



Neutral Citation Number: [2021] EWCA Crim 21

Case No: 202001558 B3 (AND 40 LINKED CASES)

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2021

Before:

LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

and

MRS JUSTICE FARBEY DBE

**IN THE MATTER OF A REFERENCE BY
THE CRIMINAL CASES REVIEW COMMISSION**

Between:

JOSEPHINE HAMILTON & OTHERS

Appellants

- and -

POST OFFICE LIMITED

Respondent

T Moloney QC & Ms K O'Raghallaigh (instructed by **Hudgell Solicitors**) for **Josephine Hamilton & others**

Miss L Busch QC & Dr S Fowles (instructed by **Aria Grace Law**) for **Tracy Felstead, Janet Skinner & Seema Misra**

Mr L Orrett instructed by **Edward Fail Bradshaw and Waterman** for **Scott Darlington, Stanley Fell, Peter Holmes & Rubina Shaheen**

Mr O Saxby QC instructed by **Gulland Solicitors** for **Carl Page**

Mr B Smith instructed by **Aliant Law** for **Vijay Parekh**

Mr B Altman QC, Ms Z Johnson QC & Mr S Baker instructed by **Peters & Peters** for **Post Office Limited**

Mr L Mably QC instructed by **Government Legal Service** as **Advocate to the Court**

Hearing date: 17 December 2020

Approved Judgment

Lord Justice Holroyde:

1. The Criminal Cases Review Commission (“the Commission”) has referred to this court forty-one cases in which sub-postmasters and mistresses and other Post Office employees were convicted of offences of false accounting, theft and fraud. The prosecutions were brought by the respondent, the Post Office (now Post Office Limited), and in most cases relied on records kept by the Post Office's Horizon accounting system. The reliability of Horizon has subsequently been called into question, and adverse findings were made by Fraser J in civil litigation, comprising a group action in which hundreds of former Post Office employees were the claimants. Fraser J gave a number of detailed judgments in the course of the litigation, including two which are of particular relevance to these proceedings.
2. It is convenient to begin with the statutory provisions, contained in Part II of the Criminal Appeal Act 1995, which give the Commission the power to make a reference of this nature. For present purposes, it is sufficient to refer briefly to the following.
3. By section 9(1), where a person has been convicted of an offence on indictment in England and Wales, the Commission may at any time refer the conviction to the Court of Appeal.
4. By section 9(2), a reference of a person's conviction shall be treated for all purposes as an appeal by the person under section 1 of the Criminal Appeal Act 1968 against the conviction.
5. Section 13, so far as material, provides:

“13.— Conditions for making of references

(1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 ... unless—

(a) the Commission consider that there is a real possibility that the conviction ... would not be upheld were the reference to be made,

(b) the Commission so consider—

(i) in the case of a conviction, ... because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, ...

and

(c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.

(2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.”

6. The effect of section 14(4A) and (4B) is that unless the Court of Appeal gives leave, the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference.
7. Section 2(1) of the Criminal Appeal Act 1968, as amended, provides:
 - “Subject to the provisions of this Act, the Court of Appeal –
 - a) Shall allow an appeal against conviction if they think that the conviction is unsafe; and
 - b) shall dismiss such an appeal in any other case.”
8. The Commission gave detailed reasons for referring each of the forty-one cases to this court. Those reasons now take effect as grounds of appeal against conviction. For convenience, we shall refer to the persons whose cases have been referred as appellants, and to the Commission’s reasons as grounds of appeal.
9. The Commission’s reasons in these cases raise the two well-established categories of abuse of process: first, that a defendant could not have a fair trial (“Ground 1”); and secondly, that his or her trial was an affront to the conscience of the court (“Ground 2”).
10. Three of the forty-one appeals are opposed on both Ground 1 and Ground 2. In thirty-four of the others the respondent does not oppose the appeals on Ground 1, but does oppose them on Ground 2. There are four cases in which, for reasons which are said to be case-specific, the respondent does not oppose the appeals on either Ground 1 or Ground 2. The respondent has helpfully made clear from an early stage that no application will be made for a successful appellant to be retried.
11. At a hearing on 18 November 2020 the court gave directions and set a date in March 2021 for the hearing of the appeals. The court also directed that the cases of the thirty-four appellants whose appeals are unopposed on Ground 1, but opposed on Ground 2, should be listed on 17 December 2020 for the hearing of submissions on two questions of principle:
 - i) Is each appellant entitled as of right to argue Ground 2?
 - ii) If not, on what principles should the court act in deciding whether to permit argument on Ground 2?
12. Directions were given as to the filing of skeleton arguments. We are grateful to HM Attorney General for appointing Mr Mably QC to act as advocate to the court. We are grateful to all counsel for their skeleton arguments.
13. Having heard the oral submissions on 17 December 2020, we gave a short judgment stating our decisions on the issues of principle and indicated that we would give our reasons in writing at a later date. This we now do.
14. At the start of the hearing, we emphasised that the court was concerned only with the cases of the thirty-four appellants to whom we have just referred. We therefore say nothing about the three cases in which the appeals are contested on both Ground 1 and

