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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT MAIDSTONE
(MR RECORDER BURGE KC [T20170443])

Case No 2023/04309/B2
NCN: [2024] EWCA Crim 1286

Wednesday 25 September 2024

B e f o r e:

LADY JUSTICE WHIPPLE DBE

MR JUSTICE LAVENDER

MRS JUSTICE STACEY DBE

R E X

- v -

BEN STEWART RICHARDSON

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Mr I Krolick appeared on behalf of the Applicant

Mr A Evans appeared on behalf of the Crown

J U D G M E N T

Wednesday 25 September 2024

LADY JUSTICE WHIPPLE:

Introduction

1. On 8 November 2022, in the Crown Court at Maidstone, the applicant pleaded guilty to four counts of fraudulent evasion of VAT (counts 1, 2, 3 and 7 on the indictment), concealing criminal property (count 4), fraud by failing to disclose information relating to Construction Industry Scheme ("CIS") returns (count 8), fraudulent evasion of PAYE income tax (count 9), and fraudulent evasion of PAYE National Insurance Contributions (count 10). Counts 5 and 6, which related to VAT fraud, were ordered to lie on the file.
2. On 3 March 2023, the applicant (then aged 47) was sentenced by Mr Recorder Burge KC to a total term of six years' imprisonment, including a term of three years and ten months' imprisonment on count 4, which sentence was ordered to be served concurrently with the other sentences imposed. A timetable for confiscation proceedings under Part 2 of the Proceeds of Crime Act 2002 ("POCA") was set, which proceedings have now commenced.
3. The applicant now seeks an extension of time of 370 days in which to apply for leave to appeal against his conviction on count 4. That application has been referred to the full court by the single judge.
4. Count 4 was charged under section 327(1) of POCA 2002 as a count of concealing criminal property. The particulars of the offence were as follows:

"Ben Stewart Richardson and Vickie Marie Amas, between the 1st day of September 2012 and the 30th day of September 2012, concealed, disguised, converted or transferred criminal property, namely monies in the sum of £219,123, knowing or suspecting that they represented in whole or part and whether directly or indirectly, benefit from criminal conduct."

5. It is now argued by Mr Krolick, who has been freshly instructed by the applicant to represent him in the confiscation proceedings, that the sum of £219,123 referred to in the particulars of count 4 was not criminal property and that in consequence his guilty plea to that count was entered under a mistake of law.
6. Mr Krolick accepts that the quashing of the conviction for count 4 would not affect the sentence, but he submits that it would affect the confiscation proceedings because the conviction on count 4 is an offence listed in Schedule 2 to POCA 2002, which means that whether or not there was any benefit obtained by the applicant, the applicant is deemed to have a criminal lifestyle and the confiscation proceedings proceed on that basis. If the only convictions were for tax evasion – i.e. the other counts, apart from count 4 – he submits that there is at least an argument that the criminal lifestyle provisions of POCA 2002 do not apply.
7. The applicant's co-accused were his wife, Dawn Richardson, who was not convicted of any offence of concealing criminal property, and his sister, Vickie Amas, who pleaded guilty to concealing criminal property in count 4 but does not join in the application to vacate her conviction on that count.

The Facts

8. The applicant, his wife and her sister were involved in various companies whose business was the supply and installation of modular buildings in the construction

industry. The offences charged related to the fraudulent evasion of taxes in the total amount of £2,177,246.18 by a succession of companies operated and controlled by the defendants. They were SBR (UK) Ltd, SBR (Modular) Ltd, Merrydale Enterprises Ltd and Ilex Industries Ltd.

9. SBR (UK) Ltd ("SBR (UK)") was incorporated in February 2007. It was liquidated due to insolvency in July 2015. Save for a period between 20 January 2012 and 1 September 2012, the applicant was the director of that company until it was liquidated. Between 20 January 2012 and 23 February 2013, the applicant's sister, Vickie Amas, was appointed a co-director. SBR (UK) was not registered for VAT until December 2011. That means that before that date it was not authorised to charge VAT on its supplies. However, in that period SBR (UK) did purport to charge VAT on sales invoices to customers. In doing so, it used the VAT registration number of another company that was controlled by the applicant, R&B Builders, which company had in fact been de-registered for VAT.
10. From December 2011 SBR (UK) was VAT registered and used its own VAT registration number. However, SBR (UK) did not account to HMRC on any of the VAT purportedly or actually charged to its customers for the entirety of the period from 22 September 2010 to 4 April 2016. Its failure to account for that VAT is reflected in count 2 (one of the counts to which the applicant had pleaded guilty and in relation to which no dispute arises).
11. Counts 4, 5 and 6 related to the purchase of Ilex Cottage in Kent. That property was purchased in the name of Vickie Amas and became the home address of the applicant and Dawn Richardson. The purchase was financed by a mortgage application by Vickie Amas, which the Crown contended contained false representations by her and

the applicant, which were the bases for counts 5 and 6 with which the Crown did not proceed.

