved in September 2011, but a bank account in the name of the company remained active until 2013.
5. In the late 1990s, SSL ran into financial difficulties. It was able to survive them with the help of a Creditors' Voluntary Arrangement and the engagement of a debt factoring company, Redd Factors Limited. By 2010, however, it was making a loss and was again in financial difficulties. By 2012, SSL had debts in excess of £400,000, a principal creditor being Her Majesty's Revenue and Customs ("HMRC"). Some of the trade creditors were paid by the appellant using monies which had been paid to him by the company. Other sums were also paid by the company to the appellant. By February 2012, he owed SSL about £130,000.
6. Some key dates were as follows: on 13 January 2012, HMRC filed a petition to wind up SSL. On 31 January 2012, £3,000 was paid from SSL's bank account, on which the appellant was the sole signatory, to the appellant's personal account. On 15 February 2012, payments of £14,500 and £12,000 were made from SSL's account to the appellant's account. On 16 February 2012, £14,000 was paid from SSL's account to the appellant's account. On 23 February 2012, Redd Factors Limited appointed an administrator of SSL. Also on that date, SSL stopped trading and all employees were made redundant. On 2 May 2012, there was an initial meeting of creditors at which it was decided to move from administration to a Creditors' Voluntary Liquidation. On 6 August 2013, administration was completed and a liquidator was appointed for the purposes of the Creditors' Voluntary Liquidation of SSL.

7. The payments which we have just mentioned from SSL's bank account to the appellant's personal bank account, totalling £43,500, were the subject of the charge in count 3. The statement of offence in that count read:

"Fraudulently removing property in anticipation of the winding-up of a company, contrary to section 206(1)(b) of the Insolvency Act 1986."

As originally charged, the particulars of the count were in the following terms:

"Anthony Peter Druzyc between 31 January 2012 and 16 February 2012, being an officer of a company, namely Secure Systems Limited, which entered a Creditors' Voluntary Liquidation on 6 August 2013, made or caused to be made a transfer of the company's property, namely £43,500, from the company bank account."

8. At trial, the prosecution case was that the appellant had acted dishonestly with intent to defraud. The prosecution relied on evidence given by the liquidator, on evidence showing the increase in the company's debt to HMRC, and on evidence that the appellant appreciated the parlous financial state of the company. The prosecution pointed to payments which had been made to the appellant from SSL's account, either directly or via the account of Maxsys Electronics Limited, the effect of which was to prevent those funds from being used to pay creditors of SSL. The appellant, it was said, had not been able to give a convincing explanation of why those transfers had been made.
9. It should be noted that in the course of the prosecution's case, the particulars of count 3 were amended by inserting the word "fraudulently" immediately before the phrase "made or caused to be made a transfer of the company's property".
10. The appellant gave evidence to the effect that he had not acted dishonestly and had never intended to defraud either HMRC or any other creditor. He pointed to the fact that all the relevant financial transactions had been openly recorded. He said that he had relied on advice from a bookkeeper. His evidence was that although he knew by January 2012 that the company was unlikely to survive, he had felt justified in taking money out of it because he honestly believed that funds would be available to pay all of the company's debts. Those funds would be generated by the sale of 2020 House, which would enable Lemon Tree Estates Limited to repay the debt which that company owed to SSL, thus in turn enabling SSL to pay its creditors. The appellant said he had not anticipated that 2020 House would ultimately be sold for substantially less than the value which he believed it to have.
11. After closing speeches, Mr Evans, then as now appearing for the appellant, submitted that the particulars of the offence charged in count 3 did not reflect the offence created by section 206 of the Insolvency Act 1986. He submitted that in considering the period of 12 months immediately preceding the commencement of the winding-up, the relevant date for the purposes of that section was 6 August 2013 when the liquidator was appointed, with the result that the relevant transfers of money had not been made in the 12 months preceding that date. Ms Mahmutaj, then as now appearing for the

prosecution, submitted that the relevant date was 2 May 2012, when the decision was made to move from administration to Creditors' Voluntary Liquidation. Although the judge gave no formal ruling on this issue, he directed the jury to make a manuscript amendment to the particulars of Count 3, so that the material words became:

"... a company, namely Secure Systems Limited, which commenced Creditors' Voluntary Winding-up on 2 May 2012... ."