Ground 2, or about the four cases in which the appeals are not contested on either Ground 1 or Ground 2. For convenience only, and intending no disrespect, we shall for the most part refer to the thirty-four appellants collectively, and will only refer to some of them by name.

15. We also made clear at the start of the hearing that the court was concerned only with the issues of principle identified in the two questions, and not with the strengths or weaknesses of any appellant's case in relation to Ground 2. The merits of an appellant's case on Ground 2, if argument on that Ground were permitted, would be a matter for the court to determine at the appeal hearing in March 2021.
16. Although the respondent does not resist the appeals on Ground 1 in these thirty-four cases, it will be for the court to determine in due course whether the convictions are unsafe on that ground. That too will be determined at the hearing in March 2021. The merits of Ground 1 are not relevant to the issues of principle which we have identified.
17. In their oral submissions in relation to the first question of principle, counsel were agreed that no appellant is entitled as of right to argue Ground 2 if his or her appeal will in any event be allowed on Ground 1. An earlier written submission to the contrary, by counsel previously acting for the appellants Tracy Felstead, Janet Skinner and Seema Misra, was not pursued. All counsel therefore focused their helpful submissions on the matters which the court should consider in deciding whether to exercise its discretion to permit argument on Ground 2.
18. As to the second question of principle, Miss Busch QC and Dr Fowles submitted on behalf of the appellants Tracy Felstead, Janet Skinner and Seema Misra that the court must act judicially. It would be wrong in principle for the court to permit the respondent effectively to preclude argument on Ground 2 by its concession that Ground 1 is not opposed. The requirement in rule 1.1(2)(e) of the Rules to deal with cases efficiently and expeditiously has to be considered in the context of the issues in the case: it should be considered as relating to expenditure of time which is disproportionate to the importance of the issue. The issue raised by Ground 2 is one of abuse of process in exceptional circumstances, and it is firmly in the interests of justice that it should be considered by the court. The appellants have suffered very severely as a consequence of their prosecutions, and a finding in their favour on Ground 1 alone would not fully vindicate them. Miss Busch invited the court to address any concerns about delay by appropriate exercise of its case management powers, and indicated that the Ground 2 submissions could be made on the basis of the material which has already been disclosed. She pointed out that there has been important disclosure since the Commission referred the cases, and submitted that the public interest required consideration of the complete picture. The respondent should not be able to sidestep the issue raised in Ground 2 by conceding the appeals on the basis of Ground 1. She referred to the decision of the Supreme Court in *R v Maxwell* [2011] 1 WLR 1837, and in particular to the judgment of Lord Dyson JSC, who said at [13] that in the second category of abuse of process –

“... the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety .. or will undermine public

confidence in the criminal justice system and bring it into disrepute”

Miss Busch submitted that these are exceptional cases, with a very sorry history, and that denying the appellants the opportunity to make good their case on Ground 2 would create a very real risk of public confidence in the criminal justice system being undermined.

