Neutral Citation Number: [2024] EWCA Crim 1245
IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202301224/B2-202301946/B2

Royal Courts of Justice
Strand
London
WC2A 2LL
Thursday 9 May 2024

Before:

LORD JUSTICE LEWIS

MR JUSTICE GARNHAM

HER HONOUR JUDGE MONTGOMERY KC
(Sitting as a Judge of the CACD)

REX

V

MUHAMMAD FARQAN FAROOKA
JIAN HENG LIANG

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MS M COWE appeared on behalf of the Applicant Farooka.
MR S RAY appeared on behalf of the Appellant Liang

J U D G M E N T

MR JUSTICE GARNHAM:

1. On 20 April 2022, in the Crown Court at Bristol, the appellant, Jian Heng Liang, pleaded guilty to one count of conspiracy to commit fraud, contrary to section 1(1) of the Criminal Law Act 1977 and section 1 of the Fraud Act 2006 (count 1 on the original indictment), and one of forgery (count 7). Other counts were ordered to lie on the file. On 20 March 2023, in the same court, the applicant, Muhammad Farqan Farooka, was convicted of being concerned in the fraudulent evasion of VAT (count 2 on the trial indictment). He was acquitted of an allegation of fraud (count 1 on the trial indictment). The Crown offered no evidence on the other counts.
2. On 24 March 2023, before HHJ Cullum, also sitting at Bristol Crown Court, the appellant Liang was sentenced to 4 years 4 months' imprisonment for the conspiracy to commit fraud by false representation. The applicant Farooka was sentenced to 18 months' imprisonment, suspended for 21 months, with a requirement to undertake 240 hours of unpaid work within 12 months.
3. The appellant Liang now appeals against the sentence with the leave of the single judge. The applicant Farooka renews his application for leave to appeal against conviction following refusal by the same single judge. We deal first with the appeal against sentence by Liang.

The Facts

4. This case surrounds the financial dealings of Hotcha Ltd, a fast food chain based in Bristol. The company was a viable business. The director (the appellant, Mr Liang) had ambitions of floating the business on the Hong Kong Stock Exchange. A successful floatation would have brought considerable benefits to the appellant and his business

associate, a Mr Chan. It was with this in mind that the appellant approached a lender called Beechbrook Capital LPP and sought a loan to facilitate the development of the business. At that stage, before any fraud had taken place, Beechbrook indicated interest. In order to encourage the proposed lender to make the loan, the appellant inflated the company's sales figures by the deposit of a large amount of cash in the business. For example, over the period 16 January 2017 to 31 July 2017, a total of £2,252,008 was said to have been taken in cash of which, £1,760,000 was in £50 notes. That was so despite it not being the policy of Hotcha Ltd to accept £50 notes from customers.

5. Over the period from 1 January 2015 to 3 October 2017, the difference between the declared sales and the till receipts was £14,850,090. This course of conduct was designed to make it seem that the company was doing far more business than was in fact the case, so as to make it more attractive to the proposed lender. The prosecution case was that the appellant directed the applicant Farooka to enter false figures into the accounts to make the amounts being received appear as genuine sales. Acting on the information received from Hotcha, Beechbrook provided a loan of £7.5 million (count 1). However, this conduct left Hotcha Ltd with an increased VAT liability in respect of the false sales. In order to reclaim almost £300,000 of VAT, false invoices of expenditure were raised and submitted. This was the subject matter of count 2.

6. As part of the loan agreement, Hotcha Ltd took on a financial consultant, a Mr Wonnacott. He was only in post for a short period when the first investigations into the company by HMRC commenced. Soon after this he resigned. His resignation letter was damning about the company and made particular critical reference to Mr Liang and Mr Farooka. The appellant Mr Liang obtained a copy of that resignation letter and manipulated it to remove contents damaging to Mr Liang and Mr Farooka, in particular

the concerns expressed in the letter about the sales figures being provided by Mr Farooka. It was this manipulation that was shared with others at Hotcha Ltd (count 7).