12. In his grounds of appeal, Mr Evans referred to detailed provisions of the Insolvency Act 1986 in order to pursue his submission that the winding-up of SSL did not commence until 6 August 2013. It is unnecessary for us now to go into the details of his submissions, because Ms Mahmutaj in a written response has helpfully conceded that the winding-up commenced on 6 August 2013, and not, as previously argued, on 2 May 2012. She reaches that conclusion by a route which differs from that taken by Mr Evans, but again it is unnecessary for this court to consider the details of the argument. We can and do proceed on the basis that it is common ground that the winding-up of SSL only commenced in August of 2013, and that accordingly the transfers made from the company bank account to the appellant's account in January and February 2012 were not paid in the period of 12 months immediately preceding the commencement of the winding-up.
13. The respondent nonetheless submits that the conviction on Count 3 should be upheld, or alternatively that this court should substitute a conviction of an offence contrary to section 207 of the 1986 Act. Ms Mahmutaj accepts that the date of the commencement of the winding-up was wrongly stated in the particulars to count 3 and that in consequence the relevant bank transfers occurred more than 12 months before the relevant date. She submits, however, that they were no more than technical errors in the indictment which are not material to the safety of the conviction. Relying on the decision of this court in the case of R v Wilson (Michael) [2013] EWCA Crim 1780, [2014] 1 Cr App R 10, she submits that the errors in count 3 amount to no more than "mislabelling" which did not materially affect the criminality pleaded in that count.
14. Ms Mahmutaj points out that Mr Evans' concerns about the drafting of count 3 were raised at a very late stage of the proceedings, and she relies upon his frank acceptance, in his written grounds of appeal, that he would not have conducted the case for the appellant any differently if he had appreciated the problem with count 3 at an earlier stage of the proceedings. She submits that if the "mislabelling" had been identified earlier in the proceedings, it could have been rectified without difficulty and without any prejudice to the appellant. The key point, she submits, is that the appellant has always known the factual substance of the allegations against him and that the only live issue in the case has always been the issue of whether he was acting dishonestly and fraudulently at the time of the relevant events. Her primary submission, accordingly, is that the conviction is not unsafe.
15. In her oral submissions to the court today, Ms Mahmutaj somewhat moved away from the first of her written submissions. She acknowledged that the case had been prosecuted as a section 206 offence, but recognises the force of the point made to the effect that it was more properly described in terms of a section 207 offence. She

points out, as indeed Mr Evans had done to the trial judge, that the wording of the particulars of count 3 follows the wording of section 207, although the statement of offence in count 3 makes clear that the allegation was of a section 206 offence.

16. In the alternative to her first submission, Ms Mahmutaj submits that this is an appropriate case for the court to exercise its power under section 3 of the Criminal Appeal Act 1968 to substitute a conviction for an alternative offence under section 207 of the 1986 Act. She submits that the offences under sections 206 and 207 are very similar in law, and that on the evidence presented to the jury, they could and would have convicted the appellant of a section 207 offence if it had been charged. Again, she submits that no prejudice would be caused to the appellant by the taking of this course.
17. In view of the concession made by the respondent as to the correct date of the commencement of the winding-up, the focus of the hearing of this appeal has been on the submissions advanced by Ms Mahmutaj with a view to either upholding the conviction or persuading the court to substitute an alternative conviction. Both those courses are opposed by Mr Evans on behalf of the appellant.
18. So far as is material for present purposes, section 206 of the Insolvency Act 1986, headed "Fraud, etcetera in anticipation of winding-up", is in the following terms:

"(1) When a company is ordered to be wound up by the court, or passes a resolution for voluntary winding-up, any person, being a past or present officer of the company, is deemed to have committed an offence if, within the 12 months preceding the commencement of the winding-up, he has-

...