19. Mr Moloney QC and Ms O’Raghallaigh, who represent Josephine Hamilton and 31 other appellants (including some whose cases fall outside the group of thirty-four with whom this judgment is concerned), relied on the court’s duty, to further the overriding objective of the procedural code contained in the Criminal Procedure Rules (“the Rules”), which by rule 1.1(1) is –

“that criminal cases be dealt with justly.”

20. Paragraph 2 of rule 1.1 states:

“(2) Dealing with a criminal case justly includes—

(a) acquitting the innocent and convicting the guilty;

(b) dealing with the prosecution and the defence fairly;

(c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;

(d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;

(e) dealing with the case efficiently and expeditiously;

(f) ensuring that appropriate information is available to the court when bail and sentence are considered; and

(g) dealing with the case in ways that take into account—

(i) the gravity of the offence alleged,

(ii) the complexity of what is in issue,

(iii) the severity of the consequences for the defendant and others affected, and

(iv) the needs of other cases.”

21. Mr Moloney submitted that the overriding objective would best be served in this case by allowing, as soon as possible, the appeals of those appellants whose convictions the court thinks unsafe. The hearing of argument on Ground 2 would lead to delay, and would involve a considerable and unnecessary use of the court’s time, notwithstanding that all parties agree that Fraser J’s judgments should be received as fresh evidence. He pointed out that of the appellants whose appeals are not opposed on Ground 1, only

three (Tracy Felstead, Janet Skinner and Seema Misra) had actively sought to argue Ground 2: other appellants would be content to have their appeals allowed on Ground 1 alone. He made plain, however, that the appellants for whom he acts do contend that Ground 2 is made out in their cases. Accordingly, if the court concluded that argument should be heard on Ground 2, they would wish their submissions on Ground 2 to be fully heard. Mr Moloney questioned whether it would be practicable for such argument to take place in March 2021, given that the programme of extensive post-conviction disclosure is not scheduled to be completed until early February. He submitted that a fact-specific analysis would be needed of each appellant's case, which would inevitably take time and may necessitate applications to adduce fresh evidence (including, he suggested, expert evidence). He acknowledged however that there would be scope for seeking the agreement of relevant facts in order to narrow any contested issues.

22. Mr Orrett indicated that the appellants Scott Darlington, Stanley Fell, Peter Holmes and Rubina Shaheen do not want further delay and therefore do not ask the court to consider Ground 2, being content if their convictions are found unsafe on Ground 1. If however the court decides that both grounds should be considered, they would wish to make submissions in support of Ground 2. He suggested that the hearing of submissions on Ground 2 would have to await the conclusion of a police investigation, recently commenced, into whether employees of Fujitsu (the company which installed and maintained the Horizon system) had committed perjury in relation to the reliability of the Horizon system.
23. Mr Saxby QC indicated that the appellant Carl Page did not seek to argue Ground 2, even if the court permitted argument by other appellants.
24. Mr Smith on behalf of the appellant Vijay Parekh also submitted that if Ground 2 was to be argued, it would have to be dealt with fully, as the public interest would not be served by an incomplete consideration of an important issue. He too submitted that considerable delay might result.
25. For the respondent, Mr Altman QC and Ms Johnson QC submitted that in referring these cases to the Court of Appeal, the Commission gave as its reason –

“... a real possibility that the Court of Appeal will conclude that it was an abuse of process to prosecute these cases, and will conclude that the associated convictions are thereby unsafe.”

