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[2022] EWCA Crim 72

IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 202001087/B2 & 202002366/B2

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 18 January 2022

Before:

LADY JUSTICE CARR DBE

MR JUSTICE LINDEN

MR JUSTICE WALL

REGINA

V

MATTHEW SUTHERLAND

MOHAMMED KHAN

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MR K MITCHELL appeared on behalf of the Applicant Sutherland

MR H GODFREY appeared on behalf of the Applicant Khan

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

LADY JUSTICE CARR:

Introduction

1. This is the renewed application of two applicants, Matthew Sutherland ("Sutherland"), now 45, and Mohammed Khan ("Khan"), now 53, for permission to appeal against their convictions. Khan also seeks a necessary extension of time of some 174 days in which to do so.
2. Following a lengthy trial in the Crown Court at Birmingham before His Honour Judge Drew QC ("the judge") both men were convicted on 26 February 2020 of conspiracy to cheat the public revenue, contrary to section 1(1) of the Criminal Law Act 1977. In the case of Sutherland the jury was unanimous; in the case of Khan it was a majority verdict of 10 to 2.
3. On 26 November 2020 Sutherland was sentenced in his absence to nine years' imprisonment and Khan was sentenced to seven years' imprisonment. Although Sutherland remains an absconder, we are satisfied that he has given the necessary authority for this renewed application to be made.
4. Their co-accused, Mohammed Zeb Zaheer ("Zaheer") was also convicted of conspiracy to cheat the public revenue, contrary to section 1(1) of the Criminal Law Act 1977 and sentenced to five years' imprisonment.
5. On the applications we have been presented with extensive skeleton arguments, together with a very large amount of material to read, including multiple transcripts. We have

considered the material carefully; despite its volume, we can keep our judgment short.

### The facts

6. The facts are set out in detail in the Criminal Appeal Office summary and do not need to be repeated here. In very brief overview, the conspiracy involved, amongst other companies:
  - i) A company incorporated in September 2014 called Convergica (Clinical Information Systems) Ltd ("Convergica"). Sutherland, through a special purpose vehicle company known as Mill Capital Nominees, was Convergica's majority shareholder;
  - ii) A company incorporated in 2005, struck off in 2006 and reinstated in 2009, called Mediatronix Ltd ("Mediatronix"). Khan was its sole shareholder;
  - iii) A company incorporated in June 2015 called Everbright Financial Holdings Ltd ("Everbright"). Zaheer was its sole director and shareholder.
  
7. Amongst what were complicated arrangements was a loan agreement whereby Everbright would loan Convergica £137 million to be paid directly to Mediatronix. In this context, in May 2015 an official at a Spanish bank known as Bandenia Banca Privada ("Bandenia") sent a letter to Sutherland stating that Everbright was a verified client of the bank.
  
8. On 27 January 2016, Convergica submitted a Corporation Tax Return and Research and Development Tax Credit claim ("R&DTC") to HM Revenue and Customs ("HMRC") for some £29 million. It was common ground at trial that Convergica was in fact not entitled to that claim for credit.

9. The prosecution case was that Sutherland, Khan and Zaheer, each of whom had financial issues at the time, had conspired to cheat HMRC. They had dishonestly sought to induce and facilitate the Convergica Board to submit the R&DTC claim. That claim falsely represented (a) that Mediatronix had carried out work to the value of £137 million on behalf of Convergica (“representation a”); (b) that Everbright had genuinely agreed to lend Convergica £137 million (“representation b”); and (c) that Everbright had paid Mediatronix £137 million on behalf of Convergica (“representation c”). Had the R&DTC claim been successful then, pursuant to the loan agreement between Everbright and Convergica, the money would have been paid to Everbright and then distributed amongst the three men.
  
10. The defence case on behalf of all three men, who were of good character, was that the evidence on which the prosecution sought to rely did not in fact prove their guilt at all. There were too many gaps and too many unanswered questions. There was some sort of scheme within Bandenia involving the use of Everbright, Convergica and Mediatronix as a mechanism by somebody else to launder money. The money was going to come out of the bank, go through Everbright to Mediatronix, then back to Convergica, then back to Everbright and then back to Bandenia.
  
11. Sutherland and Khan both gave evidence at trial. Zaheer did not. A central part of Sutherland's case, amongst other things, was that Convergica was a legitimate *bona fide* company.