(b) fraudulently removed any part of the company's property to the value of £500 or more ..."

Schedule 10 to the Act provides that on conviction on indictment of an offence contrary to section 206(1), an offender is liable to seven years' imprisonment and/or a fine.

19. So far as is material for present purposes, section 207 of the Act, headed "Transactions in fraud of creditors", provides as follows:

"(1) When a company is ordered to be wound up by the court or passes a resolution for a voluntary winding-up, a person is deemed to have committed an offence if he, being at the time an officer of the company-

(a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property

...

(2) A person is not guilty of an offence under this section-

(a) by reason of conduct constituting an offence under subsection 1(a) which occurred more than five years before the commencement of the winding-up; or

(b) if he proves that, at the end of the conduct constituting the offence, he had no intent to defraud the company and creditors."

Pursuant to schedule 10, the maximum penalty for this offence on conviction on an indictment is two years' imprisonment and/or a fine.

20. As is immediately apparent, important points of distinction between those two offences, in addition to the substantial difference in maximum penalty, are first that section 206 requires relevant conduct within a period of 12 months preceding the commencement of the winding-up, as opposed to the period of five years to which section 207 relates; and secondly, that an offence charged pursuant to section 206 imposes the burden of proof on the prosecution throughout to prove that the offender acted fraudulently, whereas the offence under section 207 involves on its face a reverse burden of proof. Whether that is a true reverse burden of proof, or merely a shift in the evidential burden, is not a matter which needs to be resolved by this court for the purposes of this appeal.
21. In Wilson (Michael), a company was charged with a number of breaches of the Regulatory Reform (Fire Safety) Order 2005. Article 32 of that order made it an offence in specified circumstances to fail to comply with any requirement or prohibition imposed by Articles 8 to 22. Each of the charges against the company alleged a specific breach contrary to a specified article in conjunction with Article 32. The appellant, who was the sole director of the company, was charged on the basis that he had consented to or connived in the company's offences, or that the commission of those offences was attributable to neglect on his part. In relation to each of the six charges against the company, there was a corresponding charge against the appellant, but the charges against the appellant referred only to Article 32. On appeal, the appellant submitted successfully that Article 32 did not create its own offence and that each of the charges against him should have been particularised to identify the specific contravention alleged in conjunction with Article 32. The appeal was nonetheless dismissed.
22. At paragraph 49 of the judgment of the court, given by Gross LJ, it was said that even where there has been a material irregularity in the drafting of an indictment, if the error constitutes no more than mislabelling, the conviction may be safe. The court made clear that the position was different if the indictment was a nullity, but noted that not every error in an indictment rendered it a nullity. At paragraph 74 it was said that whether a defective indictment renders a conviction unsafe:

"... must be a question of fact and degree, in which considerations of prejudice or unfairness to the defendant will, at least, loom large."

In Wilson (Michael), the indictment was not a nullity, and the error was no more than mislabelling. It caused no unfairness or prejudice to the defendant whatsoever. In the

view of the court, to permit reliance on that error would be to resort to undue technicality.

23. Finally, at paragraph 80, the court acknowledged that upholding the appellant's conviction would have the "less than ideal" effect of leaving the defendant on paper convicted of a mislabelled offence, but said:

"So be it. The appellant's conviction was not, in our judgment, unsafe. The indictment here was not a nullity; it was defective but the defect occasioned neither unfairness nor prejudice."

24. Section 3 of the Criminal Appeal Act 1968 provides:

"(1) This section applies on an appeal against conviction, where the appellant has been convicted of an offence to which he did not plead guilty and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.

(2) The court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

25. In Graham & Others [1997] 1 Cr App R 302, it was held that two requirements must be satisfied by the prosecution before that power could be exercised. Lord Bingham CJ, giving the judgment of the court, said at page 312G to 313B that the prosecution would have to establish:

"(1) that the jury could on the indictment have found the appellant guilty of some other offence (offence B) and (2) that the jury must have been satisfied of facts which proved the appellant guilty of offence B.