They submitted that the reason for the referrals was a single ground of abuse of process, and that in each of the thirty-four cases the respondent has conceded that there was an abuse of the process and the convictions are accordingly unsafe on Ground 1. They submitted that at present the ambit of Ground 2 is uncertain, and it is therefore uncertain whether it will be possible to hear submissions on that Ground in March 2021. Each appellant's case would require fact-specific consideration, and it would be necessary to look at the actions of employees of Fujitsu as well as of the respondent. Argument as to Ground 2 may therefore involve applications to receive fresh evidence, which may or may not succeed, and will take considerable time. Whilst disavowing any intention to mount an argument *in terrorem*, counsel pointed out that the present, extensive disclosure process is limited to a period which ends in 2013, when the respondent ceased to commence any further prosecutions in reliance on the Horizon system. If argument on Ground 2 were to be permitted, and if any appellant sought to rely on

matters occurring after that period, there might have to be a further disclosure process and consequent delay.

26. Mr Mably QC submitted that in deciding whether the court should permit argument on Ground 2, and on the premise that the court will allow the appeals on Ground 1, the overarching principle is that the court should act in the interests of justice. Factors to be considered relate to the efficient and expeditious administration of justice and the interests of an appellant in being vindicated on as wide a basis as possible. The legitimate interests of an appellant, and the wider public interest, may militate in favour of deciding an additional ground. Reputational interests of the appellants may be important. Issues of alleged abuse of the process are serious, and it may be undesirable for them to be side-stepped because the appeals will succeed on another ground. It is for the court to decide, weighing all relevant factors, whether it is in the interests of justice that Ground 2 be determined even if appeals will be allowed on Ground 1.
27. Our conclusions are as follows.
28. We approach the first question of principle on the basis required by section 9(2) of the 1995 Act, that each of these appellants, having had his or her case referred to this court by the Commission, must be treated as if he or she were bringing an appeal against conviction under the 1968 Act. The effect of the statutory provisions to which we have referred is, therefore, that each appellant is to be treated as having been granted leave to appeal against conviction on Grounds 1 and 2: we are not here concerned with the position of an applicant seeking to renew a ground of appeal in respect of which leave has been refused, or to vary grounds to add a further point. At the hearing of the appeals, it will be the duty of the court, pursuant to section 2 of the 1968 Act, to consider whether the conviction of an appellant is unsafe, to allow the appeal if the court thinks that it is unsafe, and otherwise to dismiss the appeal.
29. It is clear that the court could not properly *dismiss* an appeal against conviction without first considering all the grounds of appeal. As to whether the court may properly *allow* an appeal against conviction without considering all the grounds of appeal, we were referred to case law including the following.
30. In *R v Berry (no 3)* (1994) 99 Cr App R 88 Lord Taylor CJ at p96 considered how lengthy protraction of proceedings, such as had occurred in that case, could be avoided in the future. He observed:

“If one of a number of grounds of appeal appears well-founded, this Court not infrequently indicates that it will allow the appeal on that ground without hearing argument on the others. This is a desirable option in the interests both of the speedy and economical disposal of the instant case and of enabling other appellants’ cases to come on.”

The Lord Chief Justice went on to consider the position if some grounds of appeal had been left unresolved by the Court of Appeal, and there was then a successful appeal to the House of Lords.

31. In *R v Mandair* [1995] 1 AC 208, again in the context of considering the position if one or more grounds of appeal are left unresolved by the Court of Appeal, Lord Mackay of Clashfern LC said at p217E:

“It is often the case that a number of grounds of appeal are urged before the Court of Appeal but having reached a clear conclusion upon one which determines the case, the Court of Appeal do not decide the other grounds since such decision is unnecessary to the disposal of the case on the view they have taken of it. It would obviously be highly undesirable and wasteful to require the Court of Appeal in every case to decide all the grounds of appeal before disposing of an appeal before them, on the basis that if a point of law of general public importance is raised in the appeal the House of Lords may take a different view of the point from that taken by the Court of Appeal if leave to appeal to the House of Lords is granted in respect of the decision.”