Sentencing Remarks for Liang

7. In sentencing Mr Liang, the judge noted, early in his sentencing remarks, the appellant's exemplary good character. He acknowledged the fact that he had entered early pleas and subsequently had spent a year waiting for sentence. He said that he took into account his personal circumstances, the fact that the appellant's partner suffered from anxiety and depression and was pregnant, that his parents were elderly and in some need, and the fact that the sentence would delay his return to China to be with them. The judge noted that the business was successful and the appellant fostered a positive work culture, with many drivers being promoted to management. The judge accepted that the appellant had shown genuine remorse over the impact the offence had on the employees and more generally, as demonstrated by a letter he had written to the court. He noted the appellant had returned from China to be sentenced.
8. The judge was satisfied that the culpability in this case was high. It was an extended protracted fraud, with significant planning and covering of tracks, in which the appellant had played a leading role. Looking at harm, the judge assessed that this was a risk of loss case, and he acknowledged the sum borrowed was substantially repaid with no loss to Beechbrook. He said that risk of loss may require a downward adjustment in category depending on the likelihood of extent of risk loss.
9. In this case, the amount was £7.5 million - significantly more than the starting point in the guidelines which is for £1 million - and there was a very high risk of loss. As a result, whilst there would be a downward adjustment for the category 1 starting point of 7 years,

it would fall not as low as that for category 2 of 5 years. The starting point, he said, would be 6 years in this case. He said that the offence was a multifaceted one involving cash for casinos, trails of invoices, a forged resignation letter and manipulation of accounting software. This meant, before a guilty plea, a sentence of 6½ years would be appropriate. There would then be a full reduction for guilty plea, which would reduce the sentence to one of 4 years 4 months' imprisonment.

10. It is argued before us by Mr Ray, on behalf of the appellant, that the judge imposed a sentence that was wrong in principle and manifestly excessive. In particular, it is said first, the judge was wrong to increase the sentence from a starting point of 6 to 6½ years, as the aggravating features identified had already been used to establish high culpability and therefore that exercise amounted to double counting. Second, the judge failed to reduce the starting point in light of the factors of reducing seriousness and personal mitigation.

11. In our judgment, there is force in those submissions. In determining the starting point, the judge referred to the fact that the appellant had a leading role in this fraud, that this was a sophisticated protracted fraud and there had been significant planning and covering of tracks, and the fraud had continued over a significant period of time. When identifying factors which aggravated the offending, he noted the multifaceted nature of the fraud, the use of casinos, deposit of cash, false trailed invoices and the forgery of a resignation letter. In our judgment, these were features of the sophisticated fraud which had led him to identify the starting point he did. There was accordingly a measure of double counting.

12. The judge properly noted, when he began his sentencing remarks, the significant personal mitigation on which the appellant was entitled to rely. However, it does not appear to us

that in reaching his final sentence the judge made any allowance for that mitigation. In our judgment, the appropriate starting point, having regard to the features to which the judge referred, was 6 years. The personal mitigation warranted a reduction of 1 year. From that figure, a reduction of one third was appropriate for the guilty plea, resulting in a proper sentence of 40 months.

13. In those circumstances, we conclude that the sentence was manifestly excessive. We allow the appeal and we substitute a sentence of 40 months.
14. We note that the judge indicated in his sentencing remarks that for the forgery count there would be a concurrent sentence. The sidebar note indicates the matter was disposed of by no separate penalty. However, in fact, no sentence for that count was articulated by the judge. For the avoidance of doubt, we indicate now, that for this forgery there is no separate sentence.