## Grounds of appeal: Sutherland

12. Out of four original grounds, Mr Mitchell (for Sutherland) pursues now only two. He submits first that the conviction against Sutherland is unsafe because the judge erred in his decision to allow amendment of the indictment and in his subsequent directions to the jury.
  
13. It is said that the Crown's case was that Convergica was a scam company and its sole purpose was fraudulent. This was something which Sutherland was able to disprove; he was able to demonstrate that Convergica was a legitimate trading company. The judge often demonstrated irritation at this, considering it to be misleading. Ultimately, submits Mr Mitchell, it was the judge who drove the amendment to the indictment during an application on behalf of Sutherland that there was no case to answer.
  
14. The amended indictment, it is said, caused prejudice to Sutherland's case, alongside the subsequent directions. The defence had approached representations a), b) and c) on a conjunctive basis: all three representations needed to be established. But the directions to the jury were proceed on a disjunctive basis. Establishment of any one of the representations would suffice. The indictment and directions were unfairly tailored to suit the prosecution.
  
15. Mr Mitchell further submits that the lateness of the amendment caused prejudice. It came after the prosecution witnesses had been cross-examined; reliance is placed on the fact that the judge's directions to the jury were to the effect that the question for them was whether or not there was a false claim, not whether each of the three representations had

been established.

16. The second ground of appeal sought to be advanced is the suggestion that the judge erred in his interruptions and interference amounting to what was an expression of a "clear and cynical view and an irritation" of the defence case. As his high point, Mr Mitchell refers to a passage of exchanges involving questions by the judge of Sutherland in relation to drop box material on 8 January 2020. Mr Mitchell accepts that at no stage did he object to the judge's questioning but says now that he should have done so.

17. Finally, Mr Mitchell seeks to vary the grounds of appeal advanced to introduce a new ground. We indicate at the outset that no formal application to vary as required has been made, nor has there been any attempt to comply with CPR 36.14 and the clear guidance identified in R v James [2018] EWCA Crim 285, in particular at [38]. In summary, Sutherland seeks to benefit from the arguments deployed on behalf of Khan, to which we will shortly refer, based on Khan's allegedly poor legal representation. That is said to have had a prejudicial knock-on effect on the safety of Sutherland's conviction. Mr Mitchell points in particular to an alleged lack of cross-examination and adjournments during the course of Sutherland's evidence, in particular in his evidence in chief.

18. When pressed on the reasons for the delay in advancing this ground, Mr Mitchell frankly says that he did not ever think that this was a sustainable ground of appeal until Khan mounted his appeal. Mr Mitchell previously thought that the circumstances facing Sutherland at trial were simply a result of what was part and parcel of Khan's case.

## Grounds of appeal: Khan

19. For Khan, Mr Godfrey QC submits that Khan's legal representation was such a "shambles", not just as a result of counsel's conduct but also that of Khan's solicitors, that from "beginning to end" the trial was so unfair as to render Khan's conviction unsafe. His true case was never put.
  
20. There is a lengthy list of complaints relied upon, including complaint about a late change of leading junior counsel, the absence of any pretrial conferences and the fact that Khan was never asked for nor gave full and proper instructions pretrial - any conferences were only held at court. No meaningful defence statement was served until very late in the day. Had it been served earlier, the judge would have been able to control and intervene with the questioning of witnesses earlier than he did. A list of defence witnesses was overlooked. His counsel did not know what Khan's case was or what witnesses were needed. Khan had to rely on what is described as a "home-made proof". It is said that there was inadequate cross-examination of prosecution witnesses and of Sutherland as well. Complaint is also made as to the manner in which the closing speech for Khan came about, although frankly Mr Godfrey was unable to identify any substantive errors or omissions in the substance of the closing speech itself.
  
21. Mr Godfrey emphasises the absence in particular of any substantive defence statement until after the prosecution had closed its case and that failures properly to cross-examine witnesses were not simply cured by any adjournments. Khan's counsel was not in possession of important documents. Hundreds of documents provided by Khan to his legal team were never even considered. So it is said that the conviction of Khan is unsafe.

22. In terms of identifying specific matters not put, Mr Godfrey referred to evidence given by Khan in the witness box to the effect that there was a dishonest plan within Convergica to defraud funders and that was something which was never put to any of the prosecution witnesses.