32. Those two decisions suffice to confirm that there is a well-established practice that this court will sometimes allow an appeal against conviction on one ground without deciding, or hearing argument upon, another ground or grounds. The respondent helpfully brought to our attention two more recent examples of that practice: *R v Mears* [2011] EWCA Crim 2651 and *R v Sadeer* [2018] EWCA Crim 3000. No counsel has referred us to anything in the Criminal Appeal Act 1968 or in the Rules or the Criminal Practice Direction which casts doubt on that practice.
33. We accept Mr Mably’s submission that in performing its statutory duty under section 2 of the 1968 Act, the court must resolve all matters which are necessary to determine whether the convictions are unsafe but is not required to resolve matters which are not necessary to that resolution. The need to resolve all matters which are necessary to determine whether a conviction is unsafe is consistent, in our view, with the general rule that an appellant is required to raise in his appeal all the grounds on which he wishes to rely: he cannot present his appeal on some grounds, and hope to be permitted to advance others at a later date if his appeal is unsuccessful: see, eg, *R v Berry* (1991) 92 Cr App R 147, cited in *R v Wallace Duncan Smith (no 2)* [1999] 2 Cr App R 444 at p449E. In many cases, of course, the court will in any event wish to hear submissions on all grounds; and it will often be the case that argument on one particular ground occupies only a small proportion of the overall hearing. If however the court concludes that an appeal against conviction must be allowed on one ground, it is not required to hear argument on another ground. As we have indicated, it is for the court to determine whether a conviction is unsafe, even if the appeal against that conviction is not opposed by the respondent. It follows that it will be for the court to decide to what extent it needs to hear submissions about a particular ground of appeal before finding that a conviction is unsafe. The court has the right and duty to regulate the way in which appeals are conducted before it. In all cases, therefore, it is for the court to decide whether it needs to hear argument on all grounds and, if so, in what sequence and in what degree of detail. Those will, necessarily, be case-specific decisions.
34. We accordingly agree with counsel that in the present cases, if the court decides to allow an appellant’s appeal on Ground 1 (a decision which, we reiterate, must await the hearing of the appeal), the appellant is not entitled as of right to argue Ground 2.

35. We turn to the second question and consider the principles which should be applied by the court if it reaches the conclusion that an appellant's appeal must be allowed on one ground, and is considering whether in the exercise of its discretion to hear argument on a further ground.
36. In such a situation, the guiding principle must be that the court must act in the interests of justice. Without attempting an exhaustive list, and subject of course to the particular circumstances of the case under consideration, it seems to us that when considering whether it is necessary or desirable in the interests of justice that a further ground should be determined, the factors which the court will usually wish to consider include (but are not limited to) the following:
- i) The article 6 rights of the appellant;
 - ii) The overall importance to the parties and to the public of the further ground, bearing in mind that the appeal will in any event be successful;
 - iii) The furtherance of the overriding objective in accordance with the Rules;
 - iv) Whether the additional ground raises issues of particular importance in relation to the character and/or reputation of the appellant and/or of a witness or other person concerned in the proceedings;
 - v) Whether the additional ground relates to an issue which should be resolved in order to maintain public confidence in the criminal justice system;
 - vi) Whether the additional ground raises a legal issue which may be important in other cases;
 - vii) The desirability of an appellant, even though his or her appeal will in any event succeed, being able to seek appropriate vindication;
 - viii) The time and expense which will be involved in determining the additional ground, and the extent to which the court's resources will be taken up, bearing in mind the interests of appellants in other, unrelated cases who wish their appeals to be heard;
 - ix) Whether determination of the additional ground would give rise to undesirable delay to the instant appeal, or to other cases which are in some way linked to it or affected by it;
 - x) Whether determination of the additional ground is necessary in order to establish the proper basis on which a retrial of an appellant would be conducted;
 - xi) Whether any party may have a collateral reason for wishing to argue, or to avoid having to argue, the additional ground, and if so, the legitimacy (or otherwise) of that reason.
37. The court will need in each case to balance the above factors and any others which are relevant to the particular case. It is impossible to lay down any general rule. In some cases the court may conclude that no useful purpose would be served by hearing submissions about the additional ground, for example because it would add nothing of

significance to the conclusion already reached but would give rise to significant delay in concluding the proceedings. In others the court may conclude that it would clearly be in the interests of justice that the further ground be considered, notwithstanding the consequent lengthening of the proceedings, for example because resolution of it would provide guidance as to the proper interpretation of a statute or would clarify conflicting previous decisions on a point of law.