12. The Crown's case on count 4 was that the deposit for Ilex Cottage, in the amount of £219,100, was funded by the fraudulent evasion of VAT by SBR (UK) and constituted criminal property as well as representing benefit from criminal conduct. The facts which are relevant to count 4 are that on 13 September 2012, SBR (UK) received an automated credit of £529,569.64 from Network Rail. That was received into its business account, and there it mixed with other funds already in that account. On the same day, three separate payments totalling £220,000 were transferred from bank accounts in the name of SBR (UK) to the applicant's personal accounts. On 14 September 2012, the applicant transferred the count 4 figure, namely £219,123, from his personal account to the account of Vickie Amas. She then transferred £219,100 to solicitors for the purchase of Ilex Cottage in Kent, which was in her own name.

13. The facts which relate to counts 1 and 3 are of some interest also in demonstrating the extent of the applicant's criminal activity. So far as count 1 is concerned: in October 2010, the applicant purchased Merrydale Enterprise Ltd ("Merrydale"), which company regularly subcontracted work to SBR (UK). Merrydale was registered for VAT and submitted quarterly VAT returns to HMRC. Between September 2010 and November 2011, during which period both SBR (UK) and Merrydale were controlled by the applicant, SBR (UK) charged VAT on invoices to Merrydale, and Merrydale reclaimed the VAT charged as input tax in its returns to HMRC in the total amount of £256,078.40. Merrydale was credited with that amount of input tax by HMRC. So far as count 3 is concerned: SBR Modular, a company of which the applicant was a director along with his wife Dawn Richardson, took over the business and contracts of SBR (UK) when it became insolvent in 2015 and continued to trade until it became

insolvent in July 2016. SBR Modular was not registered for VAT until May 2016. Between October 2014 and September 2015, it purported to charge its customers VAT using the VAT registration number of SBR (UK), but it did not account for that VAT to HMRC, and thus count 3 came into existence.

14. Counts 7, 8, 9 and 10 related to Ilex Industries. They involved charges of fraudulent evasion of VAT (count 7), fraudulent evasion of income tax (count 9), and fraudulent evasion of National Insurance Contributions (count 10). The failure to comply with the CIS requirements related to income tax evasion (count 8).

The Grounds of Appeal

15. Mr Krolick submits that the £219,123 was drawn from legitimate trading receipts of SBR (UK). He submits that SBR (UK) could do what it liked with the receipts from Network Rail, including payment to directors and staff. He argues that that money was legitimately earned and was not criminal property. In the hands of SBR (UK) the time had not come when any VAT on it was due to be accounted for in any event. Further, the money belonged to SBR (UK) and not to the applicant or his sister and it followed that that money was not benefit from the offending of the applicant or anyone else. His overarching submission is that the applicant should not have entered a guilty plea to count 4.

16. By their Respondent's Notice, the prosecution dispute the applicant's submissions. They say that the applicant entered his guilty plea voluntarily. Further, they say that the £219,123 was criminal property because it derived from bank accounts of SBR (UK) on whose trading receipts VAT was evaded. The money represents, at least in part, benefit from the pecuniary advantage obtained by SBR (UK) as a result of its VAT evasion. The statute is engaged even though the funds came from the company

and not directly from the applicant's pocket. The charge of concealing criminal property is, so the prosecution submit, good in law and thus they say this applications should be refused.

Discussion

17. We start with the relevant provisions of statute. Part 7 of POCA 2002 creates a number of money laundering offences, of which concealing criminal property, pursuant to section 327(1), is one. The relevant definitions are set out at section 340, as follows (so far as relevant):

"...

(2) Criminal conduct is conduct which —

- (a) constitutes an offence in any part of the United Kingdom, or
- (b) would constitute an offence in any part of the United Kingdom if it occurred there.

(3) Property is criminal property if —

- (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
- (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

(4) It is immaterial —

- (a) who carried out the conduct;
- (b) who benefited from it;

...

(5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(6) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a

result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

..."

18. The issue raised in this application, reduced to its simplest form, is whether the £219,123 amounted to "criminal property" for the purposes of section 340(3) of the statute.

19. Whether funds which are the product of legitimate trading activity can be "criminal property" for section 340(3) purposes has been examined in a number of cases. It was established in *R v Gabriel* [2006] EWCA Crim 229 that legitimate trading profits which are not declared to HMRC for tax purposes do not *per se* amount to criminal property.