23. Trial counsel have responded to the complaints made against them. In short they take strong issue with those complaints. Their position is that the case was thoroughly prepared in accordance with instructions. There were a number of conferences with junior junior counsel and many conferences were cancelled by Khan at short notice. A conference with leading junior counsel took place on 4 October 2019 and 21 October 2019 - on the second occasion with junior junior counsel and instructing solicitors. This was months before the trial itself commenced on 2 December 2019. Their position is that all relevant prosecution witnesses were cross-examined on the key issues, including whether Mediatronix's bid was genuine and whether Khan had played any part in the R&DTC claim. All matters were ultimately put to Sutherland. The closing speech for Khan lasted half a day and covered all matters favourable to him and undermining the case against him. This was a lengthy trial, there were daily conferences at court with Khan and time was taken to discuss all matters affecting him.

#### Discussion and analysis: Sutherland

24. Grounds 1 and 2 are linked in the sense of the overall implied complaint of unfair dealing at the hands of the judge. In relation to the first ground, at the close of the prosecution case the indictment was amended to reflect the fact that there was no suggestion in fact



that any of the defendants themselves had made the false representations to HMRC.

Rather, they had induced the unwitting Board of Convergica to do so. As indicated, it is said that this late amendment created unfairness, changing the nature of the prosecution case and undermining the manner in which Sutherland's case had been presented during the course of the unfolding of the prosecution case.

25. However, what the amendment in fact did was to identify that the representation to HMRC had been made by Convergica through its Board, as opposed to by Sutherland or Khan and Zaheer personally. No formal objection was taken to the amendment at the time. That is understandable; there was no prejudice to Sutherland's position; it did not create any new or unforeseen obstacles. Mr Mitchell before us, despite being pressed on several occasions, could not identify any specific such prejudice. The judge correctly told the jury that the amendment did not change the way that the prosecution had put their case and that the amendment was required to clarify the position. The direction that he gave to the jury was agreed. The submission of no case to answer which had been mounted to Sutherland, partly based on a technical issue of corporate responsibility for the making of the claim to HMRC, was not pursued.

26. As to the argument that the prosecution case initially had been that Convergica was only ever a vehicle for fraud with no legitimate basis, that is not how the case appears from the full case summary served by the prosecution. The position there, which Mr Mitchell helpfully confirmed was repeated before the jury, was that Convergica was a "legitimate venture used for dishonest ends", not that Convergica was a scam or fraud from the outset. Rather, it was that "short of money and realising that Convergica's legitimate

activities would not generate any for a long time, if ever, Sutherland resorted to fraud." Even if, as Mr Mitchell tells us, that position was expanded on orally, the prosecution's case never went as far as to suggest that Convergica was only ever a fraud with the sole purpose of acting fraudulently from the outset.

27. Accordingly, all that the judge was doing was case managing appropriately. The Crown's case was consistent. The concern was that the particulars of the conspiracy should reflect that case. Witnesses were recalled because during Sutherland's evidence it became apparent that vital aspects of his case had not been put.

28. We turn then to the suggestion of some arguable error in the judge's final written and oral directions of law to the jury. An application that the jury should only convict if an individual had participated in agreeing to all three of the individual activities the subject of the three representations was rejected by the judge. The final directions were in our judgment unimpeachable. They were not criticised at the time. Nor can there be any prejudice arising out of the timing of the final directions. Those directions were given before closing speeches. Again, when pressed, Mr Mitchell was unable to identify any specific prejudice arising out of the timing or content of the directions that were given.

29. As for the second ground, Serafin v Malkiewicz and others [2020] UKSC 23, [2020] 1 WLR 2455 is cited in support of the suggestion that Sutherland's conviction is somehow unfair due to unwarranted and inappropriate interference during the course of the evidence by the judge. Serafin was a case where the judge's approach demonstrated manifest unfairness and hostility to the defendant's case. We have looked at all of the

passages upon which Sutherland relies. It is clear to us that at all times the judge was simply attempting to assist the jury in what was a complicated factual situation. His questions from time to time may have been detailed and forensic, but they were posed with a view to ensuring that he and the jury understood the evidence and Sutherland's case. The judge said in terms (in the absence of the jury) that he did not like interrupting but was keen to get to the heart of the case. It is to be noted that in relation to more than one of the passages of evidence to which objection now is taken, Sutherland's counsel observed both in the absence and presence of the jury that the judge's intervention on occasion had been "very helpful". Indeed, this remark was made in the absence of the jury in relation to the very line of questioning which Mr Mitchell now identifies as being the high point of his case on this second ground of appeal. There was no protest to the judge's questioning at any stage on behalf of Sutherland.