38. In these appeals, the following factors are, in our view, of particular importance.
39. First, issues of abuse of the process of the court are important matters of concern to the appellants and the respondent, and are also matters of public interest. The appellants contend that their prosecution was an abuse of the process involving prosecutorial misconduct. In our view, it is in the public interest that that matter should be considered at a public hearing. That public interest is reflected in the decision of the Commission that there were exceptional reasons which justified the making of referrals in these cases notwithstanding that the appellants had not previously applied for leave to appeal.
40. Secondly, whilst Ground 1 raises the issue of whether it was possible for an appellant to have a fair trial, Ground 2 raises the issue of whether he or she should have been prosecuted at all. Unlike Ground 2, therefore, Ground 1 presupposes that it was appropriate that there should be a prosecution. Ground 1 involves issues as to whether the respondent made appropriate and/or timely disclosure of information and material relating to the reliability or otherwise of the Horizon system. Ground 2 may substantially turn on whether the relevance of that information and material was appreciated at the time by anyone concerned in the commencing of the prosecutions against the appellants. Although both Grounds raise aspects of the court's jurisdiction to stay proceedings as an abuse of the process, both the appellants concerned and the public may legitimately feel that there is a material difference between them, and that a finding in the appellant's favour on Ground 2 adds materially to a finding in his or her favour on Ground 1. If in fact an appellant should never have been prosecuted at all, it is in our view right that the court should make that determination. To allow an appeal in such circumstances solely on the basis that the manner of that appellant's trial was unfair would not sufficiently vindicate the appellant concerned.
41. The combination of the legitimate interests of the appellants, and the public interest, make this in our view a very strong case for the court to exercise its discretion in favour of hearing argument on Ground 2.
42. Thirdly, we recognise that this court does not act as a tribunal of inquiry when considering an appeal against conviction. We are however satisfied that appropriate case management can avoid any risk of these appeals becoming an open-ended exercise in finding facts.
43. Fourthly, we do not accept the submissions that consideration of Ground 2 will cause undue delay in the determination of these appeals, or will contravene the requirement of the Rules to deal with these cases efficiently and expeditiously. The third and sixth judgments of Fraser J in the civil proceedings dealt comprehensively with many evidential and technical issues which are relevant to these appeals. The court has previously directed that those judgments may be referred to at the appeal hearing, when it will be for the court to decide whether to receive the judgments as fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968. A further analysis of the

evidence is to be found in the detailed reasons for referral given by the Commission. All that material was available to the parties when the Commission referred these cases to the court. In addition, the respondent, as we have said, is undertaking a very substantial process of disclosure, much of which has already been completed. We find it difficult to see why an appellant would not be able to argue Ground 2 on the basis of that existing material and such further material as may be disclosed in the remaining weeks of the disclosure process. Any appellant who wishes to pursue a fresh line of enquiry would have to make, and justify, an application for specific disclosure. Any party who contends that the cases could not be ready for hearing on the scheduled date in March 2021 would have to satisfy the court that an adjournment really was necessary. In those circumstances, and bearing in mind that the court will in any event need to consider whether the convictions are unsafe on the basis of Ground 1, we are not persuaded that the additional time which will be necessary to hear submissions on Ground 2 will add disproportionately to the length of the appeal hearing.

44. It was for those reasons that we concluded, and ordered –
- i) That no appellant is entitled as of right to argue Ground 2 if his or her appeal will in any event succeed on Ground 1.
 - ii) That in the exercise of its discretion, the court will however permit argument on Ground 2 by any appellant who wishes to advance it. No appellant is required to do so: all are free to limit themselves to argument on Ground 1 if they so wish.
45. The court went on to give directions, which need not be repeated here. They were intended, consistently with the overriding objective, to avoid any risk of delay to the determination of these appeals.