As to (1) it would be sufficient if looking at the indictment (not the evidence) the allegation in the particular count in the indictment expressly or impliedly included an allegation of offence B. A count charging offence A impliedly contains an allegation of offence B if the allegation in the particular count would ordinarily involve an allegation of offence B and on the facts of the particular case did so.

As to (2) this court has only the verdict of the jury to go on. The fact that the jury did not have a proper direction as to offence B is a highly relevant consideration, as is the question of whether there are reasonable grounds for concluding that the conduct of the defence would have been materially affected if the appellant had been charged with offence B."

In Graham, those two requirements were satisfied. However, in Shields [2012] 1 Cr

App R 9 they were not. The appellant in that case had been made the subject of a Sexual Offences Prevention Order ("SOPO") made pursuant to the Sexual Offences Act 2003. He was subsequently charged with an offence of breach of a Sexual Offences Order ("SOO") made pursuant to the Crime and Disorder Act 1998. On appeal against conviction, the appellant argued that the indictment had been defective. The respondent submitted that since breach of an SOO could still be indicted, albeit under the 2003 Act rather than the 1998 Act, a conviction for an offence of breach of the SOPO, which had in fact been imposed upon the appellant, could be substituted under section 3 of the 1968 Act. The appeal was allowed. The court noted that the critical words in section 3 were "could, on the indictment". That test was not satisfied, because the indictment expressly referred to the breach of an SOO contrary to the 1998 Act. It was impossible to see how that indictment expressly or impliedly included, or could be regarded as ordinarily including, an allegation of breach of the 2003 Act by reference to a SOPO made under that Act.

26. Ms Mahmutaj in her oral submissions argued vigorously that the power to substitute an alternative conviction under section 3 of the 1968 Act arises in this case and that it is a proper case for the court to exercise such power, having regard to the obvious strength of the case against the appellant and to the jury's findings on the central issue of dishonesty. She submits that if the difficulties attending the charge under section 206 had been appreciated at an earlier stage, it would have been open to her to apply to amend the indictment to charge an offence contrary to section 207 instead of an offence contrary to section 206. Having regard to the terms of the indictment as originally drawn, she submits that would have involved no more than amending the statement of offence. The particulars of offence, as originally drafted, could and would have remained the same, and, she submits, the course of the trial would have been the same and the outcome the same.
27. Mr Evans in response places reliance on the reverse burden of proof, or evidential burden on the defendant, which would arise if the charge were amended to allege an offence contrary to section 207. He submits that if he had noted the problems with section 206 at the conclusion of the prosecution case, he would then have been in a position to make what he suggests would have been an unanswerable submission of no case to answer on that charge. The proposition that at that point the prosecution could have amended to charge an offence carrying a reverse burden of proof, or carrying an evidential burden for the defendant, is one which he submits is wholly unacceptable.
28. We should note also that in the course of her submissions as to the particulars of Count 3 following the terminology of section 207 rather than section 206, Ms Mahmutaj invited the court to consider the propriety of substituting a conviction under section 207 by reference to the suggestion, inter alia, that the charge would have been understood as covering a section 207 offence. Insofar as that submission was pursued, it seems to us that it is bound to fail in view of the two amendments to the terms of count 3 which were made in the course of the prosecution case at trial, each of which unequivocally referred to a section 206 offence.
29. We have reflected on the submissions made to us, for which we are grateful. Unhappily, as it seems to us, the indictment was drafted on a mistaken understanding as



to when the winding-up of SSL commenced. It seems to us that it clearly was intended to charge the appellant with a section 206 offence, because it was mistakenly thought that the transfers of money upon which the prosecution intended to rely had been made within the period of 12 months preceding the commencement of the winding-up. That error on the part of the prosecution was not identified by them at any point during the trial, even after it had been raised by Mr Evans. The mistake was not such as to render the indictment a nullity, but the circumstances were such that the evidence relied on by the Crown was insufficient to prove the offence charged.