30. The judge did not come anywhere near to demonstrating unfairness or hostility. His questions were not badgering or hectoring in nature. He was variously seeking clarification, identifying a particular chronology, the nature of a particular document or its evidential basis and background. As he said repeatedly in front of the jury, he was merely attempting to assist the jury. He was also, as he said on occasion, intervening from time to time because he thought that fairness to Sutherland required it. Sutherland needed to have the opportunity to answer certain issues.

31. In a case of this kind, it was important that the judge ensured clarity and focus on the issues for the jury, moving matters along. It is frankly wholly unsustainable to argue that the judge here strayed too far into the arena, cross-examining Sutherland as a prosecutor.

There is no proper basis on which to argue that the judge took over and conducted the prosecution, as has been submitted.

32. For these reasons, and subject to the outcome on the fresh additional ground which Sutherland seeks to raise and which we address below, an appeal by Sutherland would have no merit and we would refuse the renewed application.

Discussion and analysis: Khan

33. Incompetence on the part of lawyers can only render a conviction unsafe when the incompetence has led to identifiable, serious errors or irregularities which in turn resulted in an unfair trial. An appellant must go beyond establishing incompetence and show that it led to identifiable errors or irregularities rendering the process unfair or unsafe: see for example R v Day [2003] EWCA Crim 1060 at [15], as approved in R v Ekaireb [2015] EWCA Crim 1930 at [22].
34. The key problem in Mr Godfrey's submissions is that, whilst there has been a heavy focus on what is alleged to be gross incompetence on the part of Khan's lawyers, there has been a failure to engage with the requirement to show that there have been identified errors or irregularities such as to result in an unfair trial. There is an absence of identifiable specific prejudice. That is so despite what has been a comprehensive view by Khan's new lawyers, who have been instructed since March 2020 and whose involvement is said to provide an explanation for the lateness of the renewed application.
35. As identified above, there is a clear conflict between the account given by Khan to his

new legal team and the response from trial counsel. That, as the single judge remarked, not does mean that the court cannot take a view at this stage on whether or not the proposed challenge has any real prospect of success. Amongst other things, many of the matters asserted on behalf of the applicant can be tested independently, either by the prosecution or by reference to other material available.

36. First, many topics are identified on behalf of Khan on which it is said that witnesses should have been cross-examined but were not. However, a list of prosecution witnesses whose evidence would be challenged for Khan was provided in November 2019. The prosecution's detailed analysis set out in a Respondent's Notice, which Mr Godfrey fairly does not challenge in terms of accuracy, shows in fact that the prosecution witnesses were cross-examined on the relevant issues now relied upon; and where they were not, the points in question could have had no relevance to the case against Khan.

37. As for a defence statement presented by Khan on the first day of trial, a short (and less than satisfactory) defence statement had been signed by Khan many months earlier. The 47-page document provided by him on the first day of trial was treated as a proof of evidence and then used to prepare an addendum defence statement, some 11 pages in length, served on 27 December 2019. It was not served until after the conclusion of the prosecution case but no point was taken on this and Khan cannot be shown to have suffered any detriment, as the prosecution confirms. Amongst other things it did not trigger any further disclosure and no point on lateness was taken before the jury. Witnesses were recalled as necessary.

38. As for the instruction of counsel, junior counsel was in place throughout. Leading junior counsel was instructed in September 2019, leaving him three months to prepare the case. Whether or not Khan met him prior to trial, he was unarguably in a position properly to represent Khan once the trial got underway. The prosecution witnesses were cross-examined appropriately. Prosecution counsel confirms that counsel obviously had a good grasp of the case as the trial progressed.

39. Complaint is made that counsel declined to call defence witnesses, but the grounds do not provide any indication of the issues to which these witnesses could have spoken but which was not otherwise covered by evidence before the jury. That is a characteristic feature of the submissions made on behalf of Khan, as already indicated.