Farooka's Application for Leave to Appeal Conviction

15. The case against Farooka on count 2, VAT evasion, was as follows. Mr Farooka was an employee of the company. His job title and role changed during his employment, but it is accepted that it included working in the head office, working in the accounts department and in handling and submitting invoices. He was the person who submitted the VAT return. The prosecution submitted that the defendant was involved in facilitating the creation of false invoices and checking and submitting the VAT return and did so aware that they were false. In so doing he was knowingly concerned in or taking steps with a view to the fraudulent evasion of VAT.
16. To prove the case, the prosecution relied on the large number of invoices for expenditure found to be fraudulent; messages between the applicant and co-defendant, said to be

evidence of colluding in the process of making the false invoices; evidence that the false invoices were entered into the Sage accounting system and provided to the company's bookkeepers; the admission in interview that the applicant was responsible for entering the amounts in Sage; evidence from Anthony Pilkington of the bookkeepers that they dealt almost entirely with the applicant; evidence from the applicant, which sought to limit the access that the independent financial consultant (Mr Wannacot) had to financial information; evidence of messages between the applicant and his co-defendant, discussing how to explain inconsistencies identified by Mr Wonnacot; the admission in interview that the applicant submitted the VAT return; and evidence that the applicant was the person responsible for providing information to the bookkeepers and HMRC in relation to the VAT inspection that followed the return.

17. The defence case was that not all the documentation to the defendant was in fact his, and that while he may have passed on information that was false, he did so unwittingly and without the knowledge that it was falsified.

No Case Submissions

18. Counsel for the defence submitted at the close of the prosecution case that there was no case to answer in respect of count 2. It was accepted that the applicant did play a role in checking and submitting the paperwork to reclaim the VAT but there were elements of the offence that had not been made out on the prosecution's evidence.
19. The defence questioned whether the inference could be drawn that the purpose of the false invoices was invasion of VAT, in light of the fact that the prosecution had not established that the false invoices totalled the amount claimed, and given the co-defendant's basis of plea, gave an alternative motive for the false invoicing namely to

provide a revenue stream for Hotcha Ltd under the cover of supply of invoices.

20. It was argued that the prosecution had failed to establish what, if any, the level of liability was. It was accepted that evasion included the obtaining of an undue credit but it would not make legal or semantic sense for a conviction of evasion to follow if the defendant was in fact owed VAT.

21. The defence position was that Ms Wong, who gave evidence for the prosecution, had confirmed that it was possible that Hotcha Ltd was due a substantial repayment, and that other prosecution evidence showed that incorrect figures in previous periods would have a knock-on effect on the subsequent VAT position. Ultimately it was not possible on the evidence, so the defence argued, to conclude what in fact the tax position was.

22. The defence relied on the Court of Appeal decision in R v Noble, (reported we think only in the Daily Telegraph on 10 June 198),8, which dealt with a person who failed to register for VAT. By doing so, he failed to pay £19,000 which had become due but it became apparent that HMRC owed him more than that amount. The conviction was overturned with the court noting that, if there was no VAT due, or if the defendant reasonably believed no VAT was due, the appropriate verdict would be not guilty. The defence submission was that even if the jury was to find the defendant was being dishonest and that the purpose in substituting the false invoices was to recoup the VAT losses incurred as a result of reliance on the false sales invoices, the jury should still not convict. If the effect of these actions was only to recoup amounts actually due to Hotcha, then, while dishonest, it would not amount to evasion, and, in the light of the evidence of Ms Wong, no jury could be sure this was not the case.

23. The prosecution response was that the claim for the specific amount of £299,409 was false if any part of that claim was false, regardless of whether it also included some

amounts contained within it which might lawfully be reclaimed. The defence accepted that the figures used to support their claim included false amounts. Had the fraud not been discovered Hotcha Ltd would have recovered the full claim and that would not have been due to them. They further submitted that the Noble case was not helpful, the offence being different, one of making use of a document a person knows to be false for the purpose of obtaining VAT. Noble owed VAT and knew he owed it but he denied dishonesty. Mr Farooka, by contrast, attempted to reclaim almost £300,000 of VAT on figures which were admittedly wrong and from which a jury could infer, not only that Mr Farooka knew they were wrong but that he was acting dishonestly when he submitted the return.