20. However, *R v K(I)* [2007] EWCA Crim 491¹ narrowed the decision in *R v Gabriel* by confirming that a person who cheats the Revenue does obtain a pecuniary advantage as a result of criminal conduct, that advantage being the sum equal to the value of the amount of which the Revenue was cheated, and that in such a case undeclared takings from legitimate trading are a benefit from criminal conduct for the purposes of section 340(3)(a), because those takings should have borne tax, and a part of the undeclared takings represents the tax which has not been paid: see paragraphs [21] and [24] in particular. In the latter paragraph, Dyson LJ rejected the appellant's argument that the legitimate trading profits were not criminal property:

"24. ... If that were correct, it would mean that the money laundering provisions of POCA can never be invoked in relation to tax evasion where the business concerned is engaged in a lawful trade or other activity. That would be a surprising conclusion to reach. It is clear from the pre-POCA jurisprudence that unpaid tax which was the product of

¹ Reported at [2007] 1 WLR 2262 and [2007] 2 Cr App R 10 by this name. Elsewhere referred to as *R v K*.

cheating was a pecuniary advantage and, therefore, a 'benefit' for the purpose of confiscation order proceedings under the Criminal Justice Act 1988: see, for example, *R v Moran* [2001] EWCA Crim 1770, [2002] 1 WLR 253. It cannot have been intended that the money laundering provisions of POCA, particularly those relating to the obtaining of benefit in the form of a pecuniary advantage, should not extend to the fruits of cheating the Revenue."

21. *K(I)* does not support the applicant's argument in this case. It has been applied in later cases: for example, *R v Venus William and Others* [2013] EWCA Crim 1262, and *Imran Ahmed* [2013] EWHC 2241 (Admin).
22. In our judgment, it is established that where a person has been proved to have cheated the Revenue, legitimate but undeclared profits may amount to "criminal property" for the purposes of Part 7 of POCA, because they represent, at least "in part", noting the broad terms of section 340(3), the tax of which the Revenue has been cheated.
23. Count 4 concerned a failure to account for VAT on taxable supplies. That VAT had been collected by SBR (UK) as an itemised element on its client invoices, but was never paid over to HMRC. SBR (UK)'s funds therefore included the VAT which was owed to HMRC. The £213,123 formed part of those funds. Applying *K(I)*, those funds were criminal property for the purposes of section 340(3).
24. Mr Krolick did not cite the authorities to which we have just referred in his written argument. Instead, he invited the court's attention to different authorities which examined the legislation now contained in Part 2 of POCA or its predecessors, namely: *R v Dimsey and Allen* [1999] EWCA Crim 1917; *R v Smith (David)* [2001] UKHL 68; and *R v Moran* [2001] EWCA Crim 1770. We have not found the first two authorities helpful on the issue raised by this appeal. They are directed at

different provisions and a different question, namely, when and to what extent a confiscation order should be made (that being the subject of Part 2 of POCA, by contrast with Part 7 with which this application is concerned). We note that *Moran* was cited in *K(I)* and in our judgment it is consistent with the Crown's case on this application.

25. Mr Krolick also argues that funds held by SBR (UK) and diverted to the applicant's own use belonged to SBR (UK), as distinct from the applicant, and that it is impossible to impute that money to him. Reliance is placed on *R v Miller* [2002] EWCA Crim 1589 and *R v Boyle (NI) Ltd* [2016] EWCA Crim 19. But the context of those cases was Part 2 of POCA and the circumstances in which a confiscation order can be made. Those cases do not touch on the issue raised in this application, which turns on sections 340(3) and (4). The applicant clearly derived a benefit, directly or indirectly, from the money in SBR (UK)'s account, which money was (as we have already indicated) criminal property.

26. In oral submissions, Mr Krolick responded to the Crown's case on *K(I)* by focusing in particular on [22] of that case, where the Court was prepared to assume that "the mere fact" of harbouring a secret intention not to disclose true trading levels to the Revenue could not convert legitimate funds into criminal property within the meaning of POCA. But in this case there was no "mere" secretly harboured intention, but instead an established track record of SBR (UK) evading VAT, evidenced by the guilty plea to count 2 (about which no dispute arises). That established pattern of defrauding the Revenue makes all the difference.

27. Further, we are satisfied that Mr Krolick's focus on the Network Rail receipt is mistaken. It is immaterial that, taken in isolation, the time had not yet come when

SBR (UK) had to account to HMRC for the VAT due on that receipt. The proper focus is on the funds in SBR (UK)'s account, which included the Network Rail receipt. Those funds were indivisible and, given SBR (UK)'s past failure to account for VAT, constituted criminal property.

28. In summary, we accept the prosecution's submissions and we agree that Mr Krolick's arguments on this application are misconceived.

Conclusion

29. Money in SBR (UK's) trading account was criminal property in that, at least in part, it represented the benefit from criminal conduct, as the applicant knew. The definition of criminal property in section 340(3) was met.

30. In those circumstances, no purpose would be served in considering the precise circumstances giving rise to the applicant's guilty plea, or the precise reasons why this application was not made earlier in time.

31. We refuse the application for an extension of time, and we refuse the application for leave to appeal against the conviction on count 4.

32. Although we are refusing these applications, we have heard full argument on the issues raised and have endeavoured to provide full reasons for our conclusions. In those circumstances, this judgment may be cited as authoritative, should the same issues arise in another case.

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

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