40. Equally, no documents said to be potentially exculpatory and yet overlooked have been identified such as to demonstrate that they can be said to be sufficiently important to have rendered the conviction unsafe. The documents in question were discussed with the judge on 3 February 2020. A large part of them were said to deal with character, and the fact that Khan was a legitimate businessman involved in a wide range of businesses over many years. As the judge said, that was unlikely to be the subject of much dispute. The adducing of documentary evidence to substantiate it was unlikely to assist the jury. The judge indicated that he would not be prepared to burden the jury with such further material unless he was challenged about other business transactions or ventures in cross-examination. There was and is on renewed application no challenge to this approach. No particular document, for example, in the unused material which it is said was not properly considered has been identified as even potentially having a material

effect on the safety of the conviction.

41. Beyond this, Khan himself gave full evidence in chief, including on his background, education, employment, good character, marriage, children, family property and financial situation at the time of the events in question. The prosecution witnesses were cross-examined. As for the cross-examination of Sutherland on behalf of Khan, there is no doubt that it was initially brief, something which concerned the judge. Indeed, the judge said that he was "very cross" about it. Given what appeared to be a cut-throat defence being run by Khan, many things needed to be put to Sutherland.

42. The point, however, is that following those concerns being raised, as the judge said, "not in a threatening way but with the interests of justice and all defendants and the prosecution at heart", Sutherland went on to be cross-examined fully on behalf of Khan. It is true that whilst the trial was delayed prior to that further cross-examination, Khan sought to dispense with the service of his leading junior counsel; but that problem was resolved and counsel continued with the case. Following Khan's evidence in chief, there was no suggestion that he had given evidence of matters not put appropriately to Sutherland or indeed anyone else. He gave evidence at length. It simply cannot be said that his case was not laid before the jury.

43. As for the specific complaint made that Khan's suggestion in his evidence in the witness box that Convergica was a sham from the outset designed to defraud funders had not been properly explored, the short point is that that was simply not something contained even in his amended defence case statement.

44. The closing speech on behalf of Khan was clear and comprehensive and addressed the points for and against him effectively and, as already indicated, Mr Godfrey has not been able to identify any actual error or omission within it.
45. In our judgment the matters which can be substantiated as failures on the part of Khan's lawyers do not come close to meeting the relevant threshold for establishing the conviction to be unsafe. As indicated, the question is not simply whether or not there has been incompetence, or even gross incompetence, but whether or not it can be said that any identifiable errors have arguably led to an unsafe conviction.
46. In these circumstances it is not in our judgment in the interests of justice to grant the necessary extension of time.
47. We revert to the parasitic ground of appeal sought to be raised by Sutherland. In the circumstances it falls away. In any event, any delays in the course of Sutherland's evidence in any event would not arguably have meant that the trial against him was not fair. There was no submission of resulting unfairness at the time. The judge was overseeing what was a challenging trial. He recognised the strain on Sutherland of being in the witness box for a long time. He gave Sutherland a break in order to allow him to recover from a cold and some delay, not insignificant, was caused by Sutherland himself who during the course of his evidence referred to material of which no one was aware, including his own legal team.



48. Further, there is no proper application to vary and there is no good reason, as we have indicated, for allowing Sutherland to raise a ground of appeal which, if it had any merit at all, should have been raised at the outset.

49. For all these reasons, both renewed applications will be refused and any reporting restrictions that remain in place are lifted.

(After further submissions and a short adjournment)

LADY JUSTICE CARR:

50. We deal first with the question of a loss of time order against Sutherland. As the Vice President of the Court of Appeal (Criminal Division) observed in R v Gray and others [2014] EWCA Crim. 2372:

“The only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prosecution of Offences Act 1985.”

51. The single judge indicated when refusing permission that the full court should consider making a loss of time order in relation to Sutherland. In our judgment a loss of time order is appropriate. The renewed application was wholly without merit. It has involved very significant time and court resources; the fact that Sutherland may have the means to pay for transcripts is no good reason not to make a loss of time order. We make such an order in the term of 28 days.

52. We turn then to Khan's position. As we have indicated, in our judgment the central flaw in the application was a failure to focus on prejudice and the safety of the conviction, as opposed to and discrete from the question of incompetent legal representation. However, albeit on fine balance, we are prepared not to make a loss of time order in relation to Khan, given the apparently positive advice that he has received both before and after refusal of permission by the single judge. So we do not make a loss of time order in relation to Khan.

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