The Judge's Ruling

24. The judge ruled that there was a case to answer. He rejected the submissions that the case could not be made out if there was no overarching liability, having taken into account the potential credit from fraudulent sale invoices. The case of Noble did not assist because in that case the issue was dishonesty and the facts were different. The jury in this case would be entitled to find dishonesty given the evidence that had been heard. There was a liability to pay VAT and false invoices were submitted to reduce and evade it. The fact there was a probable inflation of VAT owed, because of dishonest inflation of sales, did not operate as a defence to dishonest evasion that might otherwise be proven.

The Grounds

25. It is argued by Ms Cowe, on behalf of the appellant, that the trial judge was wrong to reject the applicant's submissions of no case to answer. In support of this, the applicant

argues;

26. First, section 72(1) of the Value Added Tax Act 1994, sets out the penalties for the offence with which the applicant was charged. Section 72(2) sets out that "evasion" includes obtaining VAT credit.
27. Second, it is said it would not have made legal or semantic sense for conviction to follow if Hotcha Ltd was owed more money than was claimed - something that could not be excluded on the evidence presented.
28. Third, she submits that evidence of dishonesty is insufficient. Section 72(1) covers dishonestly evading sums due from the company or obtaining what is not due to them but dishonestly obtaining what one is due does not amount to evasion.
29. Fourth, the applicant's position is that, on the prosecution evidence, it cannot be proven that the £299,409 or more was not due to Hotcha Ltd.
30. Fifth, while accepting that the case of Noble differed in offence and issue, and that the Court of Appeal did not address directly how the absence of any VAT owed impacted the need for the prosecution to prove that VAT had been evaded,it is of note that the Court held that: "*If no VAT was in fact due from the appellant, the verdict should have been not guilty*."
31. Sixth, the judge erred in approaching the applicant's submissions as a claim to a defence based on the fact there was fraudulent overstating of sales figures. The applicant's position is the lack of evidence that the reclaim was not due is relevant to an element of the offence, namely whether VAT was evaded.
32. Seventh, if evasion means the avoiding of the payment of money which is due, or obtaining money which is not due, then there was no evidence of that element of the offence. Evidence in relation to other elements of the offence does not make up for the

inability of the prosecution to exclude the possibility that, whatever the defendant did, secured only that which Hotcha was owed.

Discussion

33. In our judgment, the argument advanced by the applicant turns entirely on the proper construction of section 72 of the Value Added Tax Act 1994, which provides as is material:

> "(1) If any person is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by him or any other person, he shall be liable—"

34. The relevant penalties are then set out:

> "(2) Any reference in subsection (1) above or subsection (8) below [which is not material to the present discussion] to the evasion of VAT includes a reference to the obtaining of—
> (a)the payment of a VAT credit; or..."

35. Subsection (1) sets out penalties for someone who is knowingly concerned in or in the taking of steps with a view to the fraudulent evasion of VAT by him or anyone else - the offence with which the defendant was charged. Section 72(2)(a) provides that a reference to evasion of VAT includes a reference to the obtaining of a VAT credit and, as is material here, subsection (2)(d)(i) states:

> "... any reference... to the amount of the VAT shall be construed—
> (i)in relation to... a VAT credit, as a reference to the aggregate of the amount... falsely claimed by way of credit for input tax."

36. The offence here was fraudulent obtaining a VAT credit. The applicant submitted false invoices in order to get a VAT credit to which the company was not entitled because the receipts were false. The fact that he did that because, for other fraudulent reasons, the company may have paid too much VAT is entirely irrelevant to that offence. As a matter

of simple statutory construction, the evasion includes the obtaining of a tax credit and that is what the applicant was seeking to do.

37. There was no obligation on HMRC to show that overall, for that quarter or any other period, there might be VAT to be repaid, which might exceed the amount claimed. The meaning of "evasion" is defined in section 72(1), and importantly, 72(2) and there is no need to look for further definition. There was ample evidence to go to the jury that the applicant was seeking dishonestly to obtain a VAT credit, and by section 72(2)(a) that amounts to evasion. In those circumstances it is not necessary for us to address the very different case of Noble.

38. In all those circumstances, there is, in our judgment, no properly arguable ground of appeal and we refuse leave to appeal.

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

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