30. As we have noted, an essential ingredient of an offence contrary to section 206 of the 1986 Act is proof that the relevant removal of the company's property was fraudulently effected within the period of 12 months immediately preceding the commencement of the winding-up. Once it is accepted that the date of the commencement of the winding-up for SSL was 6 August 2013, a prosecution based on transfers made about 18 months before that date could not possibly succeed. If the prosecution had appreciated that from the outset, they would not have charged the appellant with an offence contrary to section 206. Ms Mahmutaj indicates, and we accept, that the prosecution would instead have charged an offence contrary to section 207, and, as Ms Mahmutaj submits, would thereby have lowered the maximum penalty upon conviction. That charge would have imposed at the least an evidential burden upon the appellant, if not a full reverse burden of proof. In addition, as it seems to us, it would have required the jury to focus on events at a stage of the company's trading history which was significantly longer before the date of the commencement of the winding-up than the allegation originally pleaded.
31. In those circumstances, this is not in our judgment a case of mere technicality or of mere mislabelling of an appropriate charge. Rather, it is a case of charging an offence which could never be proved on the evidence to be adduced. We accept that it is at any rate possible that at an early stage of the proceedings, the indictment might have been amended without prejudice to the appellant, though the longer the proceedings continued, the stronger the argument of prejudice which would have been available to Mr Evans. Be that as it may, the indictment was not amended, and the fact that it might have been does not in itself mean that this is no more than a case of mislabelling.
32. We therefore reject Ms Mahmutaj's first submission. We have no doubt that the conviction on count 3 is unsafe. It is unsafe for the simple reason that it is a conviction of an offence which, as is now conceded, was not and could not be proved by the evidence upon which the prosecution relied.
33. We therefore turn to consider the alternative submission advanced by the respondent. We accept that the respondent would be able to satisfy the second of the requirements identified by Lord Bingham in the passage which we have quoted from Graham. On the central issue of dishonesty, the jury were plainly satisfied that the prosecution had discharged the burden of proving beyond reasonable doubt that the appellant had acted fraudulently in the context of a charge under section 206. If the appellant had instead been charged from the outset with an offence under section 207, the conduct of the defence would have been the same, and there is no reason to doubt that the jury's conclusion on this issue would also have been the same.

34. As to the first of Lord Bingham's requirements, however, we take a different view. We agree with Ms Mahmutaj that there is a good deal of overlap between the ingredients of the two offences, and that in some circumstances, though emphatically not the circumstances of this case, the same conduct might permissibly give rise to a charge under either of the statutory provisions. A charge alleging an offence contrary to section 206 does not, however, expressly include an allegation of an offence contrary to section 207. Nor, in our judgment, does it do so impliedly.
35. As the facts of this case illustrate, an essential ingredient of the section 206 offence is relevant conduct during the period of 12 months preceding the commencement of the winding-up. An offence contrary to section 207 can be proved on the basis of conduct long before the start of such a 12 month period. It may be correct, as Ms Mahmutaj suggests, that in many cases any period of administration preceding the winding-up of a company will be concluded within less than 12 months. But whether or not that may be the case in other circumstances, we do not see how it can be said that a charge of doing something within a period of 12 months ordinarily involves, or involved in this case, an allegation of doing something before that period began. Far from usually including conduct before the relevant 12 month period, a charge under section 206 expressly excludes it.
36. We note that in AD [2016] EWCA Crim 454 at paragraph 33, the court, in rejecting an argument that a charge of indecent assault on a man would ordinarily involve an allegation of indecent assault on a woman, similarly observed that the two allegations were mutually exclusive. Although that observation was made obiter, it coincides with our approach in this case.
37. We therefore conclude that in the circumstances of this case, and notwithstanding Ms Mahmutaj's valiant submissions on behalf of the respondent, this court does not have power to substitute a conviction for an offence contrary to section 207 of the 1986 Act. We accordingly reject the respondent's alternative submission.
38. It follows that this appeal succeeds, and the conviction on Count 3 is quashed. The guilty verdicts and sentences imposed in respect of Counts 1 and 2 are of course unaffected by our decision.

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